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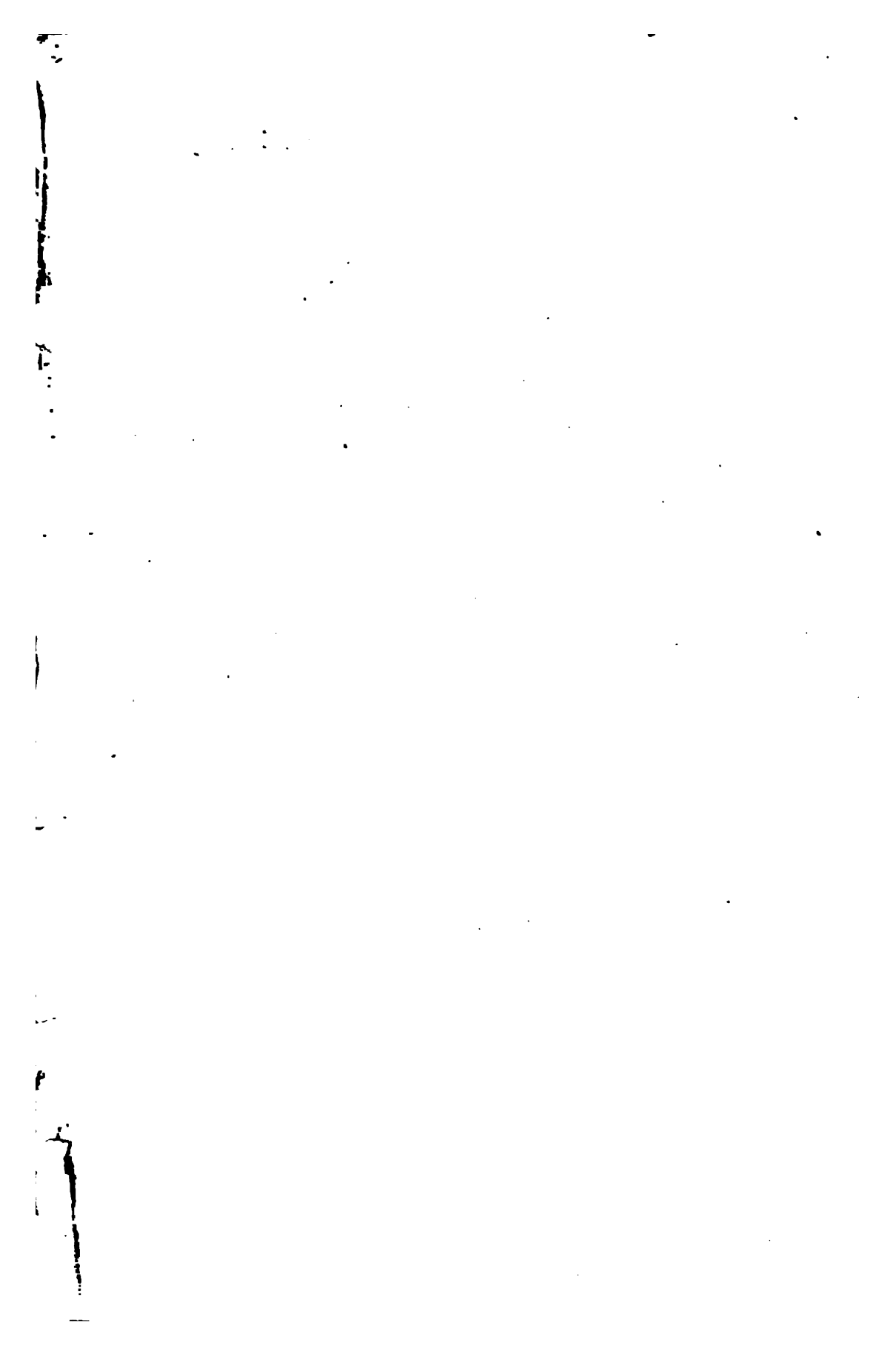
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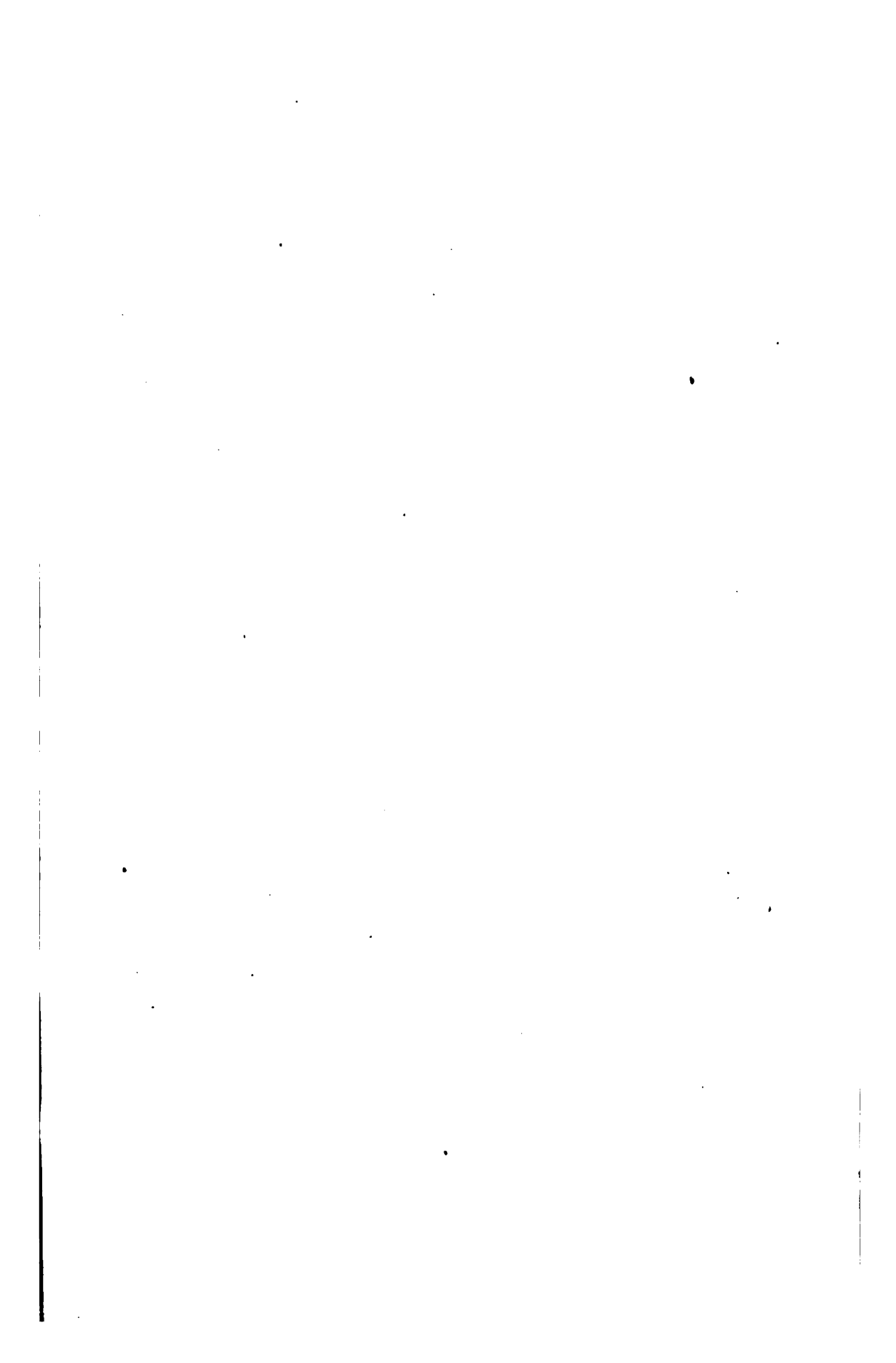
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VIRGINIA REPORTS,

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THOMAS JOHNSON MICHIE.

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REPORTS OF CASES
DECIDED IN THE
SUPREME COURT OF APPEALS,
AND IN THE
GENERAL COURT,
OF
VIRGINIA.

BY CONWAY ROBINSON.

VOLUME I.

FROM APRIL 1, 1842, TO APRIL 1, 1843.

Entered according to the Act of Congress, this fourth day of October
eighteen hundred and forty-three, for the

COMMONWEALTH OF VIRGINIA,

In the Clerk's Office of the District Court of the Eastern District of Virginia.

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JUDGES
OF THE
COURT OF APPEALS
DURING THE TIME OF THESE REPORTS.

WILLIAM H. CABELL, PRESIDENT.*
FRANCIS T. BROOKE. ROBERT STANARD.
JOHN J. ALLEN. BRISCOE G. BALDWIN.†

Attorney General: SIDNEY S. BAXTER.

*Promoted to the presidency, January 18, 1842, *vice* Henry St. G. Tucker, resigned.
†Appointed January 29, 1842, *vice* William H. Cabell, promoted to the presidency.

JUDGES
OF THE
GENERAL COURT
DURING THE TIME OF THESE REPORTS.

DANIEL SMITH.	JOSEPH L. FRY.
FLEMING SAUNDERS.	JOHN B. CLOPTON.
LEWIS SUMMERS.	RICHARD H. BAKER.
RICHARD H. FIELD.	JOHN B. CHRISTIAN.
JOHN T. LOMAX.	ISAAC R. DOUGLASS.
JOHN SCOTT.	PHILIP N. NICHOLAS.
WILLIAM LEIGH.	DANIEL A. WILSON.
LUCAS P. THOMPSON.	EDWARD JOHNSTON.
BENJAMIN ESTILL.	JAMES H. GHOLSON.
JAMES E. BROWN.	JOHN ROBERTSON.
EDWIN S. DUNCAN.	THOMAS H. BAYLY.*

*Appointed January 22, 1842, *vice* Abel P. Upshur, resigned.

PREFACE.

The editors of a legal periodical have said, they were "almost ready to lay it down as a general principle that reporters are wholly unable to write prefaces;"* so habitual is the neglect to give any information of the laws under which the reports are made. The Virginia reporters form no exception to this remark. The reports of one are the result entirely of individual enterprise, while those of another are made under authority of law and by virtue of judicial appointment: yet we are wholly uninformed by the reporters, of any difference between them. Mr. Gilmer does, it is true, mention that some of the cases in his volume were argued before his appointment as reporter; but he is altogether silent as to any legislation on the subject. Some mention of that legislation, with an enumeration of the reporters, prior and subsequent thereto, and a brief notice of the grade and authority of the courts whose decisions are reported, may not be wholly inappropriate now.

From a very early period there existed in Virginia, besides the monthly or county courts, composed of persons commissioned by the governor and council, a higher tribunal, to which appeals might be taken from the county courts. (a) This tribunal was composed of the governor and council, who held four quarter courts yearly at James City, in September, December, March and June. (b) Afterwards, December term was changed to November, (c) and June term was abolished, (d) The name quarter courts was now considered altogether unsuitable, because there were but three in the year, and they were "not equally distributed into the quarters of the year, *September and November being too near, and March too long from them, to admit of that title." It was therefore enacted that the said courts should be no longer styled the quarter courts, but should be called general courts, a name deemed "more suitable to the nature of them, as being places where all persons and causes have generally audience and receive determination." This name was given at the session of the assembly in 1661-2. (e) And thenceforward until the period of the revolution, the court thus established by the name of the general court of Virginia, and consisting of the governor or commander in chief and the council, was "the principal court of judicature for the colony and dominion of Virginia," (f) liable however, in

certain cases, to an appeal from its judgment, decree or sentence to the royal power in England. (g)

Some of the cases decided by the general court from 1730 to 1740 were reported by sir John Randolph, Edward Barradall esquire, and mr. Hopkins; and others decided from 1768 to 1772 were reported by mr. Jefferson. Since the death of mr. Jefferson a small volume has been published, containing the cases reported by him, and also such of the cases reported by the three first named gentlemen as arose under our own peculiar laws. Most, perhaps all, of the other cases reported by them may still be seen in manuscript. But in the volume entitled "Jefferson's Reports" are contained all the decisions prior to the revolution which have yet appeared in print.

After the revolution, there was established a high court of chancery, a general court, and a court of appeals; all held by judges chosen by the general assembly.

The high court of chancery, when first established, consisted of three judges, (h) but the number was afterwards reduced to one. (i)

George Wythe, who had been of the v *three, became the sole chancellor. He published in 1795 a volume of his decisions, with remarks upon decrees by the court of appeals reversing some of them. In the sketches of Virginia judges prefixed by mr. Call to the fourth volume of his reports, there is a biography of mr. Wythe, accompanied by some remarks upon his volume of "chancery decisions."

The general court has continued to be the supreme criminal tribunal. A collection of cases decided by it from 1789 to 1814 was published by William Brockenbrough and Hugh Holmes, two of the judges of that court: and judge Brockenbrough afterwards published a second volume, embracing the decisions from 1815 to 1826. These two volumes are entitled "Virginia Cases."

The court of appeals has, from the time of its establishment, been the supreme civil tribunal. Since 1789 it has consisted of five judges, (k) with the exception of the period from the resignation of judge Carrington on the first of January 1807 (l) to the death of judge Lyons on the 30th of July 1809, during which there were only four judges, and the period from the death of judge Lyons until

*American Jurist, vol. 6, p. 493, 4.

(a) 1 Hen. Stat. at large p. 126.

(b) Id. p. 174.

(c) Id. p. 271.

(d) Id. p. 524.

(e) 2 Hen. Stat. at large p. 58.

(f) 3 Id. p. 288. 5 Id. p. 408. 6 Id. p. 326.

(g) 8 Id. p. 499-500.

(h) 9 Id. p. 389.

(i) 12 Id. p. 707.

(k) 12 Hen. Stat. at large p. 764.

(l) 1 Hen. & Munf. 208. Sess. Acts of 1806-7, p. 13. ch. 22.

the act of the 9th of January 1811, during which there were only three judges.

The following reports of decisions of the court of appeals were published on private account.

Two volumes by Bushrod Washington, embracing the period from 1790 to 1796; of which there was a second edition in 1823.

Three volumes by Daniel Call, containing at the end of the third volume some cases decided in 1790, and in the three volumes a regular series from 1797 to 1803. A second edition of these three volumes, by Joseph Tate, was published in 1824.

For the period from 1803 to 1806, the reports were not accessible to the public until 1833, when Mr. Call published his fourth, fifth and sixth volumes. These volumes embrace the *decisions of the court of appeals under its organization from the revolution until 1789, the decisions for the period from 1803 to 1806, some of later date, and a few cases in other courts.

Four volumes by William W. Henning and William Munford contain decisions of the court of appeals from 1806 to 1809, and some cases decided during the same time by Creed Taylor esquire, who succeeded Mr. Wythe in the office of judge of the superior court of chancery for the Richmond district, created by an act passed the 23d of January 1802. (m)

And six volumes were published by William Munford, containing cases decided by the court of appeals from 1810 to 1820. The fifth of these volumes came down to April 1817. Before the sixth was published, the following communication was made by the judges of the court of appeals to the house of delegates:

"To the honourable the speaker of the house of delegates.

Richmond, December 6, 1819.

"Sir,

The reports of the decisions of the court of which we are members, for nearly three years back, are in arrear and unpublished. The very respectable gentleman who has heretofore published such reports has been prevented by various causes from performing that duty. The accounts of the decisions of that period are, in most instances, locked up in his office. While this circumstance produces to us some inconvenience in the discharge of our public duties, it may be highly detrimental to the best interests of the community. For want of a knowledge of these decisions, our fellow citizens are disabled from conforming thereto; counsel cannot advise their clients of the actual state of the law of our country; and judges render decrees and judgments which, when these decisions come to be inspected, will, in many cases, be reversed. This is a state of things which, we humbly conceive, requires some correction. It

vii is important that the expositions *of the law by the court of the last resort should be as much promulgated as the acts themselves which have been expounded. Experience has shewn, that when left to pri-

vate enterprise only, this important function will not be sufficiently attended to. Hence arises the necessity, in our opinion, to place the subject under public patronage. We are of opinion that a suitable character ought to be appointed, under the authority of the legislature, to publish these reports; and that they should be promulgated shortly after the decisions have been made. We are also of opinion that to insure the services of a proper character, and to compensate him for his constant attendance in the court, to the injury of his business in other courts, an adequate salary ought to be given him, in aid of the emoluments arising from the sale of his books. We do not doubt but that, on these terms, a gentleman might be procured who would perform the work with fidelity, perspicuity and brevity. The example of the national legislature, in having lately furnished a reporter to the supreme court of the United States, is, in our opinion, worthy of imitation.

"With great respect, we have the honour to be, sir, your obedient servants.

Spencer Roane.

Francis T. Brooke.

Wm. H. Cabell.

John Coalter."

This communication was followed by the act of February 24, 1820, which authorized the court of appeals to appoint a proper person to report all such cases decided in the court, as, in the opinion of any one judge of the court, should be worth reporting. Each volume was required to be printed on good paper, large octavo, and bound in calf, with a full and accurate index; and 1000 copies of the first edition were authorized to be printed, to wit, 400 by the reporter on his own account, and 600 for the use of the commonwealth, for which 600 copies the reporter was to receive out of the treasury eighty-three and a third cents for every hundred pages contained in each copy of the work. viii The 600 copies were, by *this and a subsequent act, directed to be sold, and the money arising from such sale paid into the treasury. (n)

Francis W. Gilmer was the first reporter appointed by the court. He published a single volume, called "Virginia Reports," which embraces the decisions from April 1820 to June 1821.

Upon his resignation, Peyton Randolph was appointed. The first four volumes of Randolph's reports contain the decisions to July 1826.

By an act of assembly passed the 27th of February 1828, it was made the duty of the reporter to the court of appeals to collect and publish annually, by way of appendix to each volume of the reports of cases decided in said court, the decisions of the general court, comprising in the next volume to be published all the cases decided by the general court since the publication of the second volume of Virginia Cases. (o)

(n) Sess. Acts of 1819-20, p. 16, ch. 17. Sess. Acts of 1820-21, p. 31, ch. 30, § 4.

(o) Sess. Acts of 1827-8, p. 20, ch. 25, § 5.

(m) Sess. Acts of 1801-2, p. 12, ch. 14.

The fifth and sixth volumes of Mr. Randolph bring down the decisions of the court of appeals and general court to the end of 1828.

Upon the death of Mr. Randolph, a change was made in the legislation on the subject. By the act of February 27, 1829, the reporter was required to secure the copy right of any volume thereafter to be published, for the benefit of the commonwealth. Seven hundred copies were directed to be published for the use of the commonwealth, and to be paid for in the manner before prescribed by law. (p)

The reports of Gilmer, Randolph, and some of their predecessors, had not been of so high an order as was to be desired. It was an object of some importance to raise the standard of the Virginia reports. And the judges now sought the services of one in the first rank of the profession, who was deemed by them better fitted than any other to attain the object in view. They proposed to Benjamin Watkins Leigh to ^{ix} take the office, and he accepted the appointment. To obtain the time requisite for the discharge of its duties, he withdrew from practice in the court of chancery at Richmond, then a court of large business, and confined himself to the court of appeals, the general court, and the federal courts held in Richmond.

Mr. Leigh has published eleven volumes of reports, which contain the decisions of the court of appeals and general court from January 1829 to March 1841, and also those of the general court at June and December terms 1841. He has yet to publish a twelfth volume, containing the decisions of the court of appeals from March 1841 to March 1842, for which it is proper the general assembly should, at its next session, make such an appropriation as is required by the law under which he was appointed.

On the 24th of March 1842, an act was passed to change the mode of compensating the reporter, (q) which, by force of the general law, (r) commenced the first of April following. This act provides, 1. That a reporter shall be appointed by the court of appeals, as directed by the act of February 24, 1820, whose duty it shall be to prepare a manuscript copy of the reports, (with an index and references) containing all the causes decided by the court within the year, which in the opinion of the court ought to be published, and deliver the same annually to

the secretary of the commonwealth. 2. That it shall be the duty of the secretary to contract for the printing and binding of 700 copies of said reports, in a style not inferior to the present reports; the proof sheets to be carefully examined and corrected by the reporter. 3. That the reporter shall receive as a compensation for the above mentioned services 1500 dollars per annum, to be paid quarterly.

Pursuant to this act, the court, on the 5th of April 1842, proceeded to appoint a reporter, and the vote being given viva voce in open court, judges Baldwin, Allen, Stanard, x Brooke and *the president voted for Benjamin Watkins Leigh, and so he was unanimously appointed. Mr. Leigh declining to accept the office, the court, on the 10th of May 1842, proceeded to make another appointment, and the vote being given viva voce in open court, the same judges voted for Conway Robinson, and he was therefore unanimously appointed.

On the 27th of February 1843, a further act was passed, (s) declaring, 1. That it shall be the duty of the reporter of the court of appeals to collect and prepare annually for publication, by way of appendix to each volume of the reports of the cases decided in the said court, the decisions of the general court made within the year; and it shall be the duty of the secretary of the commonwealth to contract for the printing of the same, in the like manner he is now directed to contract for the printing and binding of the decisions of the court of appeals. 2. That it shall be the duty of the secretary of the commonwealth to contract also for the printing and publishing, in pamphlet form, of 75 copies of the decisions aforesaid of the general court, and the judges of the general court shall each be entitled to a copy thereof.

Under these acts of the 24th of March 1842 and the 27th of February 1843, this volume of reports has been prepared. It contains all the causes decided by the court of appeals within the year ending the first of April 1843, which in the opinion of the court ought to be published, and the decisions of the general court within the same year. The decisions made from the first of April to the 10th of May 1842 were before the date of the reporter's appointment, and before the day from which he has received compensation; but he has inserted them because otherwise they would have remained unpublished by any one.

Richmond, September 29, 1843.

(p) Sess. Acts of 1828-9, ch. 9, p. 11.

(q) Sess. Acts of 1841-2, p. 51, ch. 88.

(r) 1 R. C. of 1819, p. 138, ch. 41.

(s) Sess. Acts of 1842-3, p. 29, ch. 89.

TABLE OF CASES REPORTED.

Abrahams <i>v.</i> the commonwealth.....	675	Garrett ex'or of Allen <i>v.</i> Carr and wife and another.....	196
Alexandria bank <i>v.</i> Patton and others....	499	Giles governor for M'Neill and Vanmeter and another.....	328
Allen's ex'or <i>v.</i> Carr and wife and an- other.....	196	Gilpin and Cocke's adm'r.....	20
Armstrong <i>v.</i> Huntons.....	323	Glascoc's adm'r and Brown.....	461
Ashby <i>v.</i> Smith and wife.....	55	Governor for M'Neill and Vanmeter and another.....	328
Auld and others and Breckenridge.....	148	Green <i>v.</i> the commonwealth.....	371
Baltimore (Merchants bank of) and bank of the United States.....	573	Harkins's adm'r's and Herrington.....	591
Bank of Alexandria <i>v.</i> Patton and others.....	499	Harris's ex'or &c. and Turner.....	475
Bank of the United States <i>v.</i> Merchants bank of Baltimore.....	573	Heath <i>v.</i> the commonwealth.....	735
Beatty and Blessing's adm'r's.....	287	Henry <i>v.</i> Bradford.....	53
Blackwell & wife and Foushee adm'r &c.....	488	Herrington <i>v.</i> Harkins's adm'r's.....	591
Blessing's adm'r's <i>v.</i> Beatty.....	287	Hewes <i>v.</i> Doddridge &c.....	143
Booth and others and Page and others..	161	Hill <i>v.</i> Salem and Pepper's ferry turnpike company.....	263
Bowen's adm'r's & another and Camp- bells.....	241	Hobbs and others and Malone's adm'r and others.....	346
Boyd <i>v.</i> the commonwealth.....	691	Hunter <i>v.</i> Matthews.....	468
Bradford and Henry.....	53	Huntons and Armstrong.....	323
Breckenridge <i>v.</i> Auld and others.....	148	Hutchison and others <i>v.</i> Kelly.....	123
Brent &c. <i>v.</i> Peyton.....	604	Hyre and others and Bryan.....	94
Brown and Creel.....	265	Ingrams <i>v.</i> Mutual assurance society..	661
Brown <i>v.</i> Glascoc's adm'r.....	461	Jackson and others <i>v.</i> Updegraffe and others.....	107
Bryan <i>v.</i> Hyre and others.....	94	Janes and M'Cann.....	256
Bryan <i>v.</i> Lofftus's adm'r's.....	12	Jones and others <i>v.</i> the commonwealth..	748
Campbell's adm'r's <i>v.</i> Montgomery.....	392	Kelly and Hutchison and others.....	123
Campbells <i>v.</i> Bowen's adm'r's & another..	241	Lambert and Cosby.....	225
Carr and wife and another and Garrett ex'or of Allen.....	196	Literary fund <i>v.</i> Dawson's ex'or and heirs.....	402
Chapman &c. <i>v.</i> Wilson & Co.....	267	Lofftus's adm'r's and Bryan.....	12
Coalter <i>v.</i> Coalter.....	79	Lynch and Garland and others.....	545
Cocke's adm'r <i>v.</i> Gilpin.....	20	Lynch and others and Skeen and others..	186
Coleman &c. and Morriss.....	478	Malone's adm'r and others <i>v.</i> Hobbs and others.....	346
Commonwealth and Abrahams.....	675	Manuel and Williams.....	639
Commonwealth and Boyd.....	691	Matthews and Hunter.....	468
Commonwealth and Green.....	731	M'Cann <i>v.</i> Janes.....	256
Commonwealth and Heath.....	735	M'Clintic <i>v.</i> the commonwealth.....	727
Commonwealth and Jones and others....	748	M'Daniel and Crawford and another....	448
Commonwealth and M'Clintic.....	727	M'Neill and Vanmeter and another.....	328
Commonwealth and Overbee.....	756	Medley <i>v.</i> Pannill's adm'r.....	63
Commonwealth and Phalen.....	713	Medley <i>v.</i> Tunia's ex'ors.....	63
Commonwealth and Stroup.....	754	Merchants bank of Baltimore and bank of the United States.....	573
Commonwealth and Young.....	744	Montgomery and Campbell's adm'r's....	392
Commonwealth <i>v.</i> Cook.....	729	Morriss <i>v.</i> Coleman &c.....	478
Commonwealth <i>v.</i> Dabney.....	696	Mutual assurance society and Ingrams..	661
Commonwealth <i>v.</i> Scott.....	695	Norvell and Warwick & wife and an- other.....	308
Cook and the commonwealth.....	729	Overbee <i>v.</i> the commonwealth.....	756
Cosby <i>v.</i> Lambert.....	225	Page and others <i>v.</i> Booth and others...	161
Cottingham and United States.....	615	Pannill's adm'r and Medley.....	63
Crawford and another <i>v.</i> M'Daniel.....	448	Patton and others and bank of Alexan- dria.....	499
Creel <i>v.</i> Brown.....	265	Peyton and Brent &c.....	604
Dabney and the commonwealth.....	696	Phalen <i>v.</i> the commonwealth.....	713
Dawson's ex'or and heirs and Literary fund.....	402	Salem and Pepper's ferry turnpike com- pany and Hill.....	263
Day and wife and Stinson ex'or &c.....	435	Scott and the commonwealth.....	695
Doddridge &c. and Hewes.....	143	Shores <i>v.</i> Wares.....	1
Ford and Spencer.....	648		
Foushee adm'r &c. <i>v.</i> Blackwell & wife..	488		
Garland and others <i>v.</i> Lynch.....	545		

I ROB.

CASES REPORTED.

Skeen and others <i>v.</i> Lynch and others..	186	Vanmeter and another <i>v.</i> Giles governor	
Smith and wife <i>and</i> Ashby.....	55	for M'Neill.....	328
Spencer <i>v.</i> Ford.....	648	Vause and others <i>and</i> Stout.....	169
Stinson ex'or &c. <i>v.</i> Day & wife.....	435	Wares <i>and</i> Shores....	1
Stout <i>v.</i> Vause and others.....	169	Warwick & wife and another <i>v.</i> Norvell.	308
Stroup <i>v.</i> the commonwealth	754	Washington <i>and</i> Winchester and Poto-	
Tunis's ex'ors <i>and</i> Medley.....	63	mac railroad company.....	67
Turner <i>v.</i> Harris's ex'or &c.....	475	Williams <i>v.</i> Manuel.....	639
United States bank <i>v.</i> Merchants bank		Wilson & Co. <i>and</i> Chapman &c.....	267
of Baltimore.....	573	Winchester and Potomac railroad com-	
United States <i>v.</i> Cottingham.....	615	pany <i>v.</i> Washington.....	67
Updegraffe and others <i>and</i> Jackson and		Young <i>v.</i> the commonwealth.....	744
others.....	107		

TABLE OF CASES CITED.

Acherley v. Vernon, Comyn 381.....	370	Bank of North Carolina v. Cowan &c., 8 Leigh 238.....	525
Alderson v. Clay, 1 Starkie 405.....	278	Bank of North Carolina and May &c., decided by court of appeals in May 1843.....	526
Alderson v. Pope, 1 Camp. 404.....	279	Bank of the United States v. Deveaux, 5 Cranch 61.....	580
Aldridge &c. v. Giles &c., 3 Hen. & Munf. 136.....	35	Bank of the Valley and Stribbling, 5 Rand. 141, 2, 148, 9, 189.....	579, 589, 590
Alexander and Robinson, 8 Bligh 352.....	79, 85, 91	Bank v. Owens, 2 Peters 527-538.....	629
Alexander and Sullivan, 19 Johns. rep. 233.....	336	Bank (Union) v. Knapp, 3 Pick. 112.....	81
Alexander's heirs v. Coleman & wife, 6 Munf. 328.....	38	Baptist association v. Hart's ex'ors, 4 Wheat. 1.....	411, 413, 418
Alexandria bank and Minor and others, 1 Peters 64.....	628	Barber v. Barber, 18 Ves. 286.....	81, 88
Allen v. Belches, 2 Hen. & Munf. 595...	36	Barclay &c. v. Howell's lessee, 6 Peters 498.....	193
Amendy and the United States, 11 Wheat. 393.....	578, 589, 590	Barksdale v. Barksdale, unreported decision of court of appeals.....	364
Anderson and Anderson's ex'ors, 11 Leigh 616.....	646, 647	Barnes & wife and Attorney general, 2 Vern. 597.....	365
Anderson &c. and Shields adm'r &c., 3 Leigh 729.....	207	Barnsley (ex parte), 3 Atk. 168.....	249
Anderson's ex'ors v. Anderson, 11 Leigh 616.....	646, 647	Barry and Brown, 3 Dall. 365.....	624
Ansell v. Ansell, 3 Carr. & Payne 563...	396, 398, 399, 400	Bartlett v. Vinor, Carth. 252.....	628
Anson v. Towgood, 1 Jac. & Walk. 619.....	39	Bassett and others and Fisher, 9 Leigh 119.....	115
Anthony and Claytor, 6 Rand. 285.....	235	Bass v. Bass, 6 Pick. 362, 8 Pick. 187....	92
Arden and Sterry, 1 Johns. ch. rep. 270...	544	Bates v. Graves, 2 Ves. jun. 292.....	135
Armistead's case, 11 Leigh 657.....	735, 742	Bates v. Holman, 3 Hen. & Munf. 502...	368, 369, 370
Armstrong v. Huntons, reported 323, cited.....	613	Battie and Nadin, 5 East 147.....	556
Armstrong v. Hussey, 12 Serg. & Rawle 315.....	275	Beaston v. Farmers bank of Delaware, 12 Peters 134, 5.....	581, 582, 589
Ashby and M'Guire, 1 Rand. 101.....	629	Beatty and Blessing's adm'rs, reported 287, cited.....	453, 458
Ashby v. Kiger, 3 Rand. 165.....	249	Beaumont v. Thorpe, 1 Ves. sen. 27....	129
Ashby v. Palmer, 1 Meriv. 296.....	491	Beckford and Quarrell, 1 Madd. ch. rep. 268, (American edi. 151.).....	223
Ashdown and Stileman, 2 Atk. 481.....	134	Beckford v. Parnecott, Cro. Eliz. 493....	370
Asaheton and Medlycott, 2 Add. 229.....	370	Bedford bank and Bennett, 11 Mass. R. 421.....	133
Atkinson v. Henshaw, 2 Ves. & Beames 85.....	610	Belches and Allen, 2 Hen. & Munf. 595..	36
Attorney general and Gallego's ex'ors, 3 Leigh 450.....	411, 414, 418	Bell and Bullard, 1 Mason 299.....	76
Attorney general v. Barnes & wife, 2 Vern. 597.....	365	Bell and Mackey, 2 Munf. 523.....	35, 52
Augusta bank v. Earle, 13 Peters 588...	581, 588	Bennett and Salmon, 1 Conn. R. 525.....	132, 134, 135
Ayleworth and Sackville, 1 Vern. 106...	249	Bennett v. Bedford bank, 11 Mass. R. 421.....	133
Bacon's legatee and Lewis's ex'or, 3 Hen. & Munf. 89.....	206	Bennett v. Hartford fire ins. co., 19 Wend. 46.....	584
Bainbridge and United States, 1 Mason 71.....	616, 634	Bennett v. Harrell, 2 Sch. & Lef. 566....	41
Baird v. Rice, 1 Call 18.....	562	Betts and Jackson, 9 Cow. 208.....	364
Baker and Butler's case, 3 Co. rep. 26...	100, 101, 103	Beverley and Martin, 5 Call 444.....	473
Ballou &c. and Murray &c., 1 Johns. ch. rep. 566.....	177	Beyer and Kretchman, 1 T. R. 463.....	519
Bank of Augusta v. Earle, 13 Peters 588..	581, 588	Bibb v. Thomas, 2 W. Bl. 1043.....	369, 381
Bank of Bedford and Bennett, 11 Mass. R. 421.....	133	Bierne v. Erskine, 5 Leigh 59.....	299, 301, 305
Bank of Cumberland and Hopewell, 10 Leigh 206.....	176	Bishop of Winchester v. Paine, 11 Ves. 194.....	177
Bank of Hartford v. Hart, 3 Day 493....	367	Blackburn and Kelso, 3 Leigh 306.....	585
		Blessing's adm'rs v. Beatty, reported 287, cited.....	453, 458
		Bloodgood and Kane, 7 Johns. ch. rep. 90.....	81

Blumfield's case, 5 Co. rep. 87.....	560	Carrington & others and Nelson, 4 Munf. 332.....	116, 295, 296, 448, 454
Boehm and Raphael, 11 Ves. 82.....	213	Carr & ux. &c. and Garrett ex'or &c., 3 Leigh 407, 417.....	196, 7, 216
Bogget v. Frier &c., 11 East 301.....	656	Carruthers and Parkin, 3 Esp. N. P. C. 248.....	277, 278
Bolling v. Turner, 6 Rand. 584.....	249	Carr's adm'r v. Chapman's legatees, 5 Leigh 164.....	166
Bonifaut v. Greenfield, 1 Leon. 60, Cro. Eliz. 80.....	97, 98, 103	Carter and Sawney, 6 Rand. 173.....	645
Borden v. Bowyer &c., 1 Leigh 108.....	36	Carter's ex'ors v. Cutting and wife, 5 Munf. 223.....	204, 206, 212
Boswell and Wormley's adm'r, unreported decision of court of appeals.....	209	Carter v. Campbell, Gilm. 170.....	448, 454
Bouchier v. Dillon, 5 Bligh 714.....	35	Carver and Waugh, 2 H. Black. 235.....	274, 276, 278, 280
Bouhey v. Moreton, 2 Lee 532.....	376	Case v. Clarke, 5 Mason 70.....	623, 626
Boulter and Jones, 1 Cox's ch. R. 288.....	130	Castleman &c. and Graff &c., 5 Rand. 201.....	112, 114, 116
Bovill &c. v. Hammond, 6 Barn. & Cress. 149.....	82	Catheart &c. v. Robinson, 5 Peters 264.....	544
Bowie &c. v. Williamson &c., 6 Munf. 176.....	585	Catlett v. the Pacific Ins. Co., 1 Paine's C. C. R. 594.....	623, 6
Bowyer &c. and Borden, 1 Leigh 108.....	36	Catling &c. v. Skoulding &c., 6 T. R. 189.....	83
Bowyer &c. v. Lewis, 1 Hen. & Munf. 553.....	35	Chambers and Willet, Cowp. 814.....	275
Boyd and Tabb, 4 Call 452.....	204	Chapman and Hill, 1 Ves. jun. 407.....	370
Boyd &c. v. Cook, 3 Leigh 32.....	365, 369, 372, 375	Chapman &c. v. Harrison, 4 Rand. 336.....	608
Bradford and others and Rankin, 1 Leigh 163.....	325, 326	Chapman's legatees and Carr's adm'r, 5 Leigh 164.....	166
Bragg and Colton, 15 East 223.....	205	Chapman v. Brown, 3 Burr. 1634.....	421, 443
Branch v. Burnley &c., 1 Call 153.....	316	Charles and others v. Hunnicutt, 5 Call 311.....	411
Branding and Bywater, 7 Barn. & Cress. 643.....	397	Charles's adm'rs and Seidenbender, 4 Serg. & Rawle 151-160.....	628
Branson and Harvey & wife, 1 Leigh 108.....	36, 43, 46, 49, 52	Chatterton and Towler, 6 Bing. 258.....	399
Brashear and Lansdale, 3 Monroe 330.....	79, 81	Chew v. Moffett, 6 Munf. 120.....	400
Brawfords and Keytons, 5 Leigh 48.....	295, 303, 304	Childers and Garnett, 2 Munf. 277.....	249
Briant and Farley, 3 Adolph. & Ell. 839.....	138	Childers v. Deane &c., 4 Rand. 406.....	204, 212, 214
Briddock and Parsons, 2 Vern. 608.....	180, 463, 464, 465, 467	Chowning v. Cox &c., 1 Rand. 306.....	153, 154
Bridges v. Mitchell, Bunbury's rep. 217.....	86, 87, 91	Christian &c. and Whittington &c., 2 Rand. 353.....	308, 310, 312, 316, 317
Brown v. Barry, 3 Dall. 365.....	624	City of Cincinnati v. lessee of White, 6 Peters 431.....	190, 191
Brown and Chapman, 3 Burr. 1634.....	421, 443	Clarke and Case, 5 Mason 70.....	623, 626
Brown and Deloraine, 3 Bro. C. C. 633.....	166	Clark v. Phelps and others, 6 Johns. ch. rep. 214.....	373
Browns and Higginbotham, 4 Munf. 339.....	477	Clay and Alderson, 1 Starkie 405.....	278
Brown and Patterson, 6 Monroe 10.....	79, 87, 88	Clayton and Fife, 13 Ves. 546.....	190
Brown &c. and Dan &c., 4 Cow. 490.....	364	Clayton v. Anthony, 6 Rand. 285.....	235
Buckley and Hill, 17 Ves. 394, 401.....	298	Clerk v. Withers, Ld. Raym. 1072.....	555
Bullard v. Bell, 1 Mason 299.....	76	Close &c. and Harrison, 2 Johns. rep. 448.....	597
Buller and Mortlock, 10 Ves. 316.....	261	Coalter and Stuart's heirs, 4 Rand. 74.....	487
Bullitt's ex'ors v. Winstons, 1 Munf. 269.....	562	Cocke & co. v. Pollok & co., 1 Hen. & Munf. 499.....	611
Burnley &c. and Branch, 1 Call 153.....	316	Codd &c. and Milburn, 7 Barn. & Cress. 419.....	82
Burns v. Burns, 4 Serg. & Rawle 297.....	368	Cogbill v. Cogbill &c., 2 Hen. & Munf. 512.....	361
Burroughs and Walker, 1 Atk. 93.....	129	Cohen v. Hoff, 2 Tredway's rep. 661.....	626
Burtenshaw v. Gilbert, Cowp. 52.....	369	Cole &c. and Paradise's adm'rs, 6 Munf. 218.....	517
Burton &c. v. Scott &c., 3 Rand. 399.....	372	Coleman & wife and Alexander's heirs, 6 Munf. 328.....	38
Burwell's adm'r and M'Dowell, 4 Rand. 317.....	340	Coles and Martini, 1 Mau. & Selw. 140.....	146
Butler and Baker's case, 3 Co. rep. 26.....	100, 101, 103	Coleman v. Croker, 1 Ves. jun. 160.....	534
Butler and Peter, 1 Leigh 285.....	586	Colton v. Bragg, 15 East 223.....	205
Bushel & another v. the Commonwealth ins. co., 15 Serg. & Rawle 173.....	577, 587	Colvin v. Fresher &c., 2 Haggard 266.....	375
Byrd's case, 2 Va. Cas. 490.....	707, 711	Commonwealth and Green, 11 Leigh 677.....	703, 732
Cadogan v. Kennett, Cowp. 432.....	132	Commonwealth and Thompson, 2 Va. Cas. 135.....	694
Cady and others and Westcott and others, 5 Johns. ch. rep. 334.....	370	Commonwealth and Wood, 4 Rand. 329.....	73
Camm &c. and Norvell, 6 Munf. 233.....	310		
Campbell and Carter, Gilm. 170.....	448, 454		
Camp's ex'ors and Franklin, 1 Coxe's rep. 196.....	83		
Cannon's ex'or v. Mitchell, 2 Desaus. 320.....	190		
Carpenter and Sorrell, 2 P. Wms. 482.....	177, 179		

Commonwealth ins. co. and Bushel & another, 15 Serg. & Rawle 173.....	577, 587	Deveau and the bank of the United States, 5 Cranch 61.....	580
Commonwealth v. Cullins, 1 Mass. rep. 116.....	656	Dicken and Crewe, 4 Ves. 98.....	98, 102
Commonwealth v. Fairfax & others, 4 Hen. & Munf. 208.....	553	Dickenson v. Davis and others, 2 Leigh 401.....	373, 390
Commonwealth v. Hewitt, 2 Hen. & Munf. 181.....	394, 396, 401	Dillon and Bouchier, 5 Bligh 714.....	35
Compton (lord) and Oxenden, 2 Ves. jun. 71.....	249	Dinwoody and Hercy, 2 Ves. jun. 87.....	166
Cook and Boyd, 3 Leigh 32.....	365, 369, 372, 375	Dobyns and Tarpley's adm'r, 1 Wash. 185.....	607
Cook v. Piles, 2 Munf. 152.....	249	Doe d. Bywater v. Brandling, 7 Barn. & Cress. 643.....	397
Cooke and Milligan, 16 Ves. 1.....	261	Doe v. Danvers, 7 East 299.....	365
Cooper and Taylor, 10 Leigh 317.....	39	Doe v. Harris, 8 Adolph. & Ell. 1.....	371, 373, 378
Cooper's lessee v. Galbraith, 3 Wash. C. C. R. 546.....	623, 626	Doe v. Manning, 9 East 63.....	542
Coster v. Murray, 5 Johns. ch. rep. 522.....	82, 85, 88, 91	Doe v. Martyr, 4 Bos. & Pul. N. R. 335.....	542
Cotes v. Harris, Bull. N. P. 149.....	83	Doe v. Routledge, Cowp. 713.....	539, 542
Cotman v. Rogers, 10 Pick. 112.....	92	Dold's ex'ors & al. and Wallace & ux., 3 Leigh 258.....	435, 439, 440, 443, 447
Countess of Jersey and St. Amand, 1 Com. rep. 255.....	129	Douglass v. Fagg, 8 Leigh 588.....	176, 465
Coupland and Fromont, 2 Bligh 170.....	280	Downman v. Downman's ex'or, 2 Wash. 189.....	545, 554, 555, 561
Coussmaker and Kidney, 12 Ves. 136.....	129	Drake v. Mitchell, 3 East 251.....	598
Coutts and Walwyn, 3 Meriv. 707.....	659	Draper v. Glassop, 1 Ld. Raym. 153.....	599
Covington's heirs and Heywood, 4 Leigh 373.....	39	Drummond and Evans, 4 Esp. N. P. C. 89.....	275, 7, 8
Cowan &c. and State bank of North Carolina, 8 Leigh 238.....	525	Drummond's adm'rs and Roane's adm'r, 6 Rand. 182.....	398
Cox &c. and Chowning, 1 Rand. 306.....	153, 154	Dulany and Green, 2 Munf. 518.....	266
Craig v. Craig, 1 Call 483.....	394, 396	Dundaas and Hendricks &c., 2 Wash. 50.....	562, 563
Crauch v. Kirkman, Peake's N. P. C. 121.....	83	Dundaas and Taylor, 1 Wash. 92.....	545, 554, 555, 560
Crawford & al. v. Jarrett's adm'r, 2 Leigh 630.....	73	Dunlop &c. and Flemming's ex'or, 4 Leigh 338.....	596, 600
Crewe v. Dicken, 4 Ves. 98.....	98, 102	Dunn v. Perine, 3 Johns. ch. R. 516.....	135
Crews v. Pendleton &c., 1 Leigh 297.....	39	Duval and Meredith's adm'x, 1 Munf. 76, 9, 83, 4.....	334, 6, 8, 340, 343, 4, 396
Croker and Colman, 1 Ves. jun. 160.....	534	Duvals v. Ross, 2 Munf. 290.....	298, 325
Cromwell and Noland, 4 Munf. 155.....	317	Dyke v. Mercer, 2 Show. 394.....	555, 564
Crosbie v. M'Dougal, 4 Ves. 616.....	370	Earl and Senhouse, 2 Ves. 450.....	40
Cuff v. Platell, 4 Russ. 242.....	368	Earle and the bank of Augusta, 13 Peters 588.....	581, 588
Cullins and Commonwealth, 1 Mass. rep. 116.....	656	Earl of Strafford and Jones, 3 P. Wms. 81.....	373
Cumberland bank and Hopewell, 10 Leigh 206.....	176	Edney and Jones, 3 Camp. 284.....	189
Cunningham and Smith &c., 1 Add. 448, 455.....	369	Elcan and Henry's ex'or, 2 Munf. 541.....	249
Cunningham &c. and Skipwith's ex'or, 8 Leigh 282.....	98, 99, 659	Ellard v. lord Llandaff, 1 Ball & Beat. 251.....	262
Cunningham's ex'or and Hull, 1 Munf. 330.....	295, 299	Elliott's ex'or v. Lyell, 3 Call 268.....	394, 396, 399
Cunningham v. Flournoy, 6 Johns. ch. rep. 1.....	207	Ellzey v. Lane's ex'x, 2 Hen. & Munf. 592.....	36
Curzen and M'Connico &c., 2 Call 358.....	207	Elwes and Tolson, 1 Leigh 436.....	520
Cutting and wife and Carter's ex'ors, 5 Munf. 223.....	204, 206, 212	Emery v. Wase, 8 Ves. 505.....	258
Dan &c. v. Brown &c., 4 Cow. 490.....	364	Emmett & al. and Whitney & al., 1 Baldwin's C. C. R. 315, 16.....	620
Daniels ex parte, 14 Ves. 191.....	629	Ensign v. Wanda, 1 Johns. ch. rep. 171.....	275
Danvers and Doe, 7 East 299.....	365	Erskine and Biene, 5 Leigh 59.....	299, 301, 305
Davis and others and Dickenson, 2 Leigh 401.....	373, 390	Erskine v. Henry &c., 6 Leigh 384.....	5, 517
Davis v. Jones, 1 New rep. (4 Bos. & Pul.) 267.....	258	Evans v. Drummond, 4 Esp. N. P. Cas. 89.....	275, 277, 278
Dawsons and Literary Fund, 10 Leigh 147.....	402, 416, 434	Evelyn v. Templar, 2 Bro. C. C. 149.....	542
Day v. Pickett, 4 Munf. 104.....	401	Ex parte Barnsley, 3 Atk. 168.....	249
Dean and Jarvis, 3 Bing. 447.....	191	Ex parte Daniels, 14 Ves. 191.....	629
Deane &c. and Childers, 4 Rand. 406.....	204, 212, 214	Ex parte Hamper, 17 Ves. 404.....	274, 278, 279, 280
De Berkorn v. Smith, 1 Esp. N. P. C. 29.....	276	Ex parte Minor, 11 Ves. 559.....	39
Delaware bank and Beaston, 12 Peters 134, 5.....	581, 582, 589	Ex parte Ward, 6 Ves. 579.....	249
Deloraine v. Brown, 3 Bro. C. C. 633.....	166	Fagg and Douglass, 8 Leigh 588.....	176, 465
		Fairfax and others and the commonwealth, 4 Hen. & Munf. 208.....	553

Fairfax v. Muse's ex'ors, 2 Hen. & Munf. 558.....	36	Godwin's adm'r v. Godwin's adm'x &c., 4 Leigh 410.....	492
Farley v. Briant, 3 Adolph. & Ell. 839....	138	Goodwin v. Miller, 2 Munf. 42.....	36
Farmers bank of Delaware and Beaton, 12 Peters 134, 5.....	581, 582, 589	Gould v. Johnson, 2 Ld. Raym. 838.....	599
Fauntleroy and Templeman, 3 Rand. 434.....	487	Grace and Wilson, 14 Ves. 172.....	249
Fawcett &c. and M'Mahon &c., 2 Rand. 514.....	465	Grace v. Smith, 2 W. Black. 998.....	280
Fenwick and Moore, Gilm. 214.....	73	Graff &c. v. Castleman &c., 5 Rand. 201..	112, 114, 116
Fife v. Clayton, 13 Ves. 546.....	190	Grant and Thompson, 4 Madd. ch. rep. 438.....	40
Fifield and Twigg, 13 Ves. 517.....	39	Grantland v. Wight, 2 Munf. 179.....	190
Findlay and Wiseley, 3 Rand. 361.....	487	Graves and Bates, 2 Ves. jun. 292.....	135
Fire ins. company of Hartford and Bennett, 19 Wend. 46.....	584	Graves and others and the United States, 2 Brock. 385, 6.....	554, 556
Fisher v. Bassett and others, 9 Leigh 119..	115	Graves and Payne, 5 Leigh 561.....	207
Fitch v. Sutton, 5 East 230.....	597	Green v. Dulany, 2 Munf. 518.....	266
Fitzer v. Fitzer, 2 Atk. 511.....	134	Greenfield and Bonifaut, 1 Leon. 60, Cro. Eliz. 80.....	97, 98, 103
Fitzhugh and Thorntons, 4 Leigh 209....	38	Green v. Garrett, 3 Munf. 339.....	477
Fleming's ex'or v. Dunlop &c., 4 Leigh 338.....	596, 600	Green v. the commonwealth, 11 Leigh 677.....	703, 732
Flournoy and Cunningham, 6 Johns. ch. rep. 1.....	207	Gregory's adm'r v. Mark's adm'r, 1 Rand. 355.....	325, 326, 327
Forbes v. Skelton, 8 Simons 335.....	79	Griffin and Syme, 4 Hen. & Munf. 277..	336, 340
Fordham and others and Scruby, 1 Add. 74.....	369, 381	Griffith and Wood, 1 Swanst. 54.....	261
Foster v. Hodgson, 19 Ves. 180.....	81, 86	Grubbum and Stone, 2 Bulst. 225.....	135
Fox's adm'r and Hill's ex'or, 10 Leigh 587.....	36, 44, 47, 48, 49, 52	Grymes v. Pendleton, 1 Call 54.....	35
Fox v. Hambury, Cowp. 445.....	277	Gurdon v. Robson, 2 Camp. 302.....	276
Fox v. Hills, 1 Conn. R. 295.....	137	Hallett v. Novion, 14 Johns. 273.....	628
Fox v. Morton, unreported decision of court of appeals.....	325, 326	Hall v. Hardy, 3 P. Wms. 189.....	258
Franklin v. Camp's ex'ors, 1 Cox's rep. 196.....	83	Hall v. Warren, 9 Ves. 605.....	249
Fraser &c. and Colvin, 2 Haggard 266....	375	Hammond and Bovill &c., 6 Barn. & Cress. 149.....	82
Freeman and Luckner, 1 Eq. cas. abr. 149.....	137	Hammond and Russell, 1 Atk. 15.....	129
French v. Loyal company, 5 Leigh 627..	179	Hamond v. Jethro, 2 Brownl. 99.....	83
Frier &c. and Bogget, 11 East 301.....	656	Hamper ex parte, 17 Ves. 404.....	274, 278, 279, 280
Fromont v. Coupland, 2 Bligh 170.....	280	Hanbury and Fox, Cowp. 445.....	277
Galbraith and Cooper's lessee, 3 Wash. C. C. R. 546.....	623, 626	Handly v. Snodgrass & others, 9 Leigh 484.....	206
Gallego's ex'ors v. the attorney general, 3 Leigh 450.....	411, 414, 418	Hanna's ex'or and Reed, 3 Rand. 56.....	597
Galliers and Peploe, 4 J. B. Moore 163....	598	Hardin's ex'ors v. Hardin, 2 Leigh 572..	325, 327
Garland v. Marx, 4 Leigh 321.....	398	Hardwick (the inhabitants of) and the king, 11 East 590.....	367, 372
Garnet &c. v. Macon & al., 6 Call 308, 2 Brock. rep. 185.....	16	Hardy and Hall, 3 P. Wms. 189.....	258
Garnett v. Childers, 2 Munf. 277.....	249	Harnett v. Yielding, 2 Sch. & Lef. 554..	262
Garrard v. lord Lauderdale, 3 Sim. 1....	659	Harrell and Bennet, 2 Sch. & Lef. 566... 41	
Garrett and Green, 3 Munf. 339.....	477	Hardridge and Hodsden, 2 Wms. Saund. 63, note 6.....	599
Garrett ex'or &c. v. Carr & ux. &c., 3 Leigh 407, 417.....	196, 7, 216	Harris and Cotes, Bull. N. P. 149.....	83
Garth v. Ward, 2 Atk. 174.....	177	Harris and Doe, 8 Adolph. & Ell. 1.....	371, 373, 378
Gee and Todd, 17 Ves. 274.....	261	Harris and Reed, 6 Adolph. & Ell. 209... 364, 365, 377, 381, 386	
George and Howel, 1 Madd. ch. rep. 1....	257	Harris and Wroe, 2 Wash. 126.....	474
George v. Milbanke, 9 Ves. 193.....	132, 133	Harrison and Chapman &c., 4 Rand. 336..	608
Gilbert and Burtenshaw, Cowp. 52.....	369	Harrison v. Close &c., 2 Johns. rep. 448..	597
Giles &c. and Aldridge &c., 3 Hen. & Munf. 136.....	35	Harris v. Harris, 6 Munf. 367.....	235
Giles governor and Perkins and others, 9 Leigh 397.....	338, 340, 546, 554, 557, 571	Hart and the Hartford bank, 3 Day 493..	367
Gillespie and Mestaer, 11 Ves. 640.....	261	Hartford bank v. Hart, 3 Day 493.....	367
Givens & al. v. Nelson's ex'or & al., 10 Leigh 383.....	176, 180, 465	Hartford fire ins. co. and Bennett, 19 Wend. 46.....	584
Glasscock v. Smither &c., 1 Call 479.....	363	Hart's ex'ors and Baptist association, 4 Wheat. 1.....	411, 413, 418
Glassop and Draper, 1 Ld. Raym. 153....	599	Harvey & wife v. Branson, 1 Leigh 108..	36, 43, 46, 49, 52
Glover v. Smith, 1 Desaus. 433.....	298	Hay and Monkhouse, 8 Price 256.....	139
Godfrey v. Turnbull, 1 Esp. N. P. C. 371.....	277, 279	Hays & al. v. Goode & al., 7 Leigh 452..	166
Goode & al. and Hayes & al., 7 Leigh 452..	166	Hayling v. Mulhall, 2 W. Bl. 1235.....	555

Haynes and Meade & others, 3 Rand. 33.....	473, 474	Hutchison and others v. Kelly, reported 123, cited.....	500, 527
Haythorne and Makepeace, 4 Russ. 244..	368	Imber and Rackstraw, 1 Holt 368.....	277
Henderson &c. v. Southall &c., 4 Call 371..	597	Inglilby and Walburn, 1 Mylne & Keene 61.....	35
Hendricks &c. v. Dundass, 2 Wash. 50.....	562, 563	Inglis v. Sailor's sung harbour, 3 Peters 99.....	411, 418, 421, 423, 427
Henry &c. and Erskine, 6 Leigh 384, 5... 517		Inhabitants of Hardwick and the king, 11 East 590.....	367, 372
Henry's ex'or v. Elcan, 2 Munf. 541.....	249	Insurance company of Hartford and Bennett, 19 Wend. 46.....	584
Henshaw and Atkinson, 2 Ves. & Beames 85.....	610	Insurance company (Pacific) and Catlett, 1 Paine's C. C. R. 594.....	623, 6
Hercy v. Dinwoody, 2 Ves. jun. 87.....	166	Insurance company (Commonwealth) and Bushel and another, 15 Serg. & Rawle 173.....	577, 587
Hewitt and the commonwealth, 2 Hen. & Munf. 181.....	394, 396, 401	Insurance company of Utica and the people, 15 Johns. 382.....	579
Heywood v. Covington's heirs, 4 Leigh 373.....	39	Isaac v. West's ex'or, 6 Rand. 652.....	54
Higginbotham v. Browns, 4 Munf. 516.....	477	Israel &c. and Long's ex'or &c., 9 Leigh 556.....	295, 296, 297
Higgins and Holmes, 1 Barn. & Cress. 74.....	82	Jackson and Thompson, 3 Rand. 504.....	233
Hilliard v. Lenard, 1 Mood. & Malk. 297..	399	Jackson ex dem. Van Buren v. Myers, 18 Johns. rep. 425.....	137
Hills and Fox, 1 Conn. R. 295.....	137	Jackson v. Betts, 9 Cow. 208.....	364
Hill's ex'or v. Fox's adm'r, 10 Leigh 587..	52	Jackson v. Kniffen, 2 Johns. rep. 31.....	361
.....36, 44, 47, 48, 49, 52		Jackson v. M'Gavock, 5 Rand. 509.....	317
Hill v. Buckley, 17 Ves. 394, 401.....	298	Jackson v. Town, 4 Cowp. N. Y. rep. 604.....	132
Hill v. Chapman, 1 Ves. jun. 407.....	370	Janey's ex'or v. Latane and others, 4 Leigh 327.....	411, 414
Hinde's lessee v. Longworth, 11 Wheat. 199.....	132	Jarrett's adm'r and Crawford & al., 2 Leigh 630.....	73
Hite &c. and Jolliffe &c., 1 Call 329.....	295, 299, 303, 304	Jarvis v. Dean, 3 Bing. 447.....	191
Hite's heirs v. Wilson &c., 2 Hen. & Munf. 268.....	517	Jersey (countess of) and St. Amand, 1 Com. rep. 255.....	129
Hodgson and Foster, 19 Ves. 180	81, 86	Jethro and Hammond, 2 Brownl. 99.....	83
Hodgson and others and William & Mary college, 6 Munf. 163.....	411	Jett v. Walker, 1 Rand. 211.....	562
Hodsden v. Horridge, 2 Wms. Saund. 63, note 6.....	599	Johnson and Gould, 2 Ld. Raym. 838....	599
Hodson and Law, 11 East 300.....	629	Johnson and Royall's adm'r's &c., 1 Rand. 421.....	38
Hoff and Cohen, 2 Tredway's rep. 661....	626	Johnson and the king, 6 East 597.....	597
Holecroft's case, Dyer 294, in note.....	539	Johnson v. Macon, 1 Wash. 6.....	335, 337
Hollinshead and Reid, 4 Barn. & Cress. 867.....	280	Jolliffe &c. v. Hite &c., 1 Call 329.....	295, 299, 303, 304
Holloway and Wilkinson & co., 7 Leigh 277.....	113, 115, 116	Jones and Davis, 1 New rep. (4 Bos. & Pul.) 267.....	258
Holloway v. Millard, 1 Madd. ch. rep. 413.....	133	Jones and Taylor, 2 Atk. 600.....	129, 135
Holman and Bates, 3 Hen. & Munf. 502..	368, 369, 370	Jones v. Boulter, 1 Cox's ch. R. 288.....	130
Holmes v. Higgins, 1 Barn. & Cress. 74..	82	Jones's case, 1 Leigh 617.....	743
Home v. Richards, 4 Call 441.....	473	Jones v. earl of Strafford, 3 P. Wms. 81..	373
Hooe v. Tebbis, 1 Munf. 501.....	335, 337, 338, 340, 341, 345	Jones v. Edney, 3 Camp. 284.....	189
Hoome and Richards, 2 Wash. 36.....	473	Jones v. Stevenson, 5 Munf. 7.....	266
Hoopoy v. Royster, 1 Munf. 119.....	205	Kane v. Bloodgood, 7 Johns. ch. rep. 90..	81
Hopewell & al. v. bank of Cumberland, 10 Leigh 206.....	176	Karr and Roberts, 1 Camp. 362, note....	194
Horton's case, 1 Va. Cas. 335.....	688, 689	Kaye v. Waghorne, 1 Taunt. 428.....	598
House's case, 8 Leigh 755.....	728	Keeran &c. and Russell &c., 8 Leigh 19..	301
Howell's lessee and Barclay &c., 6 Peters 498.....	193	Keighley and Malim, 2 Ves. jun. 335....	421
Howel v. George, 1 Madd. ch. rep. 1.....	257	Kell v. Naimby, 10 Barn. & Cress. 20....	276
Howlet v. Wilbraham, 5 Madd. ch. rep. 423.....	249	Kelly and Hutchison and others, reported 123, cited.....	500, 527
Hughes and M'Clung, 5 Rand. 453.....	317	Kennett and Codogan, Cowp. 432.....	132
Hull v. Cunningham's ex'or, 1 Munf. 330.....	295, 299	Kelso v. Blackburn, 3 Leigh 306.....	585
Hundley v. Lyons, 5 Munf. 342.....	303	Keytons v. Brawfords, 5 Leigh 39.....	295, 303, 304
Hunnicut and Charles and others, 5 Call 311.....	411	Kidney v. Coussmaker, 12 Ves. 136.....	129
Huntons and Armstrong, reported 323, cited.....	613	Kiger and Ashby, 3 Rand. 165.....	249
Hussey and Armstrong, 12 Serg. & Rawle 315.....	275	Kincheloe v. Kincheloe, 11 Leigh 398....	349
		Kinder v. Shaw, 2 Mass. rep. 398.....	146
		King and Taylor, 6 Munf. 358.....	235
		The king of Spain and others v. Machado and others, 4 Russ. 225.....	368

The king <i>v.</i> Johnson, 6 East 597.....	597	Machado and others <i>and</i> the king of Spain and others, 4 Russ. 225.....	368
The king <i>v.</i> Rudd, Cowp. 332, Leach's C. L. 115.....	703	Mackey <i>v.</i> Bell, 2 Munf. 523.....	35, 52
The king <i>v.</i> the inhabitants of Hardwick, 11 East 590.....	367, 372	Macon <i>and</i> Johnson, 1 Wash. 6.....	335, 337
Kirkman <i>and</i> Cranch, Peake's N. P. C. 121.....	83	Macon & al. <i>and</i> Garnet &c., 6 Call 308, 2 Brock. rep. 185.....	16
Kirkpatrick <i>and</i> the United States, 9 Wheat. 720.....	620	Mahon <i>and</i> Mutual ass. co., 5 Call 517....	669
Kirton <i>and</i> Simpson, Cro. Jac. 115.....	371	Makepeace <i>v.</i> Haythorne, 4 Russ. 244. .	368
Knapp <i>and</i> Union bank, 3 Pick. 112.....	81	Malim <i>v.</i> Keighley, 2 Ves. jun. 335.....	421
Kniffen <i>and</i> Jackson, 2 Johns. rep. 31....	361	Mandeville &c. <i>v.</i> Wilson, 5 Cranch 15....	79, 83, 85, 92
Knubley <i>and</i> Wilson, 7 East 128.....	138	Manhattan company <i>and</i> Osgood, 3 Cow. 623.....	367
Kretchman <i>and</i> Winter &c., 2 T. R. 45....	517	Manning <i>and</i> Doe, 9 East 63.....	542
Kretchman <i>v.</i> Beyer, 1 T. R. 463.....	519	Maria and others <i>v.</i> Surbaugh, 2 Rand. 228.....	53, 54, 55
Kyle's adm'r <i>and</i> Rowt's adm'r, 1 Leigh 216.....	282	Marks's adm'r <i>and</i> Gregory's adm'r, 1 Rand. 355.....	325, 326, 327
Lade <i>v.</i> Shepard, 2 Strange 1004.....	190	Marks <i>v.</i> Marks, 1 Str. 129.....	415
Laidley <i>v.</i> Merrifield, 7 Leigh 360, 61....	116	Marston <i>v.</i> Roe, 8 Adolph. & Ell. 14.....	362, 363
Lane's ex'r <i>and</i> Ellzey, 2 Hen. & Munf. 592.....	36	Martin <i>and</i> Style, 1 Ch. cas. 150.....	177
Lansdale <i>v.</i> Brashear, 3 Monroe 330....	79, 81	Martini <i>v.</i> Coles, 1 Mau. & Selw. 140....	146
Larkins and others <i>v.</i> Larkins and others, 3 Bos. & Pul. 16.....	369	Martin <i>v.</i> Beverley, 5 Call 444.....	473
Latane and others <i>and</i> Janey's ex'or, 4 Leigh 327.....	411, 414	Martin <i>v.</i> Mitchell, 2 Jac. & Walk. 425..	259
Law and Ray, 3 Cranch 179.....	20, 39, 40	Martyr <i>and</i> Doe, 4 Bos. & Pul. N. R. 335.....	542
Law <i>v.</i> Hodson, 11 East 300.....	629	Marx <i>and</i> Garland, 4 Leigh 321.....	398
Leach <i>and</i> Thompson, 2 Ventr. 198, 3 Mod. 301, 1 Show. 296, Show. P. C. 150, 2 Salk. 618.....	97, 98, 9, 103	Matthews &c. <i>and</i> Nelson, 2 Hen. & Munf. 164.....	296, 299
Lee <i>v.</i> Rogers, 1 Levinz 110.....	599	May &c. <i>v.</i> the State bank of North Carolina, decided in court of appeals May 1843, cited.....	526
Lenard <i>and</i> Hilliard, 1 Mood. & Malk. 297.....	399	Mayor &c. <i>v.</i> Wilks, Salk. 445.....	83
Lenthall's case, 2 Keb. 499.....	136	Mayo <i>v.</i> Murchie, 3 Munf. 358.....	190, 191
Lethbridge <i>v.</i> Winter, 1 Camp. 263, note.....	194	Mayo <i>v.</i> Pleasants, unreported decision of court of appeals.....	334
Lewis <i>and</i> Bowyer &c., 1 Hen. & Munf. 553.....	35	M'Call <i>v.</i> Peachy, 1 Call 55.....	35
Lewis's ex'or <i>v.</i> Bacon's legatee, 3 Hen. & Munf. 89.....	206	M'Clintee <i>and</i> Purviance, 6 Serg. & Rawle 259.....	280
Liddel <i>and</i> Welford, 2 Ves. 400.....	83	M'Clung <i>v.</i> Hughes, 5 Rand. 453.....	317
Literary fund <i>v.</i> Dawsons, 10 Leigh 147.....	402, 416, 434	M'Connico <i>v.</i> Curzen, 2 Call 358.....	207
Livingston and others <i>and</i> Reade, 3 Johns. ch. rep. 500....	123, 129, 131, 133, 142	M'Dougal <i>and</i> Crosbie, 4 Ves. 616.....	370
Livingston <i>v.</i> Roosevelt, 4 Johns. rep. 251.....	275	M'Dowell <i>v.</i> Burwell's adm'r, 4 Rand. 317.....	340
Long &c. <i>and</i> Shirley, 6 Rand. 747, 753, 764.....	233, 235	M'Gavock <i>and</i> Jackson, 5 Rand. 509.....	317
Long's ex'or &c. <i>v.</i> Israel &c., 9 Leigh 556.....	295, 296, 297	M'Guire <i>v.</i> Ashby, 1 Rand. 101.....	629
Longworth <i>and</i> Hinde's lessee, 11 Wheat. 199.....	132	M'Mahon &c. <i>v.</i> Fawcett &c., 2 Rand. 514.....	465
Lord Compton <i>and</i> Oxemden, 2 Ves. jun. 71.....	249	M'Queen <i>v.</i> Middletown manufacturing co., 16 Johns. rep. 5.....	576, 583, 587
Lord Llandaff <i>and</i> Ellard, 1 Ball & Beat. 251.....	262	Mead and others <i>v.</i> Haynes, 3 Rand. 33.....	473, 474
Lord Lauderdale <i>and</i> Garrard, 3 Sim. 1..	659	Means &c. <i>v.</i> Moore &c., Harper 314....	364
Lord Sandwich <i>and</i> Montague, 12 Ves. 136 n.....	129	Mearns <i>and</i> Scholey &c., 7 East 148....	598
Lord Townshend <i>v.</i> Windham, 2 Ves. sen. 1.....	129, 134	Mechanics bank of Alexandria <i>and</i> Minor and others, 1 Peters 64.....	628
Loyal company <i>and</i> French, 5 Leigh 627.....	179	Medlycott <i>v.</i> Assheton, 2 Add. 229.....	370
Luckner <i>v.</i> Freeman, 1 Eq. cas.abri. 149.....	137	Mercer <i>and</i> Dyke, 2 Show. 394.	555, 564
Lyell <i>and</i> Elliott's ex'or, 3 Call 268....	394, 399	Meredith's adm'r <i>v.</i> Duval, 1 Munf. 76, 79, 83, 84.....	334, 336, 338, 340, 343, 344, 396
Lyle's adm'r <i>and</i> Watson &c., 4 Leigh 236.....	85	Merrifield <i>and</i> Laidley, 7 Leigh 360, 61..	116
Lyle <i>v.</i> Stephenson, 6 Call 54.....	339	Mestaer <i>v.</i> Gillespie, 11 Ves. 640.....	261
Lyons <i>and</i> Hundley, 5 Munf. 342.....	303	Metcalfe <i>and</i> Wilson, 1 Russ. 530....	223
		Middletown Manufacturing co. <i>and</i> M'Queen, 16 Johns. rep. 5.....	576, 583, 587
		Milbanke <i>and</i> George, 9 Ves. 193.....	132, 133
		Milburn <i>v.</i> Codd &c., 7 Barn. & Cress. 419.....	82
		Millard <i>and</i> Holloway, 1 Madd. ch. rep. 413.....	133
		Miller <i>and</i> Goodwin, 2 Munf. 42.....	36
		Milligan <i>v.</i> Cooke, 16 Ves. 1.....	261

Minor and others v. Mechanics bank of Alexandria, 1 Peters 64.....	628	Overseers of poor v. Tayloe's adm'r, Gilm. 336.....	411
Minor's case, 1 Ves. 559.....	39	Oxenden v. lord Compton, 2 Ves. jun. 71..	249
Mitchell and Bridges, Burnbury's rep. 217.....	86, 87, 91	Owens and Bank, 2 Peters 527.....	538, 629
Mitchell and Cannon's ex'or, 2 Desaus. 320.....	190	Pacific insurance company and Catlett, 1 Paine's C. C. R. 594.....	623, 626
Mitchell and Drake, 3 East 251.....	598	Page and Tuffnell, 2 Atk. 37.....	365
Mitchell and Martin, 2 Jac. & Walk. 425..	259	Paine and bishop of Winchester, 1 Ves. 194.....	177
Mitchell v. Smith, 4 Dall. 269.....	628	Palmer and Ashby, 1 Meriv. 296.....	491
Moffatt & wife and Mortimer, 4 Hen. & Munf. 503.....	646	Paradise's adm'r's v. Cole &c., 6 Munf. 218.....	517
Moffett and Chew, 6 Munf. 120.....	400	Paramour v. Yardley, Plowd. 543.....	98
Monkhouse v. Hay, 8 Price 256.....	139	Parker v. Proctor, 9 Mass. rep. 393.....	538
Montague v. lord Sandwich, 12 Ves. 136 n.....	129	Parkin v. Carruthers, 3 Esp. N. P. C. 248.....	277, 278
Moore and Wilson, 1 Mylne & Keene 337..	112	Parks's adm'r and heirs v. Rucker, 5 Leigh 149.....	325, 609
Moore &c. and Means &c., Harper 314.....	264	Parnecott and Beckford. Cro. Eliz. 493..	370
Moore &c. v. Moore &c., 1 Phill. 375.....	369, 381	Parry and Wilkinson, 4 Russ. 272.....	373
Moore v. Fenwick, Gilm. 214.....	73	Parsons v. Briddock, 2 Vern. 608.....	180, 463, 464, 465, 467
Moreton and Boughey, 2 Lee 532.....	376	Patterson v. Brown, 6 Monroe 10.....	79, 87, 88
Morgan's heirs v. Morgan, 2 Wheat. 303 note d.....	261	Payne v. Graves, 5 Leigh 561.....	207
Morley and Wright, 11 Ves. 22.....	465	Peachy and M'Call, 1 Call 55.....	35
Morris v. Stephenson, 7 Ves. 474.....	258	Peggy and others and Redford's adm'r, 6 Rand. 316.....	372
Mortimer v. Moffatt & wife, 4 Hen. & Munf. 503.....	646	Pendleton and Grymes, 1 Call 54.....	35
Mortlock v. Buller, 10 Ves. 316.....	261	Pendleton &c. and Crews, 1 Leigh 297..	39
Morton and Fox, unreported decision of court of appeals.....	325, 326	Pendleton's ex'ors v. Stewart, 5 Call 1.....	304, 305
Mountford v. Ranie, 2 Keb. 499.....	136	Pennington &c. v. Townsend, 7 Wend. 276..	629
Mulhall and Hayling, 2 W. Bl. 1235.....	555	The people v. Utica ins. co., 15 Johns. 382.....	579
Munford v. Rice and others, 6 Munf. 81..	554	Peploe v. Galliers, 4 J. B. Moore 163....	598
Murchie and Mayo, 3 Munf. 358.....	190, 191	Perine v. Dunn, 3 Johns. ch. R. 516.....	135
Murray and Coster, 5 Johns. ch. rep. 522.....	82, 85, 88, 91	Perkes v. Perkes &c., 3 Barn. & Ald. 489..	364
Murray &c. v. Ballou &c., 1 Johns. ch. rep. 566.....	177	Perkins and others v. Giles governor, 9 Leigh 397.....	338, 340, 546, 554, 557, 571
Muse's ex'ors and Fairfax, 2 Hen. & Munf. 558.....	36	Peter v. Butler, 1 Leigh 285.....	586
Mutual ass. co. v. Mahon, 5 Call 517.....	669	Pettus and Oakover, Cas. temp. Finch 270 ..	135
Myers and Van Buren, 18 Johns. rep. 425.....	137	Phelps and others and Clark, 6 Johns. ch. rep. 214.....	373
Myers &c. v. Wade &c., 6 Rand. 444.....	209	Pickett and Day, 4 Munf. 104.....	401
Nadin v. Battie &c., 5 East 147.....	556	Piles and Cook, 2 Munf. 152.....	249
Nainby and Kell, 10 Barn. & Cress. 20..	276	Platell and Cuff, 4 Russ. 242.....	368
Nash and Shelly, 3 Madd. C. R. 125.....	233	Pleasants and Mayo, unreported decision of court of appeals.....	334
Nelson's ex'or & al. and Givens & al., 10 Leigh 383 ..	176, 180, 465	Pollok & co. and Cocke & co., 1 Hen. & Munf. 499.....	611
Nelson v. Matthews &c., 2 Hen. & Munf. 164.....	296, 299	Poor (overseers of) v. Tayloe's adm'r, Gilm. 336.....	411
Nelson v. Carrington and others, 4 Munf. 332.....	116, 295, 296, 448, 454	Pope and Alderson, 1 Camp. 404.....	279
Nicholl and the United States, 12 Wheat. 505.....	621	Porter's case, 1 Rep. 22.....	413, 418
Nicloson v. Wordsworth, 2 Swanst. 371..	98	Pratt &c. and Winsor &c., 2 Brod. & Bingh. 650.....	364
Noland v. Cromwell, 4 Munf. 155.....	317	Price and Trueheart, 2 Munf. 468.....	190
North Carolina state bank and May &c. decided by court of appeals May 1843, cited.....	526	Proctor and Parker, 9 Mass. rep. 393.....	538
North Carolina state bank v. Cowan &c., 8 Leigh 238.....	525	Purviance v. N'Clintee, 6 Serg. & Rawle 259.....	280
Norvell v. Camm &c., 6 Munf. 233.....	310	Quarrell v. Beckford, 1 Madd. ch. rep. 268, (151 of am. ed.).....	223
Novion and Hallett, 14 Johns. 273.....	628	Quesnel v. Woodlief, 6 Call 218.....	299, 303
Oakover v. Pettus, Cas. temp. Finch 270..	135	Rackstraw v. Imber, 1 Holt 368.....	277
Ochterlony and Walcott, 1 Curteis 580. .	371, 374, 375, 378, 386	Randolph's adm'r v. Randolph, 3 Rand. 490.....	545, 555, 561, 565, 596, 600
Olive and Stephens, 2 Bro. C. C. 93.....	132	Randolph's ex'or &c. v. Tucker & al., 10 Leigh 655.....	609, 614
Onions v. Tyrer, 2 Vern. 742.....	376	Raine and Mountford, 2 Keb. 499.....	136
Osgood v. the Manhattan co., 3 Cow. 623..	367		
Osiander's case, 3 Leigh 780.....	735, 742		

Rankin v. Bradford and others, 1 Leigh 163.....	325, 326	Scholey &c. v. Means, 7 East 148.....	598
Raphael v. Boehm, 11 Ves. 82.....	213	Scott &c. and Burton &c., 3 Rand. 399....	372
Ray v. Law, 3 Cranch 179.....	20, 39, 40	Scruby v. Fordham and others, 1 Add. 74.....	369, 381
Read and Wainwright, 1 Desaus. 573....	190	Seeman and Talbot, 1 Cranch 1.....	623
Reade v. Livingston & others, 3 Johns. ch. rep. 500.....	123, 129, 131, 133, 142	Seidenbender v. Charles's adm'r's, 4 Serg. & Rawle 151-160.....	628
Redford's adm'r v. Peggy and others, 6 Rand. 316.....	372	Senhouse v. Earl, 2 Ves. 450.....	40
Reed v. Hanna's ex'or, 3 Rand. 56.....	597	Sexton v. Wheaton, 8 Wheat. 246.....	134, 538
Reed v. Harris, 6 Adolph. & Ell. 209.....		Shaw and Kinder, 2 Mass. rep. 398.....	146
Reid v. Hollinshead, 4 Barn. & Cress. 867.....	364, 365, 377, 381, 6	Shelly v. Nash &c., 3 Madd. C. R. 155....	233
Rex v. Johnson, 6 East 597.....	280	Shepherd and Lade, 2 Strange 1004.....	191
Rex v. inhabitants of Hardwick, 11 East 590.....	367, 372	Sheppard's ex'or v. Starke & wife, 3 Munf. 29.....	38, 44
Rex v. Rudd, Cowp. 332, Leach's Cr. L. 115.....	703	Sherwood v. Sanderson, 19 Ves. 280.....	249
Rice and Baird, 1 Call 18.....	562	Shields adm'r &c. v. Anderson &c., 3 Leigh 729.....	207
Rice and others and Munford, 6 Munf. 81.....	554	Shirley v. Long &c., 6 Rand. 747, 753, 764.....	233, 235
Richards and Home, 4 Call 441.....	473	Short v. Smith, 4 East 419.....	369, 381
Richards v. Hoome, 2 Wash. 36.....	473	Simpson v. Kirton, Cro. Jac. 115.....	371
Richardson v. Smallwood, 1 Jacob's rep. 556.....	130, 134	Singleton and Stevenson, 1 Leigh 72....	645
Rider v. Union factory, 7 Leigh 154.....		Sir Thomas Rumbold's case, 4 Ves. 98..	98
Roane's adm'r v. Drummond's adm'r's, 6 Rand. 182.....	398	Skelton and Forbes, 8 Simons 335.....	79
Roberts v. Karr, 1 Camp. 262 note.....	194	Skipwith and Young, 2 Wash. 300.....	35
Robinson and Catheart &c., 5 Peters 264..	544	Skipwith's ex'or v. Cunningham &c., 8 Leigh 282.....	98, 99, 659
Robinson v. Alexander, 8 Bligh. 352.....	79, 85, 91	Skoulding &c. and Catling &c., 6 T. R. 189.....	83
Robson and Gurdon, 2 Camp. 302.....	276	Smallwood and Richardson, 1 Jacob's rep. 556.....	130, 134
Roe and Marston, 8 Adolph. & Ell. 14.....	362, 363	Smallwood and Walker, 2 Amb. 676.....	177
Rogers and Cotman, 10 Pick. 112.....	92	Smith and De Berkorn, 1 Esp. N. P. C. 29.....	276
Rogers and Lee, 1 Levinz 110.....	599	Smith and Glover, 1 Desaus. 433.....	298
Rogers v. Vosburgh, 4 Johns. C. R. 84..	316	Smith and Grace, 2 W. Black. 998.....	280
Roper &c. v. Wren &c., 6 Leigh 38.....	207	Smith and Short, 4 East 419, 369.....	381
Roosevelt and Livingston, 4 Johns. rep. 251.....	275	Smither &c. and Glasscock, 1 Call 479... 363	
Ross and Duvals, 2 Munf. 290.....	298, 325	Smith and Mitchell, 4 Dall. 269.....	628
Routledge and Doe, Cowp. 713.....	539, 542	Smith &c. v. Cunningham, 1 Add. 448, 455.....	369
Rowe and Wood, 2 Bligh 595.....	262	Smith &c. v. Triplett &c., Leigh 590....	565
Rowt's adm'r v. Kyle's adm'r, 1 Leigh 216.....	282	Smith's adm'r and Tazewell & al., 1 Rand. 313, 320.....	491
Royall's adm'r's v. Johnson &c., 1 Rand. 421.....	38	Smith v. Smith, 6 Barn. & Cress. 112....	104
Royster and Hooper, 1 Munf. 119.....	205	Smith v. Watson, 2 Barn. & Cress. 401..	280
Rucker and Parker's adm'r and heirs, 5 Leigh 149.....	325, 609	Smith v. Wheeler, 2 Ventris 128.....	98
Rudd's case, Cowp. 332, 1 Leach's Cro. Ca. 115....	703, 708, 9, 10, 11	Snodgrass & others and Handy, 9 Leigh 484.....	206
Rumbold's case, 4 Ves. 98.....	98	Snow and Stevenson, 3 Burr. 1240.....	669
Russell and Western, 3 Ves. & Beam. 192.....	261	Sorrell v. Carpenter, 2 P. Wms. 482..	177, 179
Russell and Wheeler, 17 Mass. R. 259-281.....	628	Southall &c. and Henderson &c., 4 Call 371.....	697
Russell &c. v. Keeran &c., 8 Leigh 19....	301	Spain (the king of) and others v. Machado and others, 4 Russ. 225.....	368
Russell v. Hammond, 1 Atk. 15.....	129	Spencer &c. and Wilson, 1 Rand. 76.....	629
Sackville v. Ayleworth, 1 Vern. 106.....	249	Spotswood and Thornton & others, 1 Wash. 142.....	607
Sailor's snug harbour and Inglis, 3 Peters 99.....	411, 418, 421, 423, 427	St. Amand v. countess of Jersey, 1 Com. rep. 255.....	129
Sallee v. Yates, 1 Wash. 226.....	115	Starke & wife and Sheppard's ex'or, 3 Munf. 29.....	38, 44
Salmon v. Bennett, 1 Conn. R. 525.....	132, 134, 135	State bank of North Carolina and May &c. decided in court of appeals May 1843.....	526
Sanderson and Sherwood, 19 Ves. 280....	249	State bank of North Carolina v. Cowan &c., 8 Leigh 238.....	525
Sandwich (lord) and Montague, 12 Ves. 136 n.....	129	Stephenson and Lyle, 6 Call 54.....	339
Sawney v. Carter, 6 Rand. 173.....	645	Stephenson and Morris, 7 Ves. 474.....	258
		Stephens v. Olive, 2 Bro. C. C. 93.....	132
		Stephens v. White, 2 Wash. 211.....	555
		Steptoe and Templeman, 1 Munf. 339....	35

<i>Sterry and Verplanck</i> , 12 Johns. rep. 557.....	132, 542, 544
<i>Sterry v. Arden</i> , 1 Johns. ch. rep. 270.....	544
<i>Stevenson and Jones</i> , 5 Munf. 7.....	266
<i>Stevenson v. Singleton</i> , 1 Leigh 72.....	645
<i>Stevenson v. Snow</i> , 3 Burr. 1240.....	669
<i>Stewart and Pendleton's ex'ors</i> , 5 Call 1 304, 305	
<i>Stileman v. Ashdown</i> , 2 Atk. 481.....	134
<i>Stone v. Grubbum</i> , 2 Bulat. 225.....	135
<i>Strafford (earl) and Jones</i> , 3 P. Wms. 81.....	373
<i>Stribbling v. bank of the Valley</i> , 5 Rand. 141, 2, 148, 9, 189.....	579, 589, 590
<i>Stuart's heirs v. Coalter</i> , 4 Rand. 74.....	487
<i>Style v. Martin</i> , 1 Ch. ca. 150.....	177
<i>Sullivan v. Alexander</i> , 19 Johns. rep. 233.....	336
<i>Surbaugh and Maria and others</i> , 2 Rand. 228.....	53, 54, 55
<i>Sutton and Fitch</i> , 5 East 230.....	597
<i>Sutton v. Sutton</i> , Cowp. 812.....	369, 381
<i>Syme v. Griffin</i> , 4 Hen. & Munf. 277.....	336, 340
<i>Tabb v. Boyd</i> , 4 Call 453.....	204
<i>Talbot v. Seeman</i> , 1 Cranch 1.....	623
<i>Tapscott and Weaver</i> , 9 Leigh 424.....	274, 278
<i>Tarpley's adm'r v. Dobyns</i> , 1 Wash. 185.....	607
<i>Tayloe's adm'r and overseers of poor</i> , Gilm. 336.....	411
<i>Taylor v. Cooper</i> , 10 Leigh 317.....	39
<i>Taylor v. Dundass</i> , 1 Wash. 92.....	545, 554, 555, 560
<i>Taylor v. Jones</i> , 2 Atk. 600.....	129, 135
<i>Taylor v. King</i> , 6 Munf. 358.....	235
<i>Tazewell & al. v. Smith's adm'r</i> , 1 Rand. 313, 320.....	491
<i>Tebbs and Hooe</i> , 1 Munf. 501.....	335, 337, 338, 340, 341, 345
<i>Templar and Evelyn</i> , 2 Bro. C. C. 149 ..	542
<i>Templeman v. Fauntleroy</i> , 3 Rand. 404.....	487
<i>Templeman v. Steptoe</i> , 1 Munf. 339.....	35
<i>Thellusson v. Woodford</i> , 4 Ves. 327, 329..	421
<i>Thomas and Bibb</i> , 2 W. Bl. 1043.....	369, 381
<i>Thompson v. Grant</i> , 4 Madd. ch. rep. 438.....	40
<i>Thompson v. Jackson</i> , 3 Rand. 504.....	233
<i>Thompson v. Leach</i> , 2 Ventris 198, 3 Mod. 301, 1 Show. 296, Show. P. C. 150, 2 Salk. 618.....	97, 8, 9, 103
<i>Thompson v. the commonwealth</i> , 2 Va. cas. 135.....	694
<i>Thornton and others v. Spotswood</i> , 1 Wash. 142.....	607
<i>Thorntons v. Fitzhugh</i> , 4 Leigh 209.....	38
<i>Thorpe and Beaumont</i> , 1 Ves. sen. 27.....	129
<i>Tickell & c. and Townson</i> , 3 Barn. & Ald. 31.....	94, 97, 98, 100, 103
<i>Tivill and Webber</i> , 2 Saund. 124.....	82
<i>Todd v. Gee</i> , 17 Ves. 274.....	261
<i>Tolson v. Elwes</i> , 1 Leigh 436.....	520
<i>Toncray and White</i> , 9 Leigh 347.....	591, 602
<i>Towgood and Anson</i> , 1 Jac. & Walk. 619	39
<i>Towler v. Chatterton</i> , 6 Bing. 258.....	399
<i>Town and Jackson</i> , 4 Cowp. N. Y. rep. 604.....	132
<i>Townsend and Pennington & c.</i> , 7 Wend. 276.....	629
<i>Townshend (lord) v. Windham</i> , 2 Ves. sen. 1.....	129, 134
<i>Townson v. Tickell & c.</i> , 3 Barn. & Ald. 31.....	94, 7, 8, 100, 103
<i>Travis and Waters</i> , 9 Johns. 450.....	261
<i>Triplett & c. and Smith & c.</i> , 4 Leigh 590..	565
<i>Trueheart v. Price</i> , 2 Munf. 468.....	196
<i>Tucker & al. and Randolph's ex'or & c.</i> , 10 Leigh 655.....	609, 14
<i>Tuffnell v. Page</i> , 2 Atk. 37.....	365
<i>Turnball and Godfrey</i> , 1 Esp. N. P. C. 371.....	277, 279
<i>Turner and Bolling</i> , 6 Rand. 584.....	249
<i>Twigg v. Fifield</i> , 13 Ves. 517.....	39
<i>Twyne's case</i> , 3 Rep. 83.....	128, 135, 136
<i>Tyrer and Onions</i> , 2 Vern. 742.....	376
<i>Union bank v. Knapp</i> , 3 Pick. 112.....	81
<i>Union factory and Rider</i> , 7 Leigh 154	499, 515, 518, 524
<i>United States v. Amendy</i> , 11 Wheat. 393	578, 589, 590
<i>United States bank v. Deveau</i> , 5 Cranch 61.....	580
<i>United States v. Bainbridge</i> , 1 Mason 71	616, 634
<i>United States v. Graves and others</i> , 2 Brock. 385, 6.....	554, 556
<i>United States v. Kirkpatrick</i> , 9 Wheat. 720.....	620
<i>United States v. Nicholl</i> , 12 Wheat. 505	621
<i>United States v. Vanzandt</i> , 11 Wheat. 184.....	621
<i>Utica insurance co. and the people</i> , 15 Johns. 382.....	579
<i>Uttersson v. Uttersson</i> , 3 Ves. & Beam. 122	370, 378, 384
<i>Valley bank and Stribbling</i> , 5 Rand. 141, 2, 148, 9, 189.....	579, 589, 590
<i>Vanzandt and United States</i> , 11 Wheat. 184.....	621
<i>Vernon and Acherley</i> , Comyn 381.....	370
<i>Verplanck v. Sterry</i> , 12 Johns. rep. 557	132, 542, 544
<i>Vinor and Bartlett</i> , Carth. 252.....	628
<i>Vosburgh and Rogers</i> , 4 Johns. C. R. 84	361
<i>Wade & c. and Myers & c.</i> , 6 Rand. 444..	209
<i>Waehorne and Kaye</i> , 1 Taunt. 428 ..	598
<i>Wainwright v. Read</i> , 1 Desaus. 573.....	190
<i>Walburn v. Ingilby</i> , 1 Mylne & Keene 61	35
<i>Walcott v. Ochterlony</i> , 1 Curteis 580....	371, 374, 375, 378, 386
<i>Walker and Jett</i> , 1 Rand. 211.....	562
<i>Walker v. Burroughs</i> , 1 Atk. 93.....	129
<i>Walker v. Smallwood</i> , 2 Amb. 676.....	177
<i>Wallace & ux. v. Dold's ex'ors & al.</i> , 3 Leigh 258.....	435, 439, 440, 443, 447
<i>Walwyn v. Coutts</i> , 3 Meriv. 707.....	659
<i>Wands and Ensign</i> , 1 Johns. ch. rep. 171	275
<i>Ward and Garth</i> , 2 Atk. 174.....	177
<i>Ward ex parte</i> , 6 Ves. 579.....	249
<i>Warren and Hall</i> , 9 Ves. 605.....	249
<i>Wase and Emery</i> , 8 Ves. 505.....	258
<i>Waters v. Travis</i> , 9 Johns. 450.....	261
<i>Watson and Smith</i> , 2 Barn. & Cress. 401	280
<i>Watson & c. v. Lyle's adm'r</i> , 4 Leigh 236	85
<i>Waugh v. Carver</i> , 2 H. Black. 235.....	274, 276, 278, 280
<i>Weaver v. Tapscott</i> , 9 Leigh 424.....	274, 278
<i>Webber v. Tivill</i> , 2 Saund. 124.....	82

CASES

DECIDED IN THE

Supreme Court of Appeals of Virginia.

Shores v. Wares.*

April, 1842, Richmond.

(Absent ALLEN, J.)

Equity Jurisdiction—Set-Off against Judgment at Law.—A sale is made of a tract of land, and the terms set forth in articles of agreement executed under seal between the two vendors and the vendee. One of the vendors dies after bequeathing what is due to her, and appoints her legatee executor. A lien being alleged to exist upon the land, the surviving vendor and the executor enter into bond with surety to indemnify the vendee, who thereupon pays most of the purchase money. Afterwards the vendee is compelled to pay a considerable sum to satisfy the lien, and one of the principal obligors being out of the commonwealth, and the other insolvent, he retains for his indemnity the assets of the surety (of whose estate he is administrator) against other creditors of the surety, some of equal and others of inferior degree. An action of covenant being then brought on the articles of sale, in the name of the vendor who survived, for the benefit of the legatee of the other, against the vendee, a trial is had, upon which both parties treat the

2 amount of assets of the surety's estate retained by the administrator, as a satisfaction *pro tanto* of the indemnifying bond, and the difference between the amount so retained and the sum paid to satisfy the lien being credited, a verdict is found and judgment rendered for what is supposed to be the balance due of the purchase money. On a bill in equity by the vendee, in his own right and as administrator of the surety, against the surviving vendor and the legatee of the other, shewing the foregoing facts, and that, since the judgment, debts against the surety, alleged to be of superior dignity to that upon the indemnifying bond, have been demanded of the complainant and claimed by suit, HELD, 1. That though none of the other debts against the surety's estate should appear to be of higher dignity than the claim on the indemnifying bond, still the complainant, as administrator of the surety, is rightly in equity, to obtain satisfaction for the payment made out of the surety's estate on account of the suretyship; and one of the principals having removed from the commonwealth, and the other being insolvent, he may stay in his hands the amount due from himself personally on the judgment, in part satisfaction of the claim of the surety's estate: 2. That if any of the debts against the surety's estate shall appear to be of higher dignity than the claim against

the surety on the indemnifying bond, and it shall become necessary to apply to the payment of those debts any part of the assets of the surety's estate, the complainant will for so much have a valid claim in his own right, and to that extent the injunction to the judgment should be perpetuated.

By articles of agreement entered into the 27th of September 1815, between John Ware and Polly Ware of the one part and Thomas Shores of the other part, it was witnessed that John Ware and Polly Ware had sold to Thomas Shores certain lands, to wit, 410 acres of high land and 59 acres of islands, at the following prices, to wit, 8 dollars per acre for the high land, and 60 dollars per acre for the islands; and then, after setting forth that the late mrs. Susanna Wilcox, as administratrix of Edmund Wilcox deceased, had a mortgage on said lands (including certain land in the possession of Washington Ware), the amount of which could not then be ascertained, and that John Forbes as agent for Thompson Snodgrass & Co. had also a claim against the said lands, the amount of which could not then be as-

3 certain, it was *agreed that John Ware and Polly Ware should ascertain, as soon as they could, the amount of said claims, and have the same certified under the hands of the claimants, and Shores should retain in his hands and pay to the respective claimants two thirds thereof (Washington Ware's part of the land being bound for the other third). The articles then provided for the execution of a deed, the payment by Shores to John and Polly Ware of the residue of the purchase money over and beyond the said two thirds, and the delivery of possession of the land.

Shores paid off the claim of mrs. Wilcox, and also paid to John and Polly Ware part of the purchase money. Polly Ware, by her will, bequeathed the balance due to her on account of the said purchase, and almost all the rest of her estate, to her brother Washington Ware, and appointed her brothers Washington Ware and John Ware her executors, of whom Washington Ware alone qualified as such.

On the 16th of April 1818, a bond was entered into by John Ware, Washington Ware and William Pasteur to Thomas Shores, in the penalty of 4000 dollars, whereby, after reciting that it was uncertain whether the said John Forbes, attorney as aforesaid, had any legal or equitable claim on the land sold to Shores, or against Shores as the holder

*For monographic note on Debts of Decedents, see note at end of case.

thereof, and that John Ware and Washington Ware, as executor of Polly Ware, were desirous of drawing out of the hands of Thomas Shores the balance of the money remaining due for the purchase of the land, the condition was that if John Ware, Washington Ware and William Pasteur should save harmless and indemnify Thomas Shores for all costs or other damages he might sustain in consequence of his paying to the said John and Washington the balance of the said money, in case the said John Forbes agent as aforesaid, or any other person on account of his claim as agent,

4 should recover any money, costs or damages of Shores *in consequence of his purchase, or otherwise interrupt him in the possession of the said land, or in consequence of his paying over to the said John and Washington the balance of the said money, then the said obligation was to be void.

A question arising at the time this bond was executed, whether Shores was bound for interest on the money while retained in his hands to satisfy the unascertained claims, this matter was not then adjusted, but Shores paid at that time 1200 dollars.

An action of covenant was afterwards brought against Shores, in the name of John Ware as surviving covenantee of John and Polly Ware, for the benefit of the estate of Polly Ware, in which action a verdict was found and judgment rendered for the plaintiff against Shores, on the 27th of October 1830, for 206 dollars 50 cents damages, with interest from the 22d of October 1822 till paid, and the costs. The next day the defendant moved the court to set aside the verdict and judgment, and grant him a new trial, upon the ground of a mistake of the jury in the estimation of damages, committed in the calculation of payments made by the defendant. Whereupon the plaintiff by his counsel agreed to release 1579 dollars 22½ cents parcel of the damages assessed, as of the 22d of October 1822, and the defendant withdrew his application for a new trial.

On the 10th of May 1831, Thomas Shores, in his own right and as administrator of the estate of William Pasteur deceased, exhibited a bill of injunction, setting forth that the payment of 1200 dollars made at the time the indemnifying bond was given, and other payments made from time to time, fully satisfied the whole purchase money exclusive of interest; that a decree had been obtained in favour of John Forbes attorney in fact for Thompson Snodgrass & Co. subjecting the lands to sale to satisfy the same, and complainant had purchased the land at the price of 1925 dollars 57 cents, being

5 the two thirds to which his proportion of the land was subject; that being compelled to rely on the indemnifying bond for this sum, and the principal obligors therein being unable to refund the same, and William Pasteur the surety in that bond having died in embarrassed circumstances, he had, with a view of obtaining a preferable claim to the assets over other creditors, become the administrator of Pasteur's estate,

the assets of which appeared, by the report of the commissioners who had settled his accounts, to amount to about 1600 dollars, and the amount in his hands as administrator of Pasteur he had retained, by virtue of his claim on Pasteur as surety in the indemnifying bond, against other creditors of Pasteur, some of equal and others of inferior degree; that nevertheless a claim has been set up, and a verdict and judgment rendered against him, for an alleged balance upon the original purchase. To shew how that balance is made up, he refers to a statement by which the jury were guided at the time of their verdict. He insists that injustice has been done in charging him with interest upon the purchase money before it was due, and also in charging him interest on the money kept in his hands for the claimants, which money he was at all times ready and willing to pay, if certificates had been produced to him, under the hands of the claimants, of the amount of their claims, and had only failed to pay because of the failure to produce such certificates. And inasmuch as the complainant, as the administrator of the estate of Pasteur, has a just claim against Washington Ware, on account of the assets of Pasteur's estate retained by virtue of the indemnifying bond in which Pasteur was the surety of John and Washington Ware, and Washington Ware is, by virtue of the will of Polly Ware, entitled to the benefit of the judgment obtained against the complainant, (there existing, as the complainant charges, no debts whatever against

6 Polly Ware's estate,) the *complainant insists that if the estate of Polly Ware is entitled to recover any thing of him, it is equitable and just that his demand as administrator of Pasteur should be set off against the same, and the said complainant allowed to retain the same in his hands, to be applied towards satisfying the creditors of Pasteur's estate, instead of resorting to an action at law to recover the amount so due to Pasteur's estate, which, if he were so to proceed, would in all probability be unavailing, as Washington Ware is without any visible property sufficient to satisfy the demand, and John Ware some years since left the commonwealth as an absconding debtor, and is not now an inhabitant of the same. The complainant farther states that a credit for 203 dollars 12 cents was allowed by the jury, as the difference between what was supposed to be the amount of assets of Pasteur's estate, and the amount which the complainant had been compelled to pay under the decree in favour of John Forbes attorney in fact for Thompson Snodgrass & Co. This was upon the idea that the whole of the 1600 dollars would certainly be retained in the complainant's hands, towards satisfying his demand. But the complainant sets forth, that since the verdict and judgment rendered against him, a debt due from Pasteur by judgment has been demanded from him; that a scire facias is also pending against him as administrator of Pasteur, upon a recognizance of special bail; and that these debts he may be compelled to pay as debts of superior dignity

to his own. The bill also sets forth that Pasteur was in his lifetime the administrator of several estates, the accounts of which have not been settled, and it is yet uncertain whether the complainant will not be compelled to pay considerable sums on account thereof. Washington Ware and John Ware are prayed to be made defendants, and an injunction is asked to the judgment against the complainant.

7 *The statement of the jury, a copy whereof was exhibited with the bill, contains no credit of the 1200 dollars paid at the time the indemnifying bond was given. The amount, including interest to the 22d of October 1822, was, according to the calculation of the jury, 2230 dollars 30 cents. Then the following credit was given: "22d October 1822. Cr. by amount due Thomas Shores by Pasteur's estate, occasioned by not receiving from said estate sufficient to pay the debt to Thompson Snodgrass & Co. for which said Pasteur was security, \$203. 82." This sum being deducted, the statement concluded thus: "By this amount due W. Ware 22d October 1822, \$2026. 50." And subjoined was the verdict of the jury for 2026 dollars 50 cents damages, with interest from the 22d of October 1822.

The answer of Washington Ware alleges, in general terms, that in the action at law every just claim which the complainant brought forward was allowed. While, however, it controverts those allegations in the bill which were made to shew that injustice had been done in charging interest, the other specific allegations are left uncontradicted, the payment of 1200 dollars at the time of the execution of the indemnifying bond is admitted, and it is stated that the claim of Forbes amounted, when settled, to nearly 3000 dollars.

With his answer, Washington Ware filed a statement of his claim against Shores, according to which the amount in his favour, with interest calculated to the 16th of April 1818, was 2110 dollars 11 cents. This was without any deduction on account of the lien of Forbes, or of the 1200 dollars.

Against the defendant John Ware, the plaintiff proceeded in the mode prescribed by law in relation to absent defendants.

The cause coming on to be heard before the Circuit court of Fluvanna (to which the case had been removed) that court decreed that the injunction be dissolved, and the bill dismissed with costs.

8 *Shores, in his own right and as administrator of Pasteur, petitioned this court for an appeal.

By the petition it was admitted that it did not distinctly appear in the record on what account the sum of 1579 dollars 22 cents was released as of the 22d of October 1822, but it was said to be fairly inferrible that it was the principal and interest of the 1200 dollars paid the 16th of April 1818, amounting to about 1524 dollars, and some other small item of omitted credit, or of error in the interest charged. It was, the petitioner contended, certainly not on account of the payment to Forbes, because the jury had already

allowed on that account the supposed difference between this payment and Pasteur's funds in the petitioner's hands. And he insisted that in equity his right to use the payment to Forbes as a setoff against the judgment was perfectly clear, because in equity Washington Ware is principal debtor and principal creditor, and equity would not allow that the petitioner should retain the assets of the surety his intestate, and pay the claim of the principal debtor.

The appeal was allowed.

C. Johnson, for appellant.

Lyons and Patton, for appellees.

STANARD, J. The record shews with satisfactory certainty, that in ascertaining the balance for which the jury's verdict was rendered, Shores was not credited for the payment of 1200 dollars confessedly received by the party for whose benefit the suit at law was prosecuted, nor was he credited for more than 203 dollars of the amount of the lien of Forbes attorney in fact of Snodgrass; that on the trial of the case before the jury, both parties treated the amount of assets of Pasteur's estate, retained by Shores the administrator of Pasteur on account of his claim on the bond to indemnify him against *the said claim of

9 Forbes, as a satisfaction pro tanto of that bond; and that the amount of the said lien of Forbes on the land purchased by Shores (being two thirds of the entire claim of Forbes) though not precisely shewn, was from 1800 to 2000 dollars. These facts are proved, 1st, by the statement of the appellee's claim on the covenant, which, excluding the credit for the payment of 1200 dollars, and the lien of Forbes, exhibits a balance of a little upwards of 2100 dollars. 2dly, By the statement shewing the manner in which the balance for which the verdict was rendered was ascertained. 3dly, By the uncontradicted allegations of the bill. 4thly, By the admission of the answer, that the entire claim of Forbes was about 3000 dollars. I am also satisfied, that in the adjustment of the credit which was allowed against the amount found by the verdict, the said sum of 203 dollars only was taken into account, as resulting from the lien of Forbes, and the residue of the lien was considered as covered by the assets retained of Pasteur's estate, so that the Wares have been charged with but the said 203 dollars on account of that lien. The judgment at law, then, placed the parties in this predicament: Shores was indebted on his own account to the Wares in the amount of the judgment at law, and the Wares were indebted to Shores as administrator of Pasteur, in the amount of the assets of Pasteur's estate, that he had by retainer applied in part satisfaction of the claim on Pasteur as the surety of the Wares in the indemnifying bond: and such is still their predicament, if the retainer by Shores of the assets of Pasteur's estate has not been disturbed by other creditors of Pasteur, having claims of higher dignity than the claim on the indemnifying bond. Were this still the predicament of the

parties, Shores as the administrator of Pasteur was rightly in a court of equity, to obtain satisfaction of a claim of Pasteur's estate for a payment made on a suretyship for the defendants, and at all events the bill ought not to be dismissed. As the bill suggests that one of the principals (John Ware) had removed from the commonwealth and the other was insolvent, the plaintiff had further title to stay in his hands the amount due from him personally on the judgment in favour of the Wares, in part satisfaction of the claim of Pasteur's estate, and which might become the claim of Shores in his own right, if the assets of Pasteur are charged by debts of higher dignity than that of Shores on the indemnifying bond. The bill further suggests that suits of the creditors of Pasteur are depending, in which the assets retained by Shores are claimed. The success of those suits, so far as they might withdraw the retained assets, would reinstate the claim of Shores in his own right to retain the purchase money for which the judgment was rendered, and to offset it against the judgment; and this arising since the rendition of the judgment, was an ample foundation for the title to relief in a court of equity. Had there been no other foundation for relief, the court below ought not to have dismissed the bill, but should at least have retained the injunction until the fate of the pending suits was ascertained, and to the extent that the assets retained might be charged by other creditors of Pasteur, have perpetuated the injunction. On the whole, my opinion is that the decree is erroneous, and ought to be reversed with costs, and the following entered as the decree of this court:

"The court is of opinion that it appears with sufficient certainty, that on the trial of the action in which the judgment enjoined in this case was rendered, no credit was given to the appellant in respect of the lien of Forbes attorney in fact of Snodgrass, except the sum of 203 dollars 82 cents, credited, in the statement by which the jury ascertained the balance for which the verdict was rendered, as the excess of that lien above the assets of Pasteur's estate retained by the appellant as the administrator of Pasteur, in virtue of his claim on Pasteur as the surety in the indemnifying bond; and that the sum agreed as a credit against the amount of the verdict, was for the omission of the jury to credit the appellant 1200 dollars paid by him when the indemnifying bond was given, and for miscalculations of payments made by the appellant to the Wares, and did not include any allowance for the lien of Forbes. The court is further of opinion that instead of dissolving the injunction and dismissing the bill, the court below should have directed a commissioner to ascertain the amount of Forbes's lien, whether discharged by Shores or still outstanding, and the amount of the assets of Pasteur's estate that was retained by the appellant to indemnify or reimburse him for the lien of Forbes, and the amount (if any) that other creditors of Pasteur may have charged on the assets so retained; that for the amount of

the assets so retained, so far as they have not been charged by creditors of Pasteur, the principals in the indemnifying bond (John Ware and Washington Ware) are responsible to the appellant as the administrator of Pasteur, and so far as they may have been charged by other creditors, are responsible to the appellant in his own right, and the appellant is entitled to set off these responsibilities (first, that which may accrue in his own right, and then that accruing to him as administrator of Pasteur) against the judgment, and have a perpetual injunction to the judgment to the extent of such setoff, and, for the excess (if any) of the said responsibilities above the judgment, to a decree against the said principals in the indemnifying bond, in the right in which such excess may be due to him; and that the said decree is erroneous. Decree therefore reversed with costs, injunction ordered to be reinstated, and cause remanded to circuit court for further proceedings to be had therein in conformity with the foregoing principles."

The other judges concurring, decree entered accordingly.

DEBTS OF DECEDENTS.

I. What Constitute Claims against Decedent's Estate.

A. Claims Based on Contracts of Decedent.

1. In General.
2. Personal Contracts—Promises of Marriage.
3. Joint Contracts.
4. Contracts of Suretyship.
5. Covenants.
6. Agreements to Make Will.
7. Debt Acknowledged in Codicil.
8. Services Rendered Decedent.
9. Failure of Consideration—Recovery Back of Money Paid.

B. Torts of Decedent.

C. Claims Barred by Limitations and Laches.

D. Funeral Expenses.

E. Expenses of Administration.

F. Improvements.

G. Loans or Advances to Estate.

H. Support Furnished Decedent's Family.

I. Taxes.

J. Authority of Personal Representative to Bind Estate.

II. Order of Payment of Debts.

A. Classification of Debts.

1. In General.

2. Particular Classes of Debts.

- a. Funeral Expenses.
- b. Expenses of Administration.
- c. Expenses of Last Illness.
- d. Judgments.
- e. Specialty Debts.
- f. Fiduciary Debts.
- g. Taxes.
- h. Partnership Debts.

B. Conflict of Laws.

C. Preference by Executor or Administrator.

D. Retainer.

III. Mode and Sufficiency of Payment.

IV. Proceedings to Enforce Payment.

V. Property Liable for Payment of Debts.

- A. In General.
- B. Property Primarily Liable.
- C. Marshaling Assets.

VI. Liability of Heir, Devisee, Distributee and Legatee.

VII. Personal Liability of Representative.

Cross References to Monographic Notes.

- Executors and Administrators, appended to Rosser v. Depriest, 5 Gratt. 6.
- Legacies and Devises.
- Limitation of Actions.
- Marshaling Assets, appended to Carrington v. Didier, 8 Gratt. 200.

I. WHAT CONSTITUTE CLAIMS AGAINST DECEDENT'S ESTATE.

A. CLAIMS BASED ON CONTRACTS OF DECEDENT.

1. **IN GENERAL.**—"The death of a party to a contract does not extinguish the contract if it is capable of being fulfilled by his representatives, but as a general rule all contractual obligations continue as claims against the estate of the deceased obligor, and this is the rule irrespective of whether that contract be implied or express, or for the payment of money, or the performance of some act not personal." 8 Am. & Eng. Enc. Law (2d Ed.) 1007.

Thus, where one contracted with a person since deceased to build a church, the fact that the administrator, shortly after the work was commenced, gave notice not to proceed therewith, and that the estate would not be responsible therefor, was no bar to a recovery for work afterwards done, when the church was completed according to the contract. And the fact that, before proceeding, the contractor secured the guaranty of the church trustees that he should be paid the contract price, and as much in excess of it as the work should cost, and that he then sublet the work to another, did not bar a recovery against the estate on the original contract. *Ferguson v. Wills*, 88 Va. 186, 18 S. E. Rep. 392.

2. **PERSONAL CONTRACTS—PROMISES OF MARRIAGE.**—An action for breach of promise of marriage will not lie against the personal representative of the promisor, either at common law or under the statute, where no special damages are alleged and proved. In such case, the maxim, *actio personalis moritur cum persona* applies. *Grubb v. Sult*, 22 Gratt. 203, 34 Am. Rep. 765; *Flint v. Gilpin*, 29 W. Va. 740, 18 S. E. Rep. 33. See also, *Burton v. Mill*, 78 Va. 482.

3. **JOINT CONTRACTS.**—Upon the death of one or more joint promisors, his estate was, at common law, discharged from liability on the contract and the action survived against the survivor or survivors alone. 8 Am. & Eng. Enc. Law (2d Ed.) 1010; *Atwell v. Milton*, 4 H. & M. 253; *Richardson v. Johnson*, 2 Call 527; *Harrison v. Field*, 2 Wash. 136.

Where a joint bond was given before the act of 1786, and after that act went into operation, one of the obligors died, leaving the other, the obligation survived, and the executors of the deceased were exonerated. *Elliott v. Lyell*, 3 Call 208.

The surviving obligor in a joint note, made before the act of 1786, was alone liable in an action at law, nor could the note be set up in equity against the representatives of the deceased obligor, except on the ground of a moral obligation antecedently existing on his part to pay the money. *Chandler v. Hill*, 2 H. & M. 124.

Although the surviving partner of a mercantile house was alone liable at law to the creditors of the house, yet if the surviving partner proved insolvent, the estate of the deceased partner was liable in equity for the debts of the partnership. *Sale v. Dishman*, 8 Leigh 548. See Va. Code 1887, sec. 2886. In this case a *quere* was raised as to what kind of laches of the creditor, or dealings between him and the surviving partner, in respect to the debt claimed of the partnership, would suffice to exonerate the estate of the deceased partner from the debt. It seems that the mere delay of the creditor to assert and prosecute his demand against the surviving partner, will not suffice to exonerate the estate of the deceased partner. And there is no analogy between the duty of a creditor in such case to assert and prosecute his claim against the surviving partner, and the due diligence which the assignee of a bond is bound to exert against the obligor, in order to entitle him to recourse against the assignor.

A creditor of a firm obtained a judgment against the surviving partner, who died, and whose administrators exhausted the personal assets in paying other claims. The creditor then filed a bill in equity against the administrators and heirs of the surviving partner, and the representatives of the deceased partner. The bill sought a decree for the sale of lands of which the surviving partner died possessed, some of which belonged to himself and some to the firm; and when the funds from this source should be exhausted, then it sought to charge the representatives of the deceased partner. *Held*, that equity had jurisdiction of the case and that the representatives of the deceased partner were properly made defendants. *Jackson v. King*, 8 Leigh 689.

It seems that a bill in equity properly lies to subject the estate of a secret partner in trade to the payment of a debt contracted by the ostensible members of the firm. *Cocke v. Upshaw*, 6 Munf. 464.

One of two partners executed bonds in the name of the firm for firm debts. The other partner died solvent. Subsequently the surviving partner, died insolvent, the bonds remaining unpaid. The surety in the bonds was perfectly solvent. The creditor filed a bill against the surety and the representatives of the deceased partners to subject the estate of the solvent partner to the payment of the debts, or to have payment of them from the parties, according to their respective liabilities. *Held*, that equity was without jurisdiction to entertain such bill, as the creditor had an adequate remedy at law by action on the bonds against the surety. *Linney v. Dare*, 2 Leigh 588.

Statutory Liability.—In Virginia and West Virginia it is provided by statute that, "the representative of one bound, with another, either jointly or as a partner, by judgment, bond, note, or otherwise, for the payment of a debt, or the performance or forbearance of an act, or for any other thing, and dying in the lifetime of the latter, may be charged in the same manner, as such representative might have been charged, if those bound jointly or as partners, had been bound severally as well as jointly, otherwise than as partners." Va. Code 1887, sec. 2886; W. Va. Code 1899, ch. 99, sec. 13, p. 767.

Under this statute, which appeared *verbatim* in the Code of 1849, ch. 144, sec. 13, it was held that where a decedent is largely indebted individually and also as partner, his real estate is equally liable for his partnership debts as for his individual debts. *Ashby v. Porter*, 26 Gratt. 455.

The proposition that the separate estate of a deceased partner is liable *pari passu* for both his individual and social debts is applied in *Robinson v. Allen*, 85 Va. 721, 8 S. E. Rep. 835; *Pettyjohn v. Woodruff*, 86 Va. 478, 10 S. E. Rep. 715.

Where a joint judgment is obtained against two defendants, and one dies, an action of debt on the judgment lies against the representative of the deceased defendant, the law respecting partitions, joint rights and obligations, 1 Rev. Code 359, being applicable to joint judgments. *Roane v. Drummond*, 6 Rand. 182. In the present statute, Va. Code 1887, sec. 2855, joint judgments are expressly mentioned.

The former statute concerning joint rights and obligations, 1 Rev. Code, ch. 98, sec. 3, p. 1350, did not contain the words "or as a partner," appearing in the present statute, Va. Code 1887, sec. 2855. While the former statute was in force, a sum of money was lent to a firm, and the firm was charged with it on the partnership books, but the partner with whom the transaction occurred executed by mistake a penal obligation, in the name of the firm, under seal, instead of giving merely a promissory note. One of the partners died, and those who survived him and the executors of the decedent conveyed all the effects of the firm in trust to pay the firm debts. The creditor who lent the money then filed a bill in equity against the surviving partners, the executors of the decedent, and the trustee. It was held that, although at law there would be no remedy on the sealed obligation, except against the partner who executed it, yet equity had jurisdiction to correct the mistake, and hold all the partners as much bound as if there were no seal, and that, regarding the debt as a simple contract debt of the firm, the estate of the deceased partner could not be charged, until the insolvency of the surviving partners and the deficiency of the trust subject were first established. *Galt v. Cálland*, 7 Leigh 594.

The statute, 1 Rev. Code, ch. 98, sec. 3, p. 359, Va. Code 1887, sec. 2855, in relation to joint rights and obligations, though it gives an action against the personal representative of a deceased joint obligor, does not affect the principle that the defeat of the remedy against one joint obligor upon a ground not personal to himself, defeats it as to all the obligors. And in an action on a joint bond against the personal representative of a deceased obligor, a surviving obligor is an incompetent witness for the defendant. *Brown v. Johnson*, 18 Gratt. 644, and *foot-note*.

4. CONTRACTS OF SURETYSHIP.—Before the estate of the surety can be subjected to the payment of the indebtedness, the property of the principal should be first exhausted. But where the bill alleges that the principal has no estate, and the allegation is not denied, but is proven, it is not error to decree at once against the estate of the surety. *Jones v. Degge*, 84 Va. 685, 5 S. E. Rep. 799. See also, *Penn v. Ingles*, 82 Va. 65; *Horton v. Bond*, 28 Gratt. 815.

Where a bond is made joint, without fraud or mistake, equity will not charge the executor of the surety, who was discharged at law by his death, in the lifetime of the principal. *Harrison v. Field*, 2 Wash. 136. See Va. Code 1887, sec. 2855. See also, *supra*, "Joint Contracts."

The plaintiff, as creditor of the decedent, proved a debt against the estate, but forebore to prove a debt for which the decedent was surety, notwithstanding to press the principal. Twenty-five years after the latter debt was due, the principal having died insolvent, the plaintiff petitioned to be made a party

to the original creditors' bill against the decedent, explaining why the debt had not been pressed, and stating that sufficient assets of the estate to pay the debt remained in the hands of the court. The debt was not barred by limitation, the war period and stay law being deducted. *Held*, that, in the absence of any contract sufficient to discharge the surety, and no notice to proceed against the principal having been given, the petitioner was entitled to the relief sought. *Coleman v. Stone*, 85 Va. 386, 7 S. E. Rep. 241.

Two sons, with their respective fathers as indorsers, executed a note to a bank for \$1,500, to obtain money to start the sons in a partnership business, with the understanding and agreement between themselves, as an inducement thereto, that each son and respective father was to be responsible for one-half of such note, and not responsible for the other half, except to the bank. Before the note matured, the business, under the management of one of the sons, proved a failure. The other son then took charge of it and wound it up, realizing only \$300 out of the social assets. This amount he applied on the note, leaving a balance of \$1,200, which he paid out of private funds. The other son being hopelessly insolvent, the father of the latter acknowledged his liability therefor, and agreed to refund one-half of such balance. Dying without doing so, the paying son presented the same against his estate. *Held*, that it was properly audited against such estate, and that such agreement could be established by parol evidence, and was not subject to the statute of frauds. *Faulkner v. Thomas*, 48 W. Va. 148, 35 S. E. Rep. 915.

Where an executor as surety for the testator pays debts out of his own funds, he is entitled only to his ratable share of the assets to repay his advances; and by crediting himself with the full amount of such debts he commits an error to the prejudice of the other creditors having unpaid debts of equal dignity. *McCormick v. Wright*, 79 Va. 524.

Debt Paid by Co-surety—Amount for Which He May Prove.—The liabilities of the estate of a decedent, and the rights of his creditors, are fixed by his death. If at that time a creditor has the right to prove against his estate a debt for which the decedent and another are bound as sureties, and subsequently the co-surety pays the debt, he is substituted to the right of the creditor, and may prove the whole debt against the estate of the decedent, and receive dividends thereon until one-half of the debt is paid, although the estate of the decedent will not pay his debts in full. *Pace v. Pace*, 95 Va. 792, 30 S. E. Rep. 361, 4 Va. Law Reg. 171. See *notes* on this case, 4 Va. Law Reg., pp. 178, 267, 298, 302, 489.

5. COVENANTS.—An action of covenant by the vendee of a slave, upon a covenant of warranty, binding the vendor and his heirs, will lie against the executors, although they are not named in the covenant of warranty. *Lee v. Cooke*, 1 Wash. 306.

An action of covenant, upon a covenant for the quiet enjoyment of real estate and that the premises are clear of all incumbrances will lie against the executors, although they are not expressly bound. *Harrison v. Sampson*, 2 Wash. 155.

In a deed of bargain and sale of lands, the words "the said T. doth hereby covenant, for himself and his heirs, to and with the said B. that he the said T. will warrant and forever defend to the said B. his heirs and assigns, the title to the said parcels

of land against all persons whatever," import a personal covenant of warranty, for breach of which, by eviction under judgment in ejectment, an action will lie against the administrator of the bargainor. *Tabb v. Binford*, 4 Leigh 132, 26 Am. Dec. 317.

An executor who prefers a claim against the estate of his testator for breach of a covenant to do a collateral thing has the burden of proof to establish the due execution of the covenant, the breach by the testator, and the amount he is entitled to recover by reason of such breach. *Scott v. Porter*, 90 Va. 553, 39 S. E. Rep. 320.

6. AGREEMENTS TO MAKE WILL.—Strictly speaking, an agreement to dispose of property by will cannot be specifically enforced, not in the lifetime of the party, because all testamentary papers are from their nature revocable; nor after his death, because it is no longer possible for him to make a will, yet courts of equity can do what is equivalent to a specific performance of such agreement by compelling those upon whom the legal title has descended to convey or deliver the property in accordance with its terms, upon the ground that it is charged with a trust in the hands of the heir at law, devisee, personal representatives, or purchaser, with notice of the agreement. *Burdine v. Burdine*, 98 Va. 515, 36 S. E. Rep. 993.

"It is * * * well settled, both in England and in this country, that while no action lies for services rendered in expectation of a legacy merely, without any contract, express or implied, yet that where there is a promise, founded upon valuable consideration, that provision will be made for the promisee by the promisor in his will, and the latter dies without making such provision, an action does lie, though the proof * * * must be clear and convincing." *Rice v. Hartman*, 84 Va. 251, 4 S. E. Rep. 621.

A court of equity will compel the conveyance of the legal title of land claimed under a parol gift, supported by a meritorious consideration, and by reason of which the donee has been induced to alter his condition and make expenditures of money in valuable improvements on the land. *Burkholder v. Ludlam*, 30 Gratt. 255, 32 Am. Rep. 608; *Stokes v. Oliver*, 76 Va. 72; *Halsey v. Peters*, 79 Va. 60. See also, *Fishburne v. Ferguson*, 85 Va. 321, 7 S. E. Rep. 351. But such parol gift must be definite in its terms, and clearly proved. *Griggsby v. Osborn*, 82 Va. 371. See also, 3 Min. Inst. (4th Ed.) 94.

One may contract to make a provision for another by will, but the evidence must be clear and convincing. The widow of the testator is not a competent witness to prove such contract and to establish the debt against the estate of her husband. *Swann v. Housman*, 90 Va. 816, 20 S. E. Rep. 830.

To warrant a court in decreeing specific performance of an agreement to devise land, the contract must be certain and must be clearly and satisfactorily proved. 8 Am. & Eng. Enc. Law (2d Ed.) 1020; *Sprinkle v. Hayworth*, 36 Gratt. 384; *Cox v. Cox*, 26 Gratt. 305.

A court of equity will require the most convincing proof to sustain a claim that deceased agreed to make a will in favor of claimant. *Miller v. Miller*, 2 Va. Dec. 97; *Rice v. Hartman*, 84 Va. 251, 4 S. E. Rep. 621; *Swann v. Housman*, 90 Va. 816, 20 S. E. Rep. 830.

Although an agreement to devise and bequeath land and personal property, in consideration of personal services to be rendered, is signed only by the intended testator, yet, if such services have been fully rendered, the agreement is binding on

the party who has signed it, and will be enforced against him. *Burdine v. Burdine*, 98 Va. 515, 36 S. E. Rep. 993.

A person may by an oral contract bind himself to dispose of his estate by will in a particular way, and such contract will be specifically enforced in equity, provided the requirements of the statute of frauds are complied with. *Hale v. Hale*, 90 Va. 728, 19 S. E. Rep. 739. See Va. Code 1887, sec. 2840. See also, monographic note on "Specific Performance" appended to *Hanna v. Wilson*, 3 Gratt. 243.

Acts of part performance to take a parol contract out of the statute of frauds, must be of such unequivocal nature as of themselves to be evidence of the existence of an agreement; as, for example, where, under a parol agreement to sell land, the purchaser is put in possession and makes improvements. *Hale v. Hale*, 90 Va. 728, 19 S. E. Rep. 739. See monographic note on "Specific Performance" appended to *Hanna v. Wilson*, 3 Gratt. 243.

An oral agreement between two sisters to make mutual wills cannot be specifically enforced, after the death of one of them, on the ground of part performance, where there has been no further performance than the making and preserving of the wills, and the will of the decedent has been revoked by her marriage after its execution. *Hale v. Hale*, 90 Va. 728, 19 S. E. Rep. 739.

A promise to leave a support at the death of the promisor in consideration of services during the balance of her life to be performed by the promisee is not within the statute, Va. Code 1887, sec. 2840, clause 7, prohibiting an action upon a promise not to be performed within a year, unless in writing. *Thomas v. Armstrong*, 86 Va. 323, 10 S. E. Rep. 6.

An executor filed his bill to have his testator's will construed, and submitted a writing executed by the latter, to wit: "\$1,000. This article is to signify that if Elliott Smith survive me, I bequeath him one thousand dollars of my property, free from any lien or incumbrance. To the above bequest I herewith set my hand and seal this first day of June, 1888. (Signed) Henry E. Smith. [Seal.]" Afterwards the testator made a will, dated December 2, 1890, disposing of his entire estate, and containing no reference to said writing or to Elliott Smith, which was duly probated. *Held*, said writing was not a contract, but was a will, and was revoked by the subsequent testament. *Swann v. Housman*, 90 Va. 816, 20 S. E. Rep. 830.

A contract by which the decedent promised to "assist" the complainant "now," and, after his death, to leave him and his family a sufficient amount to justify them in returning from a distant state to live with him, is fulfilled by the decedent's supporting them for eight years, and leaving them at his death a small property; and evidence of these promises and facts is not sufficient to entitle the complainant to a further recovery from the estate of the decedent. *Rice v. Hartman*, 84 Va. 251, 4 S. E. Rep. 621.

It was understood and agreed between a husband and wife, who had no children, that the survivor should have all his property for life and at his or her death it should be equally divided between his and her heirs and next of kin. The husband made his will by which he gave all his property real and personal to his wife absolutely. He died during her lifetime, and she died the following day without having made a will. *Held*, that equity would not enforce the agreement at the suit of the heirs of the

husband against the heirs and next of kin of the wife. *Sprinkle v. Hayworth*, 26 Gratt. 384.

Where a father agreed to devise land to his son in consideration that the son live with him upon the land and take care of him, and instead, the son, after taking care of him for some time, left the land and entered the army, where he was killed, it was held that specific performance would not be decreed. *Cox v. Cox*, 26 Gratt. 305.

A court of equity will enforce a verbal promise made by a father to a son, in consideration of love and affection, to give him land, and make him a deed therefor, if the son, induced by such promise has taken possession of the land and expended on it labor and money in improvements. But if, when such gift was made, the father required the son, in a given time, to put specified improvements on the land, such requirements would be regarded as a condition precedent to the right of the son to demand a deed; and the son, before he could acquire such deed, would have to prove that he put on the land, in the time specified, the specified improvements. *Frame v. Frame*, 32 W. Va. 468, 9 S. E. Rep. 901.

On the 16th of April 1870, John Kerr was taken suddenly and violently ill and at his request George Kurtz and James Kreemer, who were engaged in business with him left their work and nursed him, he saying to them: "Boys leave your work and come and nurse me, and I will pay you well for it in my will;" which promise he often repeated to them during his illness, and after his recovery declared, "Money cannot pay the boys for nursing me." He made his will and bequeathed to them \$1,000 each, but subsequently became angry with them and revoked the bequest. After the death of John Kerr, George Kurtz and James Kreemer brought separate actions against the executors of John Kerr for the amount promised them for their services. It was held, that since the contract as laid in the declaration was clearly proved, the only question was as to the amount of compensation, and that in estimating this the jury were not restricted to the prices usually paid nurses for their attendance upon the sick. And an instruction to the effect that it was a matter properly for the consideration of the jury, whether the bequest was made to the plaintiff in consideration of his services and in fulfillment of defendant's promise, and whether it expressed the value or estimate which the testator himself put upon the plaintiff's service to him, was not erroneous. *Kerr v. Kurtz*, 1 Va. Dec. 116.

7. DEBT ACKNOWLEDGED IN CODICIL.—A testator by a codicil to his will declares "I herein mention a debt of \$600 I owe the Presbyterian church of Charlottesville, Virginia, and I wish it duly paid, without interest, out of my estate, to that church after my sister's death." The codicil is dated November 7, 1884. The sister died in 1896, and a suit was brought by one member of the church suing on behalf of himself and four hundred other members in 1898. There was no proof of the existence of such a debt except the statement of the codicil, and no evidence was offered against it. *Held*, though a church cannot take as legatee under a will, this is not a legacy, but a debt, and the codicil alone is sufficient proof of its existence. *Perkins v. Seigfried*, 97 Va. 444, 34 S. E. Rep. 64.

8. SERVICES RENDERED DECEDENT.—Whenever compensation is claimed for services rendered near relatives, as a father, brother, or grandfather, and the like, the law will not imply a promise of pay-

ment, and no recovery can be had unless an express contract or its equivalent is shown. A moral obligation to pay is not sufficient, but an express promise must be proved, or facts from which such promise can be reasonably inferred must be established by evidence so clear, direct and explicit, as to leave no doubt as to the undertaking and intention of the parties. This is especially so when the party sought to be charged is dead. It must be shown that the deceased intended to and did assume a legal obligation to the plaintiff for such services of such a character that it could be legally enforced against him. Generally, the services of a child, grandchild, or other near relative, are presumed to have been rendered in obedience to the promptings of affection, and not with a view to compensation. Such presumption, however, may be rebutted by positive and direct evidence to the contrary. *Jackson v. Jackson*, 96 Va. 165, 31 S. E. Rep. 73.

A charge made by a son-in-law for nursing his father-in-law during his last illness, where there was no contract for compensation, ought not to be allowed. *Williams v. Stonestreet*, 3 Rand. 559.

A daughter held the bond of her father, and prior to her death she requested him to keep her children for the debt. This he did until his death, which occurred a number of years after the death of the daughter. The bond was found among his private papers. It was held that the father should be allowed a fair compensation for maintaining the children of his daughter. *Hughes v. Patterson*, 91 Va. 664, 23 S. E. Rep. 485.

A mother's estate will be allowed from the father's estate for her services in boarding their children during her lifetime, although she made no charge therefor. *Cary v. Macon*, 4 Call 605.

Where a son, who is also the administrator of his father's estate, sues such estate for wages claimed for services rendered before his father's death, he cannot recover unless he proves an express contract, or the facts and circumstances sustained by a preponderance of testimony clearly establish an expectation or intention on the part of the father to compensate him for such services. *Cann v. Cann*, 40 W. Va. 138, 30 S. E. Rep. 910.

An estate was devised to a widow for life or during widowhood, and then to her children. All of the children lived with the widow on the farm, and the eldest son managed the estate until her death, a period of fifteen years. While thus engaged, he persuaded the widow to buy, out of the funds of the estate, an adjoining tract of land and took the deed to himself. At the death of the widow, the son and another administered on her estate. *Held*, that though the son was entitled to a reasonable compensation for his service as manager, chargeable against the widow's estate, the statute of limitations barred all recovery for such compensation, except for the five years preceding the death of the widow. *Chancellor v. Ashby*, 2 Pat. & H. 26.

Where medical services rendered to a woman's children are recognized by her as constituting a liability against her, her executor may, after her death, pay such bills out of her estate. *Baker v. Baker*, 87 Va. 180, 12 S. E. Rep. 346.

Where an executor has a claim against the estate of testator, depending on a *quantum meruit* only, he may exhibit a bill in equity against his co-executors and legatees, to have such claim established and fixed at a certain sum. In such case, he ought to state the claim with reasonable certainty, by setting forth his own estimate of his services; but, should

he fail to do so, his bill ought not to be dismissed, but leave to amend it should be granted on motion. *Baker v. Baker*, 3 Munf. 222.

Collateral Agreement Partly Performed—Compensation.—Where a debtor has agreed to do a collateral thing in satisfaction of his bond to his creditor, and dies after having partially performed the agreement, the bond should not be treated as paid, but the debtor should have credit thereon for the money paid, or the value of the services rendered in pursuance of the agreement. *Hughes v. Patterson*, 91 Va. 664, 22 S. E. Rep. 485.

9. FAILURE OF CONSIDERATION—RECOVERY BACK OF MONEY PAID.—A husband and wife, in consideration of \$1,000, sold all their interest in any property of which the wife's father might die possessed. Upon the death of the wife's father, the purchaser entered into possession of the wife's share; but, upon the husband's death, the wife filed a bill for the partition of her father's estate, claiming the property of the purchaser on the ground that the deed was a nullity as to her, and obtained a decree in her favor. *Held*, that the purchaser might bring assumption against the husband's estate to recover the \$1,000, as the consideration for its payment had failed. *Garber v. Armentrout*, 32 Gratt. 235.

B. TORTS OF DECEDENT.—"At common law an action was abated by the death of either party, and could not be revived for or against the personal representative. If the cause of action survived, it was necessary to bring a new suit. This, however, has long since been altered by statute, and now, if the cause of action survives, the action may be revived. * * * It has sometimes been said that at common law all causes of action *ex contractu* survive; whereas all torts die with the person. But neither of these propositions is strictly accurate. The general rule is that rights of the former class do not survive, but the rule is not universal. Thus, for instance, a breach of promise to marry, or a breach of the implied contract of a medical practitioner, or of an attorney, to exercise skill in his profession, and other injuries of a personal nature, although arising *ex contractu*, that might be mentioned, constitute exceptions to the rule, unless, indeed, some special damage to the personal estate can be stated on the record. * * * Nor do all actions in tort, at common law, die with the person. The true test is, not so much the form of the action, as the nature of the cause of action. Where the latter is a tort unconnected with contract, and which affects the person only, and not the estate, such as assault, libel, slander, and the like, there the rule *actio personalis*, etc., applies. But where * * * the action is founded on a contract, it is virtually *ex contractu*, although nominally in tort, and there it survives." *Lee v. Hill*, 87 Va. 497, 12 S. E. Rep. 1062.

An action for breach of promise of marriage will not lie against the personal representative of the promisor, either at common law or under the statute, where no special damages are alleged and proved. In such case, the maxim *actio personalis moritur cum persona* applies. *Grubb v. Sult*, 32 Gratt. 203, 36 Am. Rep. 705; *Flint v. Glipin*, 29 W. Va. 740, 3 S. E. Rep. 23. See also, *Burton v. Mill*, 78 Va. 482.

Trespass for the mesne profits of land, recovered in ejectment against the decedent, lies against his executor. *Lee v. Cooke*, *Gilmer* 831.

Detinue against an executor for property destroyed or converted by his testator, or in the pos-

session of the co-executor, cannot be sustained. *Allen v. Harlan*, 6 Leigh 42, 29 Am. Dec. 205.

But detinue for a chattel lies against an executor as such, provided the chattel actually came into the executor's possession. *Catlett v. Russell*, 6 Leigh 344; *Allen v. Harlan*, 6 Leigh 42, 29 Am. Dec. 205; *Greenlee v. Bailey*, 9 Leigh 526.

And detinue for property in the possession of an executor although it was first taken and detained by the testator, is maintainable, and the judgment and process should be against the executor, and not against the estate. *Allen v. Harlan*, 6 Leigh 42, 29 Am. Dec. 205.

For a full discussion of the subject of detinue against an executor, see monographic note on "Detinue and Replevin" appended to *Hunt v. Martin*, 8 Gratt. 578.

Trover may be sustained against a personal representative as such, although the goods never came into his hands. *Ferrill v. Brewis*, 26 Gratt. 765. See Va. Code 1887, sec. 2555.

In *Boyles v. Overby*, 11 Gratt. 302, it was held that an action on the case for fraud in selling to the plaintiff an unsound slave, which he was induced to purchase by means of a false and fraudulent warranty of soundness, or by means of a fraudulent concealment of the unsoundness of the slave, could not be maintained against the personal representative of the vendor. This case, however, was disapproved in *Lee v. Hill*, 87 Va. 501, 12 S. E. Rep. 1052, and the true rule was said to be that, where the cause of action is a tort, unconnected with contract and affecting the person only, and not the estate, the action dies with the person; but, where the action is founded on contract it is virtually *ex contractu*, though nominally in tort, and in such case, the action survives.

C. CLAIMS BARRED BY LIMITATIONS AND LACHES.—On the subject of claims barred by limitations and laches, see generally, monographic note on "Limitations of Actions." See also, monographic note on "Laches" appended to *Peers v. Barnett*, 12 Gratt. 410.

Claimant was testatrix's physician, and while in a partnership, terminated in 1880, and while alone from 1880 to 1888, he rendered services for which no bills were ever presented. For claimant's services from 1888 to 1895, when he removed to another city, annual bills were rendered and paid, with the exception of 1894. Testatrix wrote claimant in 1895, when he moved, that it was a shame that the move had been made necessary by her failure to pay what she owed him, and if he would let her have her bill she would pay what she owed him in a short time. It was held, that the letter did not remove the bar of the statute of limitations as to the partnership and individual accounts up to 1888, since it did not refer to such accounts, but only to the unpaid bill of 1894. And the testatrix, who was still indebted to the claimant for services for 1894 and for some subsequent calls, did not remove the bar of the statute as to the old accounts by the provision in her will, made in 1897, giving to claimant, as a mark of esteem and appreciation, \$100 in addition to his fees against her for his services as a physician, since she had reference only to the recent bills, and not to the old ones. *Coles v. Martin*, 99 Va. 223, 37 S. E. Rep. 907.

An estate was devised to a widow for life or during widowhood, and then to her children. All of the children lived with the widow on the farm, and the eldest son managed the estate until her death, a period of fifteen years. While thus engaged, he

persuaded the widow to buy, out of the funds of the estate, an adjoining tract of land, and took the deed to himself. At the death of the widow, the son and another administered on her estate. *Held*, that though the son was entitled to a reasonable compensation for his services as manager, chargeable against the widow's estate, the statute of limitations barred all recovery for such compensation, except for the five years preceding the death of the widow. *Chancellor v. Ashby*, 2 Pat. & H. 28.

A court of equity will, as a rule, refuse its aid to enforce stale demands, but where the claims are not barred by the statute of limitations, the amount is certain, the transaction is not obscure, and it is not likely that injustice will be done owing to the loss of evidence or the lapse of time, and the claimant has not been guilty of such laches as should deprive him of his rights, the court will grant relief. *Houck v. Dunham*, 92 Va. 211, 33 S. E. Rep. 238.

In 1860, G.'s executor settled his accounts, showing a balance due the estate by him. The executor died in 1860, and an administrator *d. b. n. c. t. a.* of G.'s estate was appointed. In 1876, in a creditors' suit against the executor's estate, such claim was reported favorably, as a just debt owing by the executor's estate; and thereafter the same report was repeatedly made, and confirmed by the court. *Held*, there was no laches in asserting said claim. *Green v. Griffin*, 1 Va. Dec. 858.

In 1856, an executor filed a bill for a judicial settlement of his accounts as executor of his father's estate. Thereafter, and before the report of the commissioner to whom the account had been referred was returned, the executor's brother, who had filed a claim on a bond against the estate, died, and the executor became administrator of his estate. The commissioner's report was made in 1860, but exceptions thereto were never passed on, and it remained unconfirmed. No further action was taken until 1897, when the executor and nearly all of the original parties to the suit were dead, when a supplemental bill was filed, reciting the existence of the bond, alleging that it remained unpaid, and seeking its satisfaction out of land held under the executor's will, but failing to allege any excuse for the delay, and the evidence tended to show that the bond had not been paid, though the executor declared in his lifetime that it had been satisfied. *Held*, that, in the absence of an allegation of fraud or breach of trust, plaintiff was not entitled to relief because of laches. *Covington v. Griffin*, 98 Va. 124, 34 S. E. Rep. 974.

Where, in a suit for the settlement of an estate, it appears that the original plaintiff, the administrator against whom the suit was brought, and the chief *cestui que trust* are all dead; that the claims as to the first year's transactions arose thirty years ago; that another claim involves the settlement of accounts, running through five years, between parties who have since died; that another involves transactions covering a period of nine years, commencing more than thirty years ago, and that no books, accounts or vouchers can be produced to substantiate them,—the claims will be rejected, as barred by limitations and laches. *Garland v. Garland*, 2 Va. Dec. 351.

Where, on the settlement of an administrator's accounts, a balance found in his hands is ordered to be divided proportionally among creditors, a creditor cannot, twenty-one years thereafter, assert his claim in a lien creditors' suit against such administrator, instituted by other creditors of the estate.

The lapse of twenty-one years after an order directing an administrator to distribute the assets of the estate among creditors raises a presumption of payment. *White v. Orfield*, 90 Va. 336, 18 S. E. Rep. 436.

Administration of the estate of a deceased person was granted upon the supposition that he had died without a will. Afterwards a will was discovered and proved, and administration with the will annexed was granted, the former administration being revoked. *Held*, that the statute of limitations began to run against the estate from the time of the qualification of the administrator with the will annexed, and not from the time of the former grant of administration. *Manns v. Plinn*, 10 Leigh 93.

Where a suit in equity is brought by a creditor against the personal representative of a decedent, and also against the heirs at law of the intestate, for the purpose of having the personal assets applied to the discharge of the debt, as far as they will go, and to have the real estate of the intestate sold to pay the residue, and the court takes into its own hands the administration of the assets by referring the cause to a commissioner to take an account of the debts of the intestate, the statute of limitations ceases to run against the creditors, not formal parties to the bill, the bill not being in form a creditors' bill from the date of such decree, in such a case. *Woodyard v. Polesley*, 14 W. Va. 211.

The statute of limitations does not run against a debt acknowledged in a codicil, and there directed by testatrix to be paid by her executor on the death of her sister, till the sister's death. *Perkins v. Seigfried*, 97 Va. 444, 34 S. E. Rep. 64.

A clause in a will directing all just debts to be paid will not save a debt which is barred by the statute of limitations. *Braxton v. Wood*, 4 Gratt. 25; *Tazewell v. Whittle*, 18 Gratt. 329; *Baylor v. Dejarnette*, 18 Gratt. 152.

A devise of real estate for the payment of debts will not affect the operation of the statute of limitations upon such debts, whether they are barred at the time of the testator's death or not, unless the contrary intention on the part of the testator plainly appears. *Johnston v. Wilson*, 29 Gratt. 384. In expressing the opinion of the court in this case, *STAPLES, J.*, says: "In some of the earlier cases (see *Lewis v. Bacon*, 3 H. & M. 89; *Chandler v. Hill*, 2 H. & M. 124; *Brown v. Griffiths*, 6 Munf. 450), it was held that a devise for the payment of debts had the effect of reviving debts already barred by limitations; but this doctrine has been long since exploded, and it is now held that such a devise does not take a debt out of the operation of the statute. *Burcke v. Jones*, 2 Ves. & Beam. 275; 7 John. Ch. R. 203; *Tazewell v. Whittle*, 18 Gratt. 329; *Baylor v. Dejarnette*, 18 Gratt. 152; 1 Rob. Prac. 346." See Va. Code 1887, sec. 2924.

If the creditor relies upon a charge in a will to prevent the operation of the statute, it is for him to show that the testator died before his debt was barred. *Tazewell v. Whittle*, 18 Gratt. 329.

Where a testator directs his executors to sell a certain farm, and out of the proceeds to pay, first, the debts of one of his sons on which another of his sons is surety, the executors cannot pay any such debt which before payment becomes barred by the statute of limitations, when the statute is relied on by the debtors. *Dunn v. Renick*, 33 W. Va. 476, 10 S. E. Rep. 810.

Duty of Executor or Administrator to Plead Statute.—The statute providing that an executor or administrator shall have no credit for a claim which he

pays knowing the facts whereby recovery could be prevented, does not require him to plead the statute of limitations to a claim apparently barred, where he knows facts making the statute inapplicable. *Radford v. Fowkes*, 85 Va. 820, 8 S. E. Rep. 817.

New Statute of Limitations May Be Set Up.—An administrator may interpose the bar of the statute of limitations by a plea or answer, or by exceptions to the report of the commissioner. *Leith v. Carter*, 83 Va. 880, 5 S. E. Rep. 584; *Smith v. Pattie*, 81 Va. 654. On this subject, see generally, monographic note on "Limitations of Actions."

"The same strictness of pleading is not required in equity as at law. It is not common to plead the statute specially or formally in equity; but only to rely upon it in general terms in the answer. The only reason for requiring the defence to be made by plea or answer is that the plaintiff may have an opportunity, if he can, to take the case out of the operation of the statute. *Tazewell v. Whittle*, 13 Gratt. 329." *Coles v. Martin*, 99 Va. 223, 37 S. E. Rep. 907.

The defence of the statute of limitations to a claim asserted before a commissioner in chancery may be made by an exception to the commissioner's report. The mere fact that, subsequently, the claimant asserts his claim by a petition filed in the cause, upon which no process issues, does not render it necessary to make the issue of the bar of the statute again. *Coles v. Martin*, 99 Va. 223, 37 S. E. Rep. 907.

But the statute of limitations cannot be availed of in a court of equity by demurrer to the bill, for the demurrer does not apprise the plaintiff of the intention of the defendant to rely on the bar of the statute, and affords him no opportunity to reply any facts that might take the claim asserted in the bill out of the operation of the statute. *Hubble v. Poff*, 98 Va. 646, 37 S. E. Rep. 277. See *Coles v. Martin*, 99 Va. 223, 37 S. E. Rep. 907.

The statute of limitations may be relied on before the commissioner, even where it has not been pleaded before the court prior to the order of reference. *Woodyard v. Polsley*, 14 W. Va. 211.

If the statute of limitations has not been specially pleaded in the cause, and has not been relied on before the commissioner, and the commissioner failed to recognize the statute, or disregard it, and no exception was endorsed upon the report for that reason, the appellate court will consider the statute of limitations out of the case, although the report, upon its face shows, that some of the claims allowed by the commissioner were barred by the statute. *Woodyard v. Polsley*, 14 W. Va. 211.

Estoppel of Heir to Plead Statute of Limitations.—An heir cannot oppose a credit allowed an executrix for debts paid on the ground that at the time of payment they were barred by the statute of limitations, where he had agreed, in consideration of concessions made him by the other heirs and administratrix, not to object to payment by her of any just claims though they might be barred by the statute. *Radford v. Fowkes*, 85 Va. 820, 8 S. E. Rep. 817.

Power of Executor or Administrator to Waive Bar.—A debt which is barred by the statute of limitations at the death of the debtor, cannot be revived by the promise of the personal representative to pay it. *Seig v. Acord*, 21 Gratt. 365; *Brown v. Rice*, 26 Gratt. 467; *Brown v. Rice*, 76 Va. 629; *Smith v. Pattie*, 81 Va. 654; *Switzer v. Noffsinger*, 82 Va. 518; Va. Code 1887, sec. 2923.

On the trial of an issue on the *assumpsit* of the tes-

tator within five years, repeated promises by the executor cannot be given in evidence to prevent the operation of the statute of limitations. *Fisher v. Duncan*, 1 H. & M. 563, 3 Am. Dec. 605.

An administrator cannot, by the acknowledgment in pleading of a debt against his decedent which is barred by the statute of limitations, or in any other way, remove the bar of that statute. *Stiles v. Laurel Fork Oil & Coal Co.*, 47 W. Va. 838, 35 S. E. Rep. 986; W. Va. Code 1899, ch. 104, sec. 9, p. 777.

But a personal representative "may, as in *Bishop v. Harrison*, 2 Leigh 537, where the debt is known to be just and is about to be barred, after the death of the testator or intestate, make a promise to pay, which will prevent the operation of the statute." *Smith v. Pattie*, 81 Va. 654.

Although it is generally true, that an executor or administrator cannot create a new cause of action against the estate, yet he may make a valid promise to pay a debt not barred by the statute of limitations, out of the assets of the estate, upon which a suit may be maintained. *Braxton v. Harrison*, 11 Gratt. 30.

Same—Requisites of New Promise to Remove Bar.—

A new promise to remove the bar of the statute of limitations must be determinate and unequivocal; and to imply a promise of payment from a subsequent acknowledgment, such acknowledgment, must be an unqualified admission of a subsisting debt which the party is liable for and willing to pay. *Coles v. Martin*, 99 Va. 223, 37 S. E. Rep. 907; *Switzer v. Noffsinger*, 82 Va. 518. See *Bell v. Crawford*, 8 Gratt. 110, and *foot-note*. See also, *Tazewell v. Whittle*, 13 Gratt. 329, and *foot-note*; monographic note on "Limitations of Actions."

An acknowledgment in writing, to operate as a new promise to remove the bar of the statute of limitations, must be a clear and definite acknowledgment of a precise sum, plainly importing a willingness and liability to pay, not in any wise conditional, or by way of compromise or attempt at settlement. *Stiles v. Laurel Fork Oil & Coal Co.*, 47 W. Va. 838, 35 S. E. Rep. 986.

The fact that the creditor has furnished the executor, at his request, with a statement of his debt, to which the executor makes no objection, will not remove the bar of the statute. *Tazewell v. Whittle*, 13 Gratt. 329.

D. FUNERAL EXPENSES.—It seems that an action will not lie against a personal representative as such for the funeral expenses of his testator or intestate. *Fitzhugh v. Fitzhugh*, 11 Gratt. 300, 63 Am. Dec. 658; *Dalingerfield v. Smith*, 83 Va. 91, 1 S. E. Rep. 590.

E. EXPENSES OF ADMINISTRATION.—As to what constitute expenses of administration, and as to the right of an executor or administrator to be allowed credit for such expenses, see monographic note on "Executors and Administrators" appended to *Rosser v. Depriest*, 5 Gratt. 6.

Reasonable fees of counsel may be paid by an executor or administrator out of the assets, as part of the expense of administration, and, if not paid by him, are a lawful charge on the assets. *Crim v. England*, 46 W. Va. 480, 33 S. E. Rep. 810.

Counsel fees and expenses incurred in taking depositions in support of a claim are not proper charges against the estate of a decedent. *Garland v. Garland*, 2 Va. Dec. 351.

F. IMPROVEMENTS.—Where a decedent allowed his son to plant an orchard and put other costly improvements on a farm as though it belonged to

the son, it was inequitable, on settling decedent's estate, to charge the son with full rental value of the farm, and allow him to set off merely the cost of the trees and the planting thereof, without regard to their value when in full bearing, and the care and attention bestowed on them for years. *Lightner v. Speck*, 2 Va. Dec. 557.

Upon a bill by a single creditor against the administrator and heirs of a decedent for the sale of the decedent's real estate to pay debts, an account was ordered, and a portion of the land was sold. One of the heirs purchased the interest of the other heirs remaining unsold, and made valuable improvements thereon. It was afterwards found necessary to sell all the land to pay the debts. *Held*, that the heir was not entitled to an allowance for the improvements under Va. Code 1873, ch. 132. *Hurn v. Keller*, 79 Va. 415.

In a suit to settle a decedent's estate, one of the decedent's sons filed a cross bill setting up a claim to a farm under a parol agreement with the decedent, who had permitted him to take possession and make valuable improvements. The claim was not sustained, and cross complaint was charged with rent of the farm, and allowed a certain sum for improvements, the evidence as to the value thereof being unsatisfactory and conflicting. *Held*, that the court should have dismissed the cross complaint without attempting to adjust the accounts between cross complainant and deceased, thereby leaving them where they had, by their manner of dealing, placed themselves. *Lightner v. Speck*, 2 Va. Dec. 557.

G. LOANS OR ADVANCES TO ESTATE.—In some cases where money has been paid for a deceased person, an action for such money will lie against the personal representative as such; as where money has been paid by a joint surety. *Fitzhugh v. Fitzhugh*, 11 Gratt. 300, 62 Am. Dec. 653. See *supra*, "Contracts of Suretyship."

Where a bill was brought against an administratrix to enforce an agreement to give the complainant certain of the real estate of her intestate, in consideration that he would effect a compromise of certain claims against the estate, it was held that he stood on the same footing as a vendee, and might properly be allowed as damages for the nonperformance of the agreement, in addition to his advances and interest, the commission of 10 per cent. for extra trouble in collecting the debts which the law would have allowed her. *Shepherd v. Hammond*, 3 W. Va. 484.

It is error to overrule a demurrer to a petition in equity, by a commissioner to sell real estate, against unpreferred creditors, to recover back payments made by him to them voluntarily, in good faith, and with full knowledge of outstanding preferred claims, to pay which said money is sought to be recovered. *Findlay v. Trigg*, 83 Va. 539, 3 S. E. Rep. 142.

An administrator made a verbal promise to an agent employed to collect a debt from the estate, that if the agent would pay the amount to his principal, the administrator would repay him with interest. The agent accordingly paid the principal the debt, and the administrator afterwards refunded to the agent the sum paid with interest. *Held*, that the payment by the agent was a payment by the administrator for which he was entitled to credit at the date thereof, whatever might be the time the amount was repaid to the agent. *Morrow v. Peyton*, 8 Leigh 54.

Payments by Executor Out of Individual Funds.—As to the right of an executor or administrator to credit in the settlement of his accounts for payments made by him on the debts of the decedents, see generally, monographic note on "Executors and Administrators" appended to *Rosser v. Depriest*, 5 Gratt. 6.

An executor having exhausted the personal estate in payment of debts, and being largely in advance to the estate for payment of debts which bind the heirs, is entitled to stand in the place of creditors whose debts he has paid, and charge the real estate. And the real estate in the hands of the devisees is liable in proportion to its value at the death of the testator. *Gaw v. Huffman*, 12 Gratt. 623.

Ex parte accounts of executors or administrators are not evidence at all of over-payments by them, or that the claims stated in such accounts were debts justly due by the deceased, and chargeable upon his real assets. If an executor or administrator, after exhausting the assets which properly come into his hands, pays debts of the decedent out of his own estate, he can only claim to be substituted to the rights of the creditor, and must prove his demand by the same kind of evidence that would be demanded of the original creditor. *Leavell v. Smith*, 99 Va. 374, 38 S. E. Rep. 232, 7 Va. Law Rep. 191.

The payment of the debts of his decedent, which were created before the war, by an administrator, out of his own funds collected from debts due him prior to the war, in Greenbrier county, in the years 1862 and 1863, at the instance and request of the widow and heirs, and with a view to save the real estate from being sold during the war (the personalty being exhausted), in confederate treasury notes, is a valid payment or advancement, for which the administrator is entitled to be reimbursed out of the real estate descended. *Surber v. Kent*, 5 W. Va. 95.

Where an executor as surety for the testator pays debts out of his own funds, he is entitled only to his ratable share of the assets to repay his advances; and by crediting himself with the full amount of such debts he commits an error to the prejudice of the other creditors having unpaid debts of equal dignity. *McCormick v. Wright*, 79 Va. 534. See *supra*, "Contracts of Suretyship."

Where an executor as surety for a distributee pays a judgment against the distributee, he is entitled to set off in equity the amount so paid, against the distributive share of the distributee, and the distributee is not a competent witness to testify concerning the judgment, the executor being dead. *Boyd v. Townes*, 79 Va. 118.

Upon a bill filed by an administrator to recover advances by him to pay specialty debts against the intestate, the account of the administrator, settled *ex parte* before auditors, and reported and recorded, is not evidence against the heirs. *Street v. Street*, 11 Leigh 498.

An executor has no power to borrow money and charge the estate of his testator with it, unless such power is conferred by the will. Legatees cannot be charged with money so borrowed without their consent and approval, and a subsequent recognition thereof and promise to pay is without consideration and ineffectual. *Robertson v. Breckinridge*, 98 Va. 569, 37 S. E. Rep. 8.

H. SUPPORT FURNISHED DECEDENT'S FAMILY.—In *assumpsit* against an executor in his in-

dividual character for the price of goods sold and delivered to him for the use of his testator's widow and legatees, upon evidence being given of such sale and delivery of a promise by the defendant to pay for goods out of his testator's estate and of assets sufficient for that purpose, the plaintiff may recover although the promise was not in writing. *Collins v. Row*, 10 Leigh 114.

I. TAXES.—"Taxes upon real estate due at the time of the death of the owner of the land constitute a claim against his estate, and are payable from his personal estate, instead of being merely a lien on the land. Taxes, however, accruing after the death of the owner do not constitute a debt against his estate, but are to be paid by the devisee, heir or purchaser of the land." 8 Am. & Eng. Enc. Law (2d Ed.) 1082. See *Breckinridge v. Breckinridge*, 98 Va. 561, 31 S. E. Rep. 892.

It is provided in Virginia by statute, Va. Code 1849, § 67, p. 189, Va. Code 1887, § 474, that the land of a decedent shall be charged to the estate until it can be properly charged to the heir or devisee, and that while so charged the taxes are payable out of the personal estate. Under this statute it was held that, where an administrator was a party to a suit for the partition of the intestate's land, and the land was not charged for taxation on the land book until after the decree confirming its partition, the administrator should be allowed credit for payment of the taxes which accrued before the decree confirming the partition, but not for those which accrued after the decree. *Dillard v. Dillard*, 77 Va. 830.

A testator devised his estate, real and personal, to his wife for life; but requested her, at her discretion, to make suitable advancements to his children as they became of age or married. He directed that, at the death of his wife, so much of his estate as remained in her hands should be equally divided among his children, taking into consideration advancements made. She kept the property together and managed it for the benefit of herself and children for a number of years, and then the property was divided among the children, on the basis of a partition reported to the court some years before, but never acted on. While the whole was in the possession of the widow, taxes accrued on the property, which were paid by the executor. No objection was made at the time to the payment of the taxes. This suit was brought thirty years afterwards. *Held*, that under the facts of this case, it was not error to credit the executor by the taxes so paid, and that it will be presumed that what was done was the result of a family arrangement. *Breckinridge v. Breckinridge*, 98 Va. 561, 31 S. E. Rep. 892.

If the heirs permit real estate to be returned delinquent for the nonpayment of taxes, and the executors pay the taxes to prevent the loss of the land, they will be entitled, as against the residuary legatees, to credit for the taxes so paid, whether or not the executors, having a naked power to sell, were under a duty to pay such taxes. *Dunn v. Benick*, 33 W. Va. 476, 10 S. E. Rep. 810.

Where a written contract for land has been made, and the vendee dies, and the vendor of the land is compelled to pay taxes incurred after the death of the vendee to prevent the sheriff from selling it for delinquent taxes, the heirs and not the administrator of the vendee are bound to refund to the vendor the taxes so paid. *Creigh v. Boggs*, 19 W. Va. 240.

The state has no lien, under Va. Code 1873, ch. 126,

sec. 25, on a decedent's estate for taxes collected by him as a tax collector of the state and not accounted for, but only for taxes assessed upon him during his lifetime. *Spilman v. Payne*, 84 Va. 435, 4 S. E. Rep. 749.

J. AUTHORITY OF PERSONAL REPRESENTATIVE TO BIND ESTATE.—An order drawn upon the executor of an estate by a legatee, when not a valid charge against the estate, does not become such by its acceptance by the executor; he having no authority to bind the estate by executing any evidence of indebtedness. *Staples v. Staples*, 85 Va. 76, 7 S. E. Rep. 199.

A note, executed by an executor for the amount of the principal and accrued interest of a debt due by the estate, was allowed to run two years, when the interest then due was added to the amount of the note, and the whole embraced in a judgment, which was confessed by the executor. *Held*, that the executor having no authority by virtue of his office to bind the estate to the payment of compound interest, the estate should be charged only with the principal sum originally due, with simple interest at the legal rate. *Staples v. Staples*, 85 Va. 76, 7 S. E. Rep. 199.

Where a personal representative confesses judgment on condition that if the demand be improper it shall be corrected, the estate is entitled to credit on the judgment to the extent that the demand is improper. *Staples v. Staples*, 85 Va. 76, 7 S. E. Rep. 199.

It is the duty of an administrator to protect the estate of his decedent by interposing every legal defence, and he cannot by an agreement *in pais*, where infants are concerned and are made parties, either obtain commissions as administrator, to which he is not entitled by statute, or provide for the allowance of claims against said estate without proof of their correctness and validity. *Crotty v. Eagle*, 35 W. Va. 148, 13 S. E. Rep. 59.

II. ORDER OF PAYMENT OF DEBTS.

A. CLASSIFICATION OF DEBTS.

1. IN GENERAL.

At Common Law.—"At common law the personal representative was required to pay the claims against the estate of the decedent in the following order: (1) The necessary funeral expenses, the extent of which was fixed by the condition and rank of the decedent; (2) the necessary expenses of the administration; (3) debts of record due to the crown; (4) debts of record due to subjects, which included judgments, decrees, statutes, recognizances; (5) debts by specialty, founded upon valuable consideration, and debts for rent; (6) simple contract debts based upon valuable consideration; (7) voluntary bonds or covenants; (8) other voluntary debts." 8 Am. & Eng. Enc. Law (3d Ed.) 1084.

In *Moon v. Pasteur*, 4 Leigh 35, it was held that a debt due by recognizance of special bail, is of higher dignity than a debt due by specialty, and should have preference accordingly in the administration of the assets of a decedent. But under the statute, debts of record, of specialty, and by simple contract, are all brought into one class. Va. Code 1887, § 2660; W. Va. Code 1899, ch. 85, § 25, p. 733.

By Statute.—It is provided in Virginia by statute that "where the assets of the decedent in the hands of his personal representative after the payment of funeral expenses and charges of administration are not sufficient for the satisfaction of all demands against him they shall be applied. First. To claims

of physicians not exceeding fifty dollars, for services rendered during the last illness of the decedent, and accounts of druggists not exceeding the same amount for articles furnished during the same period. Second. To debts due the United States and this state. Third. To taxes and levies assessed upon the decedent previous to his death. Fourth. To debts due as trustee for persons under disabilities, as receiver or commissioner under decree of a court of this state, as personal representative, guardian, or committee, where the qualification was in this state, in which class of debts shall be included a debt for money received by husband acting as such fiduciary in right of his wife. Fifth. To all other demands except those in the next class; and Sixth. To voluntary obligations." Va. Code 1887, § 2660, as amended by Acts 1895-6, p. 299.

The W. Va. statute provides that, "where the assets of the decedent in the hands of his personal representative, after the payment of funeral expenses and charges of administration, are not sufficient for the satisfaction of all demands against him, they shall be applied—First. To debts due the United States; secondly. Taxes and levies assessed upon the decedent previous to his death; thirdly. Debts due as personal representative, guardian or committee, where the qualification was in this state, in which debts shall be included a debt for money received by a husband acting as such fiduciary in right of his wife; fourthly. All other demands ratably, except those in the next class; fifthly. Voluntary obligations." W. Va. Code 1899, ch. 85, sec. 25, p. 733.

These statutes direct that debts shall be paid in the order of their classification, and those of any one class are to be paid ratably when there is not enough to pay them in full. But a personal representative who, after twelve months from his qualification, pays a debt of his decedent, shall not thereby be personally liable for any demand against the decedent of equal or superior dignity, whether of record or not, unless before the payment he had notice of the demand. Va. Code 1887, sec. 2661; W. Va. Code 1899, ch. 85, sec. 25, p. 733. These provisions, however, do not affect any lien acquired in the decedent's lifetime. Va. Code 1887, sec. 2662. See *Trevillian v. Guerrant*, 31 Gratt. 526.

Under section 25, ch. 85, and section 3, ch. 86 of the Code of West Virginia, it is error for the court to take a debt proved as a general debt against an estate, under the fourth clause of said section 25, out of said class, and postpone it to the payment of the other debts of the same dignity and class. The payment of all such debts must be *pro rata*. *Gardner v. Gardner*, 47 W. Va. 306, 34 S. E. Rep. 792.

A trustee under a will for the benefit of infant children died in 1865, indebted to the trust, and his executor paid the other trustee in the will a portion of the debt. Upon settlement of the estate of the deceased trustee in 1877, it appeared that he was largely indebted for more than his assets. It was held that, under the statute (Va. Code 1880, ch. 131, sec. 25), in force at the time of the trustee's death, his debt as trustee was not embraced in the third class of creditors provided for in that act; but must be placed in the fourth class, with the general creditors; and that his executor was not entitled to a credit in his administration account for the amount of the trust debt he had paid. In this case it was also held that the Act of July 1870, Va. Code 1873, ch. 126, sec. 25, which amended the former law by inserting in the third class "debts of trustee for persons under disabilities," was only

prospective in its operation, and did not authorize the placing of the decedent's debt as trustee in the third class, though the estate was not distributed until this last act went into operation. *Price v. Harrison*, 31 Gratt. 114.

2. PARTICULAR CLASSES OF DEBTS.

a. Funeral Expenses.—In Virginia and West Virginia, the funeral expenses and the costs of administration are placed in the same class. These debts are given preference over all other classes of obligations. Va. Code 1887, sec. 2660; W. Va. Code 1899, ch. 85, sec. 25, p. 733. See *supra*, "What Constitutes Claims against Decedent's Estate."

b. Expenses of Administration.—Executors and administrators ought to be allowed in their accounts all reasonable charges and disbursements for the benefit of the estate they represent and a reasonable recompense for their personal trouble, in preference to the claim of any creditor of the estate. *Nimmo v. Com.*, 4 H. & M. 57, 4 Am. Dec. 498.

In Virginia and West Virginia the expenses of administration are now ranked by statute with the funeral expenses, and are given preference over all other demands against the estate. Va. Code 1887, sec. 2260; W. Va. Code 1899, ch. 85, sec. 25, p. 733.

As to what constitute expenses of administration, see monographic note on "Executors and Administrators" appended to *Rosser v. Depriest*, 5 Gratt. 6.

c. Expenses of Last Illness.—In Virginia by statute, the expenses of the last illness rank next after the funeral expenses, and costs of administration. Va. Code 1887, sec. 2660.

d. Judgments.—A judgment lien, obtained in the lifetime of a decedent and which attached during his life to real estate, of which he died seized and possessed, has priority over the funeral expenses of said decedent so far as regards the disposition of the proceeds of the real estate upon which the lien has attached. The court feels warranted in holding that even at common law a lien upon personal property, obtained in the lifetime of a decedent, has superiority over a claim for the payment of funeral expenses out of that property; and this is true although by the death of the decedent such personal property comes into the hands of the personal representative. The latter takes the property *cum onere*, and has no greater rights therein than his decedent. Chapters 119 and 120 of the Code of 1887 are codified enactments of the common law for administering the assets, real and personal, of deceased persons, with such innovations and amendments as the legislature has thought wise to engraft upon the law of the commonwealth. Construing these chapters in this light, it is clear that the liens obtained in the lifetime of a decedent, whether upon his real or personal property, are paramount to all other claims whatsoever, attaching thereon after his death. *Wood v. Wood*, 5 Va. Law Reg. 395.

A judgment obtained during the life of an intestate is a lien upon his lands in the hands of his heirs for the payment thereof, and was held to be entitled to priority of payment out of the proceeds of the sale thereof over a simple contract creditor, who acquired no equal or superior lien for his debt upon the realty during the life of the debtor. *Laidley v. Kline*, 8 W. Va. 218.

A judgment recovered by a creditor against an administrator is not a lien on the realty of the intestate. *Woodyard v. Polsley*, 14 W. Va. 211; *Laidley v. Kline*, 8 W. Va. 218.

An executor must at his peril take notice of a

judgment against his testator, in whatever court it may have been rendered; and if he exhausts the assets by paying debts of inferior dignity, he must satisfy such judgment *de bonis propriis*. *Nimmo v. Com.*, 4 H. & M. 57, 4 Am. Dec. 488; *Mayo v. Bentley*, 4 Call 528. Under the present statute, debts of record, of specialty, and by simple contract, are all brought into one class. Va. Code 1887, sec. 2660; W. Va. Code 1899, ch. 85, sec. 25, p. 733.

In *Mayo v. Bentley*, 4 Call 528, it was held that an administrator who had no notice of a specialty debt might pay or confess judgment to a simple contract creditor. Under the present statute, these debts are brought into the same class. Va. Code 1887, sec. 2660; W. Va. Code 1899, ch. 85, sec. 25, p. 733.

A commissioner appointed to ascertain the debts of a decedent, and their order of priority, has no authority to go behind a judgment rendered against the decedent in his lifetime; and since Acts Va. 1865-66, ch. 171, §§ 1, 2, provide for setting up the fact of a confederate transaction only as a defence to a suit while pending, so as to reduce the judgment to be rendered, the action of the commissioner in scaling the judgment as a confederate transaction will not affect the judgment creditor, who was not a party to and had no notice of the proceedings. *Marshall v. Cheatham*, 86 Va. 31, 13 S. E. Rep. 308.

e. Specialty Debts.—A mere recital, in a deed of trust, that the *cestuis que trustent* are liable as indorsers for the maker of the deed, and that he is willing to indemnify them from all loss in consequence of their becoming indorsers, by conveying property for that purpose, was held not to entitle the indorsers to rank as specialty creditors in the administration of the personal assets of the maker. *Powell v. White*, 11 Leigh 309. Under the present statute, debts of record, of specialty, and by simple contract, are all brought into one class. Va. Code 1887, sec. 2660; W. Va. Code 1899, ch. 85, sec. 25, p. 733.

f. Fiduciary Debts.—Moneys collected by deputies of a deceased insolvent sheriff on the tax bills due to the state placed in their hands, and which they acknowledged and paid over, as the state's money, to the personal administrator of such deceased sheriff, to be paid through him into the treasury of the state, were properly paid over, by the administrator to the state, to the exclusion of the other creditors of the decedent, in accordance with the doctrine of "ear-marking." *Spilman v. Payne*, 84 Va. 435, 4 S. E. Rep. 749.

An English executor collected the assets of his testator's estate in England, and brought them with him to Virginia, where he died, having never qualified in Virginia. *Held*, that the debt due his testator's estate was entitled, in the administration of his own estate, to priority over all his other debts. *Tunstall v. Pollard*, 11 Leigh 1.

Where the husband of an executrix administered the estate as executor in his wife's right, wasted the assets, and died, leaving the executrix still surviving him, it was held that the waste committed by the husband during the coverture did not constitute a debt due from him to the testator's estate, which was entitled to preference in the administration of his own estate over his own proper debts, under the statute. 1 Rev. Code, ch. 104, sec. 60. *Henrico Justices v. Turner*, 6 Leigh 116. See, however, Va. Code 1887, sec. 2660; W. Va. Code 1899, ch. 85, sec. 25, p. 733.

The statute, Va. Code 1880, ch. 181, sec. 25, preferring debts due as "personal representative, guardian, or committee," did not include a debt due as

trustee of infant *cestuis que trustent*. *Price v. Harrison*, 31 Gratt. 114. See, however, Va. Code 1887, sec. 2660.

There is no priority given by the statute to a debt due as administrator over a lien created by judgment in the lifetime of the judgment debtor, who is also the administrator. *Alderson v. Henderson*, 5 W. Va. 183.

A guardian had a settlement with his ward upon the ward's coming of age, and, being found indebted on his account as guardian in the sum of \$3,000, he executed to the ward four bonds, each for \$750, payable in one, two, three and four years, with interest. The guardian paid the interest during his life, and a part of the principal, and was up to the war able to pay the whole. *Held*, that the giving and taking of these bonds was not a novation of the debt, but the debt due from the guardian to the ward continued to be a fiduciary debt and entitled to rank as such in the administration of the guardian's estate. *Smith v. Blackwell*, 31 Gratt. 291, and *foot-note*. See also, *Hamlin v. Atkinson*, 6 Rand. 574; *Yerby v. Lynch*, 3 Gratt. 460, and *note*, p. 365.

The statute of 1705, ch. 33, sec. 13, giving preference to debts due from deceased executors to their testator's estates, in the administration of the estates of such executors, was not repealed by the statute of 1748, ch. 4, sec. 13, notwithstanding the general repealing clause therein contained, or by the statute of 1785, ch. 61, sec. 50, or by the revised statute of 1792; the statutes subsequent to that of 1705 containing nothing inconsistent with it and being only cumulative. *Tunstall v. Pollard*, 11 Leigh 1.

A statute giving preference to debts due by a decedent as executor applies not only to debts of decedents who were appointed executors by the state giving such preference, but also to debts due by a foreign executor. *Tunstall v. Pollard*, 11 Leigh 1.

The statute preferring fiduciary debts is only prospective in its operation, and does not affect the distribution of the estate of a decedent who died before the passage of the act. *Price v. Harrison*, 31 Gratt. 114.

In a suit for the administration of a decedent's estate, the commissioner classified the debt of J. among the general creditors of the decedent, and a decree was entered confirming the report and distributing a fund in court *pro rata* among the creditors. There were several other decrees for accounts of further debts of the decedent, and still a fund in court to be distributed, when J. made himself a defendant in the suit and filed his petition insisting that his was a fiduciary debt. *Held*, that the decree confirming the report was an interlocutory decree, and J. was not concluded from setting up his claim as a fiduciary creditor of the estate. *Smith v. Blackwell*, 31 Gratt. 291.

g. Taxes.—The preference in favor of the state is only given to taxes assessed against the decedent in his lifetime. The state has no priority, under the statute, against a decedent's estate for taxes collected by the decedent, as a collector of taxes, and not accounted for. *Spilman v. Payne*, 84 Va. 435, 4 S. E. Rep. 749.

The lien of the commonwealth as purchaser at a sale for delinquent taxes accruing on realty after the death of the owner is superior to the rights of creditors of the owner whose claims arose prior to his death, and were reduced to judgment after that event, and before the taxes were assessed. *Commonwealth v. Ashlin*, 95 Va. 145, 28 S. E. Rep. 177.

h. Partnership Debts.—Where a party who is a member of an insolvent partnership is indebted on his individual account to different parties, and dies, the social assets are applicable first to the social debts, and, if insufficient, the social creditors come in as general creditors *pari passu* with separate creditors of the same class upon the separate estate of the deceased partner. *Freeport Stone Co. v. Carey*, 42 W. Va. 276, 26 S. E. Rep. 183; *Pettyjohn v. Woodruff*, 86 Va. 478, 10 S. E. Rep. 715. See also, *Robinson v. Allen*, 85 Va. 721, 8 S. E. Rep. 835; *Ashby v. Porter*, 26 Gratt. 455; *Morris v. Morris*, 4 Gratt. 293.

In *Pettyjohn v. Woodruff*, 86 Va. 478, 10 S. E. Rep. 715, *FAUNTLEROY, J.*, thus states the rule in Virginia for the application of the social and separate assets as between the social and separate creditors: "Whatever may have been the rule in other states, independently of statute law, the law of Virginia is, that the legal effect of the partnership is, to set apart or dedicate the social assets as a fund for the payment of the social debts, for the mutual protection of the partners *inter se* (subject to the right of the partners, while all alive, by consent, to vary that dedication, as in *Shackelford v. Shackelford*, 33 Gratt. 481), and for any unpaid balance due them the social creditors come in as general creditors, *pari passu*, with the separate creditors of the same class, upon the separate estate of the deceased partner. This principle has the sanction of the deliberate and unanimous decision of this court in *Ashby v. Porter*, 26 Gratt. 455, and an implicit legislative adoption of section 2855, Code of 1887, taken, word for word, from section 13, chapter 144, Code of 1849, with the construction which it had received by this court, and that construction has been followed and reaffirmed by this court in the case of *Robinson v. Allen*, 85 Va. 721, 8 S. E. Rep. 835."

In *Robinson v. Allen*, 85 Va. 721, 8 S. E. Rep. 835, it was held that, where the assets of the estate of a deceased partner are not sufficient to pay all the debts of the estate in full, the statute, Va. Code 1887, sec. 2885, which makes the representative of a deceased partner liable for the firm debts to the same extent that he would have been if the debts had been contracted by the partners severally as well as jointly, does not affect the order in which such assets should be applied to the payment of debts under Va. Code 1887, § 2660. See *Ashby v. Porter*, 26 Gratt. 455.

In *Morris v. Morris*, 4 Gratt. 293, the court did not pass upon the question (since decided in the cases above set out) as to whether a joint or partnership creditor is entitled to share in the separate estate of his debtor with the separate creditors of such debtor, but it was held that where a debtor partner by his will subjects his real estate to the payment of his debts, the partnership creditor is entitled to share with the separate creditors in such fund. In this case it was also held that where two partners give their joint and several bond to a creditor of the firm for a partnership debt, the creditor is entitled to share with the separate creditors in the separate estate of the deceased partner.

A partnership creditor, who has acquired a lien upon the individual assets of the deceased partner is entitled to priority over individual creditors to the extent of his lien. *Straus v. Kerngood*, 21 Gratt. 584.

Two co-partners entered into an agreement by which one of them was to take the entire assets of the firm, and pay off the firm debts, discharging the other from all liability, and to hold the surplus

as his own. Upon the death of the purchasing partner, it was held that the outgoing partner could compel the part of the decedent's estate which belonged to the firm to be first applied to the payment of the firm debts. *Shackelford v. Shackelford*, 32 Gratt. 481.

B. CONFLICT OF LAWS.—A decedent, domiciled at Norfolk, Va., there contracted a debt by bond to a certain party. He was also indebted to the Union Bank of Georgetown, D. C., on simple contract. He died intestate in Bedford, Pa., leaving personal estate in the county of Washington, D. C., of which administration was there granted. By the law of Virginia, bond debts were given priority over simple contract debts; but by the law of Maryland, which was in force in the district, no priority was given to bond debts. It was held that the effects of the intestate were to be distributed among his creditors according to the law of Maryland, and not according to the law of Virginia. *Smith v. Union Bank*, 5 Pet. (U. S.) 518.

C. PREFERENCE BY EXECUTOR OR ADMINISTRATOR.—It is the duty of an executor or administrator to pay the debts of his decedent according to the order of their priority. If he pays an inferior debt with notice of a superior debt, he will be liable to the superior creditor as for a *devastavit*; but except as to judgments and decrees, as to which the personal representative was bound to take notice, the payment of an inferior debt before notice of a superior debt is good. 8 Am. & Eng. Enc. Law (2d Ed.) 1065; *Mayo v. Bentley*, 4 Call 528. It is provided by statute that a personal representative, who, after twelve months from his qualification, pays a debt of his decedent, shall not thereby be personally liable for any debt or demand against the decedent of equal or superior dignity, whether it be of record or not, unless before such payment he shall have notice of such debt or demand. Va. Code 1887, sec. 2661; W. Va. Code 1890, ch. 85, sec. 25, p. 733.

But it is not a *devastavit* for the executor to pay debts of inferior dignity, if he retains sufficient assets to pay those of higher rank. *Braxton v. Clalborne*, 4 Call 308.

An administrator, who has no notice of a specialty debt, may pay or confess judgment to a simple contract creditor. *Mayo v. Bentley*, 4 Call 528. Under the present statute, debts of record, of specialty, and by simple contract, are all brought into one class. Va. Code 1887, sec. 2660; W. Va. Code 1890, ch. 85, sec. 25, p. 733.

Where there were two bonds, one payable at the death of the intestate, and the other not, it was formerly held that the administrator might delay the creditor in the first with dilatory pleas until the second became payable, and then confess judgment upon the latter pending the prior suit upon the first, and plead it in bar of the first action. For among creditors of equal dignity, the administrator was allowed to prefer either; and the second bond, was *debitum in presentia*, though payable at a future day. *Mayo v. Bentley*, 4 Call 528. But under the present statute, the executor has no right to prefer creditors of equal degree, and the assets must be ratably distributed among them. Va. Code 1887, §§ 2660, 2661.

D. RETAINER.—The right of retainer is given only to the executor or administrator regularly appointed and qualified. An executor *de son tort* cannot retain. *Shields v. Anderson*, 3 Leigh 720.

Where the claim of an appellee creditor of a

decedent was determined by the appellate court to be a debt by simple contract only, the administrator had a right, as against such creditor, to retain the amount of his own simple contract demand against the testator. *Shearman v. Christian*, 9 Leigh 571. See Va. Code 1887, § 2661, providing that creditors are to be paid in the order of their classification, those of a class to be paid ratably when not enough to pay them in full.

An administrator is not entitled to retain for his debt due by simple contract, as against bonds with collateral conditions creating contingent liabilities, which may never occur before the breach of such condition, although he has no notice of such contingent liability for eight years after his qualification as administrator, and the breach of the condition is not ascertained for eleven years after his qualification. *Cookus v. Peyton*, 1 Gratt. 481. See Va. Code 1887, §§ 2660, 2661.

The vendors of land gave the vendee a bond of indemnity, with surety, against an outstanding lien on the land, and thereupon the vendee paid a part of the purchase price. The vendee was obliged to pay a large sum to discharge the lien, and, upon the death of the surety, was appointed administrator of his estate. One of the principal obligors in the indemnifying bond left the state, the other became insolvent, and the vendors recovered judgment against the vendee for the balance of the purchase money. *Held*, that, as against the debts of the surety of equal and inferior dignity to that of the indemnifying bond, the vendee might retain the assets as satisfaction *pro tanto* of his claim on the indemnifying bond, and, as administrator of the surety, might retain in his hands the amount due from him personally on the judgment of the vendors, in part satisfaction of the claim in favor of the surety's estate against the vendors, his principals in the bond of indemnity. *Shores v. Wares*, 1 Rob. 1. See Va. Code 1887, §§ 2660, 2661.

Where a surviving partner is the administrator of a deceased partner, he is entitled to retain out of the separate estate in hands, against separate claims of no higher dignity, on account of all debts for which he is entitled to share the separate estate with the separate creditors. *Morris v. Morris*, 4 Gratt. 298. See Va. Code 1887, §§ 2660, 2661. See also, *supra*, "Partnership Debts."

Sureties in a bond, who pay it off after the death of the principal, are entitled to rank as specialty creditors of the principal, and if they are administrators of his estate, may retain whatever they pay on account of such suretyship, out of the assets that come to their hands as administrators, against other specialty creditors. *Powell v. White*, 11 Leigh 309. See Va. Code 1887, §§ 2660, 2661.

Where the same person is the personal representative both of the creditors and the debtor, he may retain out of the effects of which he is possessed as the representative of the debtor to satisfy the debts due to him as the representative of the creditor. *Green v. Thompson*, 84 Va. 376, 5 S. E. Rep. 507. See *Caskie v. Harrison*, 76 Va. 85; *Harvey v. Steptoe*, 17 Gratt. 289; *Morrow v. Peyton*, 8 Leigh 54.

An administrator *d. b. d.*, who was also administrator of the estate of the former administrator, settled the accounts of the latter, by which settlement it appeared that there was due his estate a large sum of money for advances made to the heirs. He then transferred or assigned to himself, as administrator, a bond of the first intestate's estate, in payment of the amount thus ascertained to be due.

Held, that, as he represented both the debtor and creditor estates, he could apply the funds of the former in payment of a debt due the latter, and could therefore assign to himself a chose in action of the debtor estate for the same purpose, and account to the debtor estate as so much cash administered. *Green v. Thompson*, 84 Va. 376, 5 S. E. Rep. 507.

III. MODE AND SUFFICIENCY OF PAYMENT.

On the subject of payment by an executor or administrator, see generally, the title, "Accounting and Settlement—Credits," in monographic *note* on "Executors and Administrators" appended to *Rosser v. Depriest*, 5 Gratt. 6.

If there is a valid demand binding assets of a decedent, it is not discharged merely by reason of the fact that the executor gives a note therefor signed by him, with the addition to his name of the words, "Executor of —, Deceased." *Crim v. England*, 46 W. Va. 480, 33 S. E. Rep. 310.

Where an administrator, out of confederate money collected by him in the course of his administration, pays off specie debts of his decedent, he is to be credited in the settlement of his account with the debts so paid at their nominal amount. *Moss v. Moorman*, 24 Gratt. 97.

In 1863, an administrator, acting under an order of court authorizing him to loan money belonging to the estate to any undisputed creditors thereof, made a loan of confederate money to one of the creditors. *Held*, that the loan should not be scaled, but should be applied, as of its date, as a payment of a debt due the borrower. *Robertson v. Trigg*, 32 Gratt. 76.

A personal representative may pay a debt due by the default of his decedent, as treasurer of a public fund, before an action on the decedent's official bond is barred by the statute of limitations, without waiting to be sued for such debt, and may credit himself with its payment in the settlement of his account. *Van Winkle v. Blackford*, 33 W. Va. 573, 11 S. E. Rep. 26.

Where a personal representative confesses judgment on condition that if the demand be improper it shall be corrected, the estate is entitled to a credit on the judgment to the extent that the demand is improper. *Staples v. Staples*, 85 Va. 76, 7 S. E. Rep. 199.

Where a person leases land from an executor, he cannot purchase judgments against the testator and set them against the rent, unless the executor acknowledges a sufficiency of assets to pay all the debts of the estate. But the tenant may maintain a bill in such case for the discovery of assets by the executor. *White v. Bannister*, 1 Wash. 166.

IV. PROCEEDINGS TO ENFORCE PAYMENT.

See generally, on this subject, monographic *note* on "Executors and Administrators" appended to *Rosser v. Depriest*, 5 Gratt. 6.

Nature and Form of Proceeding.—A fiduciary cannot be compelled by summary process of rule, to show cause why he shall not be fined and imprisoned, to pay a decree against him as such, especially where his accounts have not been settled in the suit, and it has not been shown that he has assets in his hands. *Cheatham v. Cheatham*, 81 Va. 895.

Where a creditor, instead of proceeding at common law to recover his claim against a decedent's estate, obtains an order for its payment on a summary rule to show cause, this is a departure from

the established modes of procedure, and the order so obtained has not the force of a judgment, but is void on its face. *Thurman v. Morgan*, 79 Va. 367.

A court of law cannot compel an executor summoned as a garnishee to pay a legacy left to the debtor, the remedy in such case being in equity. *Whitehead v. Coleman*, 81 Gratt. 784.

Creditors' Suits.—For a full discussion of the subject of bills filed by creditors of decedents, see monographic note on "Creditors' Bills" appended to *Suckley v. Rotchford*, 12 Gratt. 60.

The rights of general creditors of a decedent are subject to all equities attaching to the decedent's estate at the time of his death. General creditors take the estate in the plight in which they find it, and their rights cannot be enlarged or improved beyond their debtor's, to the prejudice of a creditor who has taken a lien which he has not recorded, or which cannot be recorded. The creditors who seek to assail the lien must come with a lien by judgment, or otherwise, giving them a right to charge the property specifically. *Dulaney v. Willis*, 96 Va. 606, 29 S. E. Rep. 334; *McCandlish v. Keen*, 13 Gratt. 615.

After a decree for a general account of debts in a creditors' suit, other creditors may come in and prove their claims before the commissioner to whom the cause is referred. This should be done by the creditor or some one authorized by him, and not by the administrator of the debtor whose duty it is to represent the estate. The better practice is to require the creditor to file an affidavit that the debt remains due, but the affidavit is not evidence to prove the debt. *Conrad v. Fuller*, 98 Va. 16, 84 S. E. Rep. 893.

Persons Who May Institute Proceedings.—The personal representative of a deceased partner, as a general rule, is the only person who has the right to sue the surviving partner for an account of the partnership affairs; but, under special circumstances, a distributee, legatee, or creditor of the decedent may file a bill against the personal representative of the decedent and the surviving partner. *Conrad v. Fuller*, 98 Va. 16, 84 S. E. Rep. 893.

Parties Defendant.—Where an executor has died after partially administering the estate of his decedent, and a suit is brought to recover a claim against said estate simply, no defendant is necessary, except the personal representative. *McGlaughlin v. McGlaughlin*, 43 W. Va. 226, 37 S. E. Rep. 378.

The representatives of two deceased persons cannot be joined in the same action, although the undertaking of the testators might have been joint and several. *Grymes v. Pendleton*, 4 Call 130.

In a suit by creditors to subject the real estate of a decedent to the payment of his debts, where it appears that the decedent devised his real estate to his wife for life, with remainder in fee in equal parts to his two children, but, if either died without issue, remainder over to his sister, with power to the wife to sell and reinvest proceeds, if deemed advisable, the sister is not a necessary party. *New v. Bass*, 92 Va. 383, 23 S. E. Rep. 747.

Persons primarily bound on negotiable paper are necessary parties to a suit in equity to subject the estate of an endorser, as they may have defences unknown to the endorser, and, being first liable, equity will not, except under special circumstances, subject the estate of an endorser until that of the principal has been exhausted. *Tidball v. Shenandoah National Bank*, 96 Va. 768, 37 S. E. Rep. 318, 6 Va. Law Reg. 638.

The widow and adult children of an intestate divided his lands and chattels among themselves, leaving the administrator only certain choses in action wherewith to pay debts. An account of administration, as nearly accurate as lapse of time and meagre evidence allowed, showed the administrator to be in advance to the estate with nothing wherewith to pay a judgment obtained against him by a creditor of the decedent, who sued in chancery the administrator, his sureties, and the widow, heirs and distributees, to collect out of the decedent's unalliened lands, or otherwise, the bond debt represented by said judgment. *Held*, that the suit might be maintained against the heirs, etc., to collect the debt out of the unalliened lands, upon evidence other than the judgment, and that equity would allow resort at once to said lands, instead of going upon the sureties of the administrator. *Watts v. Taylor*, 80 Va. 627.

Pleading.—A bill by an executor for the sale of his testator's land to pay debts should show the names of the widow, heirs, devisees, and all known creditors; otherwise, a sale thereunder passes no title. *Underwood v. Underwood*, 22 W. Va. 308.

A bill in equity, filed by the widow of a deceased party against the administrator of the estate of her deceased husband, charging a failure on the part of said administrator to collect and account for the assets of his intestate, and to pay over to her the portion of the personality of her deceased husband to which she is entitled as his widow, which does not show when said administrator qualified and gave bond for the performance of his duties, or that a year had elapsed from the time of such qualification of such administrator, is demurrable, and cannot be sustained. *Harris v. Orr*, 42 W. Va. 745, 36 S. E. Rep. 455.

Notice of dishonor is a necessary charge in a bill to subject a decedent's estate to a liability as endorser of negotiable paper. *Tidball v. Shenandoah National Bank*, 96 Va. 768, 37 S. E. Rep. 318, 6 Va. Law Reg. 638.

Where an executor has a claim against the estate of his testator depending on a *quantum meruit* only, he may exhibit a bill in equity against his co-executors and legatees to have such claim established and fixed at a certain sum. In such case he ought to state the claim with reasonable certainty, by setting forth his own estimate of his services; but should he fail to do so, his bill ought not to be dismissed, but leave to amend (it should be granted on motion. *Baker v. Baker*, 8 Munf. 222.

Where the executor of an executor is sued for a debt due by the first executor to the estate of his testator, the pleadings must state distinctly that the claim is against the second executor as representing his testator in his executorial character, in order to entitle the plaintiff to rank as a creditor of the first dignity under the act of assembly. *Shearman v. Christian*, 6 Rand. 49.

If on a bill filed by creditors to subject the estate, real and personal, of a decedent, to the payment of his debts, a copy of decedent's will is filed, by which he devised and bequeathed certain property to his wife for life, and nominated her as executrix, the wife is made a party defendant as executrix and "as widow," this is sufficient to bind her personally by any proper decree made in the cause. *New v. Bass*, 92 Va. 383, 23 S. E. Rep. 747.

The answers of executors to a petition asserting a claim against the decedent's estate, consisting of a judgment confirmed by an interlocutory decree,

though interposed more than four years after the confirmation of the judgment, are properly treated as a petition for rehearing, no statutory bar existing to a petition for a rehearing of an interlocutory decree. *Staples v. Staples*, 85 Va. 76, 7 S. E. Rep. 199.

On appeal from a decree charging an administrator and his sureties with a debt, an objection that the debt was barred by the statute of limitations at the time of the qualification of the administrator will not be considered where the record fails to show that it was thus barred, but the evidence tends strongly to show that the debt was either collected or assumed by the administrator. *Harman v. McMullin*, 85 Va. 187, 7 S. E. Rep. 349.

Evidence.—An executor or administrator occupies a position antagonistic to the estate he represents with reference to independent claims preferred by him against the estate, and his *ex parte* settlements though duly confirmed, are not even *prima facie* evidence in his favor of the correctness of such claim. The burden of proof is on him to establish his demand by proper proof just as if no settlement had ever been made. *Scott v. Porter*, 99 Va. 553, 30 S. E. Rep. 320.

An executor who prefers a claim against the estate of his testator for breach of a covenant to do a collateral thing has the burden of proof to establish the due execution of the covenant, the breach by the testator, and the amount he is entitled to recover by reason of such breach. *Scott v. Porter*, 99 Va. 553, 30 S. E. Rep. 320.

A bond, note or account may, on its face, appear to be the personal debt of an executor, and yet, in truth and in fact, be the debt of the estate. The presumption is that the face of the paper discloses the true debtor, and the burden of proof is on him who controverts the fact; but if the debt has been paid by an executor, and he can establish the fact that it is not his personal debt, though it so appears on the face of the paper, but is, in truth and in fact, a debt of the estate, he should be allowed credit for it. *Breckinridge v. Breckinridge*, 98 Va. 561, 31 S. E. Rep. 392.

There being no privity between the personal representative and the party to whom the real estate has descended or been devised, a judgment against such personal representative is not even *prima facie* evidence against the heir or devisee. *Laidley v. Kline*, 8 W. Va. 218.

A judgment against personal representatives in a suit to which the heirs were not parties, does not affect the heirs for want of privity, and is not evidence against them in a suit to subject the decedent's real estate; and Va. Code 1873, ch. 137, sec. 3, does not alter the rule. *Brewis v. Lawson*, 76 Va. 36; *Watts v. Taylor*, 80 Va. 627. Yet, a suit against personal representatives jointly with heirs, etc., by a creditor of the decedent, to collect out of real estate or otherwise, a bond debt whereon judgment existed against the personal representatives, is maintainable by evidence other than the judgment, though the judgment be set forth in the bill, the heirs, etc., having as full opportunity to defend against the debt as though no judgment existed. *Watts v. Taylor*, 80 Va. 627.

Where a claim against an estate based on a judgment obtained against such estate is presented for settlement, and there is no evidence to show that such claim has ever been paid, except the unsupported assertion of persons contesting it, a rejection thereof by a commissioner to whom it has been referred is error, and the action of the court in

sustaining an exception to the commissioner's report, and entering judgment against the estate for the amount due, was proper. *Armentrout v. Shafer*, 89 Va. 566, 16 S. E. Rep. 726.

In a suit to settle the estate of a decedent, the appellant filed a claim against the estate, alleging that the decedent, in 1858, had been appointed a commissioner to collect the purchase money bonds under a decree of sale, and to deposit them in bank, and that the appellant was entitled to the fund arising from the collection of the bonds. The claim was based upon an alleged admission made by the decedent in 1877, that he had collected the bonds. This statement was made in a suit wherein the decedent had stated, as counsel, that he had collected the bonds, and had deposited them as directed, and that his report thereof had been confirmed by the court. The appellant's petition did not deny the deposit and confirmation by the court, but merely denied that the money was deposited or accounted for by the decedent in his lifetime. *Held*, that, since the claim was based on the decedent's admission, his entire statement must be taken together; and as it appeared from his whole statement that a decree was made confirming his report, in which he alleged that he had deposited the money as directed, it must be taken as established, and cannot be collaterally attacked. *Perkins v. Lane*, 82 Va. 59.

In an action on a joint bond against the personal representative of a deceased obligor, a surviving obligor is an incompetent witness for the defendant. *Brown v. Johnson*, 18 Gratt. 644.

Compromises by Creditors.—Where there is a joint decree against the executors of two persons, and a creditor receives a moiety of the debt from the representatives of one of them, and covenants not to levy the residue of the decree upon the estate of that one, the representatives of the other are not thereby discharged. *Garnett v. Brooke*, 6 Call 308.

Judgment or Decree.—It is error to decree against an executor, absolutely, that he shall pay money at fixed future periods, out of funds which shall subsequently come into his hands. *Hite v. Hite*, 2 Rand. 409.

It is error to decree that an administrator *de bonis non* shall pay a debt of his testator out of the assets in his hands, upon an admission in his answer that there are debts due the estate uncollected more than sufficient to pay all the debts. *Kent v. Cloyd*, 30 Gratt. 555.

Where an order accepted by the personal representative, is rejected in a creditors' suit, as a valid claim against the decedent's estate, there can be no personal decree for the amount thereof against such representative, because it is asserted in the bill as a debt due by the estate, and the decree must be consistent with the case made by the pleadings. *Staples v. Staples*, 85 Va. 75, 7 S. E. Rep. 199.

Where it appears that the estate of one of the deceased obligors in a bond has been fully administered in a suit for partition to which the complainant was not a party, that the assets were sufficient to pay all claims, and that the personal representative took no refunding bond, a personal decree against him is proper. *Beverly v. Rhodes*, 86 Va. 415, 10 S. E. Rep. 573.

Where, in the case of a deficiency of personal assets, a creditor of the decedent files a bill for the purpose of subjecting land devised by him to the payment of his debt, it is error for the court to decree a sale before ordering an account and settling the priorities of the liens thereon, though the par-

ties agree that a certain statement filed in the cause shall be taken as a true exhibit of the indebtedness of the estate to the plaintiff. *Daingerfield v. Smith*, 88 Va. 91, 1 S. E. Rep. 599.

On a bill by a creditor against the devisees or heirs at law of a decedent, the court should first make a decree for renting the land, and, if the rent should prove insufficient to satisfy the debts, a report should be made to the court for further proceedings to be had before a decree can be made ordering a sale. An alternative decree for the sale of land, if the rent offered be insufficient, is erroneous. *Daingerfield v. Smith*, 88 Va. 81, 1 S. E. Rep. 599.

A conditional decree, directing an executor to pay certain debts due by his testator's estate, or due from him in his fiduciary capacity when he shall have collected certain other specified claims or debts coming to his testator's estate, constitutes no lien upon the real estate of such executor. *Gay v. Skeen*, 86 W. Va. 582, 15 S. E. Rep. 64.

A commissioner appointed to ascertain the debts of a decedent, and their order of priority, cannot go behind a judgment rendered against the decedent in his lifetime; and since Acts 1865-66, ch. 171, §§ 1, 2, provide for setting up the fact of a confederate transaction only as a defense to a suit while pending, so as to reduce the judgment to be rendered, the action of the commissioner in scaling the judgment as a confederate transaction will not affect a judgment creditor who was not a party to the proceedings, and had no notice thereof. *Marshall v. Cheatham*, 88 Va. 31, 13 S. E. Rep. 308.

In a suit to settle the accounts of an executor and ascertain the debts against his decedent's estate, a decree for an account of debts stops the running of the statute of limitations as to all debts against the decedent. *Covington v. Griffin*, 98 Va. 124, 34 S. E. Rep. 974.

V. PROPERTY LIABLE FOR PAYMENT OF DEBTS.

A. IN GENERAL.—At common law the lands of a decedent were liable only to debts of record and of specialty binding the heirs expressly, but by statute the distinction between such debts and simple contract debts has been done away with, and now the real as well as the personal estate of a decedent is liable for the liquidation of all his debts. *Frasler v. Littleton*, 100 Va. —, 7 Va. Law Reg. 620. For a full discussion of the liability of a decedent's property to the payment of his debts, see monographic note on "Marshaling Assets" appended to *Carrington v. Didier*, 8 Gratt. 260. See also, monographic note on "Executors and Administrators" appended to *Rosser v. Depriest*, 5 Gratt. 6.

If the estate of the decedent is solvent, and even where it is insolvent, until they are sequestrated by the court at the instance of creditors, the rents and profits of the realty are not liable for the debts of the decedent. *Washington v. Castleman*, 81 W. Va. 835, 8 S. E. Rep. 605.

In a suit to settle a decedent's estate, it was error to adjudge the administrator entitled to recover rents accruing after the intestate's death for a farm occupied by one of the parties, such rents belonging to one of the heirs, who asserted no claim thereto. *Lightner v. Speck*, 3 Va. Dec. 557.

Where the real estate of a testator is necessary for the payment of his debts, a court of equity may direct an account of the rents and profits from his death, for the purpose of ascertaining the profits accrued from that period and by whom received, in order to enable the court to decide what persons, if

any, are accountable therefor. *McCandlish v. Edloe*, 3 Gratt. 330.

Where a life estate in lands, given to a widow in lieu of dower is of less value than her dower would have been, it is not chargeable with any of the debts of her deceased husband. *Gaw v. Huffman*, 12 Gratt. 628. See monographic note on "Dower" appended to *Davis v. Davis*, 25 Gratt. 567.

B. PROPERTY PRIMARILY LIABLE.—The personal estate of the decedent is the natural and primary fund for the payment of his debts, and must be first exhausted before the real estate can be subjected; nor will it be exonerated by a charge on the real estate, unless there be express words or a plain intent in the will to make such exoneration. See monographic note on "Marshaling Assets" appended to *Carrington v. Didier*, 8 Gratt. 260.

C. MARSHALING ASSETS.—The order in which the estate of a testator will be applied to the payment of his debts is as follows: The first to be so applied is the personal estate at large not exempted by the terms of the will or by necessary implication. Next to it, real estate or an interest therein expressly set apart by the will for payment of debts. Next, real estate descended to the heirs. After it, property, real or personal, expressly charged with payment of debts, and then, subject to such charge, specifically devised or bequeathed. If these prove inadequate, then general pecuniary legacies, and after them, specific legacies, both classes ratably; and, in the last resort, real estate devised by the will. *Frasler v. Littleton*, 100 Va. —, 7 Va. Law Reg. 620. See monographic note on "Marshaling Assets" appended to *Carrington v. Didier*, 8 Gratt. 260.

VI. LIABILITY OF HEIR, DEVISEE, DISTRIBUTE AND LEGATEE.

The common-law rule (see 8 Am. & Eng. Enc. Law [2d Ed.] 1098) exempting heirs, devisees, distributees and legatees from liability for the debts of the decedent, with the exception of debts of record and the specialty debts in which the heirs are named, has been done away with by the statute making the real estate of the decedent assets for the payment of his debts in the same order as personal estate. See Va. Code 1887, §§ 2065-2069; W. Va. Code 1899, ch. 85, §§ 3-7, pp. 734-735; *Alexander v. Byrd*, 85 Va. 609, 8 S. E. Rep. 877. See also, *Piper v. Douglas*, 3 Gratt. 371, and foot-note. For a full discussion of the liability of devisees and legatees for the debts of their decedents, see monographic notes on "Legacies and Devises" and "Wills."

VII. PERSONAL LIABILITY OF REPRESENTATIVE.

As to the personal liability of executors and administrators with respect to debts, see generally, monographic note on "Executors and Administrators" appended to *Rosser v. Depriest*, 5 Gratt. 6.

An executor or administrator is not liable for the payment of invalid claims if they were such as any judicious man, managing his own affairs, might have settled. *Kee v. Kee*, 3 Gratt. 117.

Where the executors have been assured by the testator that he owed no debts and they know of none, they will not be liable for the value of personal property, which he, in his lifetime, had put into the possession of his children. *Lewis v. Overby*, 31 Gratt. 601.

Where an administrator sells a chattel of which his intestate died possessed, but which in fact belonged to another, and applies the proceeds to the payment of his intestate's debts in due course of

administration, without any notice of the right or claim of the true owner, he is personally liable to the true owner in an action of trover for the value of the chattel. *Newsum v. Newsum*, 1 Leigh 86.

Disregarding Priorities in Payment of Debts.—It is the duty of a personal representative to pay the debts of the decedent in the order of their priority, as prescribed by law; and if he pays an inferior debt, leaving a debt of a preferred class unpaid, such payment constitutes a *devastavit* in case of a deficiency of assets, so as to render him personally liable at law and in equity to the preferred creditor who is injured thereby, unless the payment was made without notice of the superior debt. 11 Am. & Eng. Enc. Law (2d Ed.) 912; *McCormick v. Wright*, 79 Va. 524; *Nimmo v. Com.*, 4 H. & M. 57, 4 Am. Dec. 498; *Mayo v. Bentley*, 4 Call 528.

At common law, an executor or administrator was obliged, at his peril, to take notice of a judgment against his testator, and, if he exhausted the assets by paying debts of inferior dignity, was bound to satisfy such judgment out of his own estate. *Nimmo v. Com.*, 4 H. & M. 57, 4 Am. Dec. 498; *Mayo v. Bentley*, 4 Call 528. But a personal representative who had no notice of a specialty debt could pay or confess judgment to a simple contract creditor. *Mayo v. Bentley*, 4 Call 528. Under the statute, however, debts of record, of specialty, and by simple contract are all brought into one class and are to be paid ratably. Va. Code 1887, § 2660; W. Va. Code 1890, ch. 85, § 25, p. 723.

An administrator cannot pay, within 12 months after his qualification, one debt in full, or in excess of its ratable share of assets, over another of the same class, either with or without notice of such other debt; and, if he does, he is personally liable to the omitted debt for its share of money applied in such payment. If such payment be made after 12 months, he is not liable, unless he had notice of the other debt. *McCoy v. Jack*, 47 W. Va. 201, 84 S. E. Rep. 991.

Where it appears from the face of an executor's settlement that he has paid in full some debts and left unpaid, in part or wholly, other debts of equal dignity, such settlement stands impeached *per se*. *McCormick v. Wright*, 79 Va. 524.

In 1856 an infant qualified as one of the administrators of a decedent. He paid out for just debts all the assets that came to his hands, but did not apportion them ratably. In 1858 he turned over everything in his hands to his co-administrator and left the state. In 1877 a bill was filed charging him with *devastavit*. He pleaded infancy and the bar of the statute of limitations. *Held*, that, being an infant and innocent of fraud or tort, he was not liable for the alleged *devastavit*, and the lapse of the period of limitation would bar the claim against him if he was otherwise liable. *Saum v. Coffelt*, 79 Va. 510.

Where an administrator, out of the intestate's assets, voluntarily pays debts of an inferior class in preference to debts of a higher class, and there is a deficiency of assets, he is not entitled to have the creditors so paid refund. The case has no analogy to the case of an executor paying legacies before paying the debts, where the executor is entitled to be substituted to the creditor's right to have the legatees refund. *Findlay v. Trigg*, 33 Va. 539, 3 S. E. Rep. 142.

Where, in a suit against an administrator and his sureties for a *devastavit* in paying debts of an inferior class in preference to debts of a higher class, the record shows there is a deficiency of assets, and that

the funds in his hands embrace money that came to him as commissioner of sales of lands, as well as money that came to his hands as administrator, without showing the respective amounts of each, there can be no decree until there has been an account of the amount of each, respectively, as the sureties are not accountable for the money that came to his hands as such commissioner. *Findlay v. Trigg*, 33 Va. 539, 3 S. E. Rep. 142.

Where an executor as surety for the testator pays debts out of his own funds, he is entitled only to his ratable share of the assets to repay his advances and by crediting himself with the full amount of the debts, he commits an error to the prejudice of the other creditors having unpaid debts of equal dignity. *McCormick v. Wright*, 79 Va. 524.

An administrator, with money of his decedent, paid, on a note made by his decedent, an amount in excess of the sum applicable out of the assets to that debt, under the mistaken belief that he was surety in such note, and that the estate would pay a somewhat larger per cent. of its liabilities than it did. *Held*, that the administrator could not maintain an action of assumpsit against a surety in the note to compel him to refund the amount so paid in excess of the ratable share of the assets applicable to such debt. *Proudfoot v. Clevenger*, 33 W. Va. 267, 10 S. E. Rep. 364.

Paying debts of inferior dignity is not a *devastavit*, if the executor retains sufficient assets to pay those of higher rank. *Braxton v. Claiborne*, 4 Call 308.

Payment of Claims Founded on Illegal Consideration.

—An executor should not be allowed credit for paying a debt of his testator which appears on its face to have been for money lost at gaming. *Carter v. Cutting*, 5 Munf. 223. See monographic note on "Executors and Administrators" appended to *Rosser v. Depriest*, 5 Gratt. 6.

An executor should be denied credit in his accounts for usurious debts of the testator paid or retained by him, with knowledge of their usurious character. *Smith v. Britton*, 2 Pat. & H. 124.

Payment of Claims Barred by Statute.—The statute providing that an administrator shall have no credit for a claim which he pays, knowing the facts whereby recovery could be prevented, does not require the administrator to plead the statute of limitations to a claim apparently barred, where he knows facts rendering the statute inapplicable. *Radford v. Fowlkes*, 35 Va. 820, 3 S. E. Rep. 817.

See *supra*, "What Constitutes Claims against Decedent's Estate—Claims Barred by Limitation." See also, monographic note on "Executors and Administrators" appended to *Rosser v. Depriest*, 5 Gratt. 6.

Where a personal representative, after he has been removed, voluntarily pays a debt due by the default of his decedent as the treasurer of a public fund, after an action on the deceased treasurer's official bond is barred by the statute of limitations, he cannot recover the sum so paid from the estate of the decedent either at law or in equity. *Van Winkle v. Blackford*, 33 W. Va. 573, 11 S. E. Rep. 26.

Payment of Legacies and Distributive Shares.—Where an executor or administrator, without taking a refunding bond, pays legacies or distributive shares, leaving debts unpaid, and a deficiency of assets results, he is guilty of maladministration, and is liable as for a *devastavit*. *Lewis v. Mason*, 84 Va. 781, 10 S. E. Rep. 529; *Morrison v. Lavell*, 81 Va. 519; *Edmunds v. Scott*, 78 Va. 720; *Lewis v. Overby*,

81 Gratt. 601; *Cookus v. Peyton*, 1 Gratt. 481. See monographic note on "Executors and Administrators" appended to *Rosser v. Depriest*, 5 Gratt. 6. See also, monographic note on "Marshaling Assets" appended to *Carrington v. Didler*, 8 Gratt. 260.

The fact that the assets turned over to the legatee would have been lost if retained by the executor does not affect his liability to creditors. Thus an executor was held liable for slaves turned over to legatees although they were subsequently emancipated by the federal government. *Morrison v. Lavell*, 81 Va. 519.

An administratrix *c. t. a.*, who permits the trustee under the will to take possession of the personal property belonging to the estate before the payment of its debts, is guilty of a devastavit, and, to the extent of such property, becomes personally chargeable with the debts of the estate. *Lewis v. Mason*, 84 Va. 781, 10 S. E. Rep. 528.

Liability Arising Out of Contract.—Where an executor or administrator in executing an obligation appends to his signature words descriptive of his representative character, such fact will not prevent personal liability from attaching where the nature of the debt is such as to charge him personally. *Snead v. Coleman*, 7 Gratt. 300, 56 Am. Dec. 112.

An executor, trustee, or any other person acting *in autre droit*, who covenants in his own name, and yet adds to his signature the word, "executor," "agent," "trustee," etc., is personally liable, the addition being regarded as a mere description of the person, unless he was recognized as contracting in his representative capacity. *Carr v. Branch*, 85 Va. 597, 8 S. E. Rep. 476.

In order for the promise of an executor or administrator to render him personally liable it must be supported by a sufficient consideration as in the case of other contracts. 11 Am. & Eng. Enc. Law (2d Ed.) 915; *Taliaferro v. Robb*, 2 Call 258; *Snead v. Coleman*, 7 Gratt. 300, 56 Am. Dec. 112.

The fact that an executor wrote to a creditor of his testator that he would pay his claim as soon as he was able to dispose of his crops does not bind the executor personally, in the absence of proof of assets or forbearance to sue or some other consideration. *Taliaferro v. Robb*, 2 Call 258. As to the necessity of consideration to support a promise to pay money, see monographic note on "Consideration" appended to *Jones v. Obenchain*, 10 Gratt. 250.

A note given by an executor or administrator for a debt of the decedent is *prima facie* evidence of the existence of assets so as to render the note personally binding on him, without proof of the actual existence of assets. But such presumption may be rebutted, and when the absence of assets is shown by the executor or administrator the note imposes no personal liability on him. *Snead v. Coleman*, 7 Gratt. 300, 56 Am. Dec. 112.

12 **Bryan v. Lofftus's Adm'rs.*

May, 1842, Richmond.

[30 Am. Dec. 242.]

(Absent, STANARD and BALDWIN, J.*)

Sale of Land—Specific Performance—Denied to Vendor—Contract Rescinded—Account Taken between

*One had been counsel for the appellant in the court below, and the other had been retained as his counsel in this court.

Vendor and Vendee—Case at Bar.—On the 10th of October 1818, a sale was made of a tract of 870 acres of land in Augusta county, at \$40 per acre, to be paid as follows, viz. \$600 in hand (which was paid accordingly), \$1200 on the 28th of December 1818 with interest from the day of sale, \$1200, on the 28th of March 1819 with like interest, \$750, on the 28th of March 1820, and the residue in sums of \$750, payable at specified times. By the articles of agreement, the vendee was to give bonds and satisfactory security for his payments, and the vendor bound himself to make the vendee a good and sufficient deed in fee simple, with general warranty, at the first Augusta court after the payment in 1819. The vendee paid the instalment which fell due on the 28th of December 1818, and the instalment which fell due in 1819 was paid, part before, and the residue on, the 9th of December in that year, so that the vendor became bound to make a deed for the land as early as the first Augusta court after the 9th of December 1819. No deed was made. The vendee notwithstanding paid the instalment which fell due on the 28th of March 1820. About the 10th of April of that year, the vendor died insolvent, and the vendee, soon after his death, made known his determination to make no farther payments until he should get a title. On the 10th of September 1821, a suit in equity was brought by the administrators of the vendor against the vendee and the heirs of the vendor, to compel a specific execution of the contract; and no title having ever been obtained by the vendor, the complainants made defendants those in whom that title was outstanding. A considerable fall having taken place in the value of property, the vendee, by his answer sworn to in May 1825, resisted the prayer of the bill, on the ground that, under the circumstances of the case, equity required a rescission, and not an execution of the contract. At this time the default of the vendor's heirs still continued, and it continued three years afterwards; that is to say, it continued for more than eight years from the time when the vendor had bound himself to make the title. During this time the land had fallen in value more than 60 per cent. and the vendee had never surrendered possession.

13 **HELD**, 1. That the long continued default of the vendor and his heirs, and the change of circumstances during its continuance, constitute a valid objection to a specific performance of the contract. 2. That the vendee should, on the one hand, release all his rights under the contract, deliver up the land, and account for its rents and profits during the time he held it; and, on the other hand, have the purchase money paid by him returned, with interest from the times when the payments were made, and also have the value of any permanent improvements which he may have put upon the land set off against the rents and profits, provided they do not exceed the amount of the said rents and profits. 3. That if, on stating an account between the parties on these princi-

†**Sale of Land—Specific Performance.**—See on this subject, the principal case cited in *McCue v. Ralston*, 9 Gratt. 436; *Hendricks v. Gillespie*, 25 Gratt. 185, 196, 202; *Ford v. Euker*, 86 Va. 79, 9 S. E. Rep. 500; *Max Meadows, etc., Co. v. Brady*, 92 Va. 84, 23 S. E. Rep. 845. See monographic note on "Specific Performance" appended to *Hanna v. Wilson*, 3 Gratt. 243.

ples, a balance should appear to be due from the vendee, he should be decreed to pay it; if in his favour, it should be decreed to him, and if there be no sufficient personal estate of the vendor to pay the same, the land should be subjected to its payment. 4. That each party should pay his own costs, except as to taking the accounts, the costs of which should be equally divided between the parties.

This was an appeal from a decree of the superior court of chancery formerly holden in the town of Staunton. The facts of the case, so far as they are material to the questions decided by the court of appeals, were stated by CABELL, P., at the time of delivering his opinion, to be as follows:

On the 10th day of October in the year 1818, Ralph A. Lofftus and Daniel Bryan entered into articles of agreement under their hands and seals, by which Lofftus sold to Bryan a tract of land containing 370 acres more or less, lying on Middle river in Augusta county, at 40 dollars per acre, to be paid as follows, viz. 600 dollars in hand, (which was paid accordingly); 1200 dollars on the 28th of December then next ensuing, with interest from the date of the contract; 1200 dollars on the 28th of March 1819, with interest as aforesaid; 750 dollars on the 28th of March 1820; 750 dollars in nine months thereafter; and the residue in equal annual instalments of 750 dollars from the date of the payment last mentioned, until the whole purchase money *should be paid; for

14 which payments Bryan was to give bonds and satisfactory security: and Lofftus bound himself to make Bryan a good and sufficient deed in fee simple with general warranty for the land, at the first Augusta court after the payment in 1819. Bryan received possession immediately. He paid the instalment which fell due on the 28th of December 1818. On the 25th of March 1819, he paid 1200 dollars towards the instalment which was to become due on the 28th of that month; and he paid the residue thereof on the 9th of December 1819. Lofftus therefore became bound to make a deed for the land, at least as early as the first Augusta court after the 9th of December 1819. No deed was made. Bryan notwithstanding paid to Lofftus the instalment which fell due on the 28th of March 1820. Lofftus died insolvent about the 10th of April of that year, without having made any conveyance of the land, leaving as his heirs six adult brothers and sisters, and two infant children of a deceased brother. Shortly after the death of Lofftus, Bryan made known his determination to make no farther payments until he should get a title to the land. On the 23d of June 1821, fourteen months after the death of Lofftus, a deed was prepared, purporting to be a deed from the six adult heirs of Lofftus, conveying the land to Bryan. This deed was acknowledged before justices of the peace, by some of the heirs in the year 1821, by one of them in the year 1822, and by another in the year 1823; but it was not acknowledged by Nathan Lofftus, another of the heirs, until the 20th of August 1828;

nor was it ever acknowledged by John Lofftus, another of the heirs, or proved as to him, nor is his name signed to the deed. The infant heirs, of course, were not parties to it. It does not appear that this deed was ever delivered or offered to Bryan; nor was it delivered to the clerk of Augusta to be recorded, until the 25th of August 1828, the very day on which the decree in this

15 cause was *pronounced. A deed from John Lofftus and wife to Bryan appears to have been executed on the 23d of August 1828.

Ralph A. Lofftus had purchased the land in controversy from Henderson and Robertson, who had previously conveyed the same to certain trustees to secure a debt due to Donaghe. The legal title to the land was in those trustees; and although Lofftus, in virtue of his contract with Henderson and Robertson, might be regarded in a court of equity as assignee of the equity of redemption in the land, still he had received no conveyance for that, any more than for the legal title. He therefore was never, at any time of his life, in a condition to comply with his obligation to Bryan, to make him "a good and sufficient deed" for the land; and it is apparent from the bill, and from the decree itself, that his heirs were not, even at the date of the decree, in a situation to comply with that stipulation in the contract of their ancestor.

This suit was brought, on the 10th of September 1821, by the administrators of Lofftus against Bryan and the heirs of Lofftus, to compel a specific execution of the contract between Lofftus and Bryan. But as it was apparent that the administrators and heirs of Lofftus combined were not in a situation to do that which was indispensably necessary to compel a performance on the part of Bryan, Henderson and Robertson and the trustees and executor of Donaghe were made parties, in order to supply the defect, and to enable that to be done which Lofftus had bound himself to do as far back, at least, as the early part of the year 1820.

Bryan in his answer, sworn to in May 1825, and probably filed soon after, resisted the prayer of the bill, on the ground that, under the circumstances of the case, equity required a rescission, and not an execution of the contract.

16 *The default of the heirs of Lofftus continued at least three years longer, admitting (which was a point in controversy) that a good title could have been made at the time of the decree. Between the time when Bryan ought to have received a conveyance, and the time when he filed his answer, there was a considerable fall in the value of the land, and at the time of the decree it had fallen in value more than 50 per cent. Bryan still retained possession.

Such deeds being executed as in the opinion of the chancellor were proper, he made a decree compelling Bryan to an execution of the contract.

On his petition, an appeal was allowed.

The cause was elaborately argued in this

court, by Grattan and Leigh, for the appellant, and C. Johnson, for the appellees.

CABELL, P. Every application for the specific execution of a contract is addressed to the sound discretion of the court, and the result of the application will always depend upon the particular circumstances of the case; for he who asks equity must do equity; and the prayer will always be denied, when to grant it would be inequitable towards those against whom the prayer is made. I would refer to the opinion of chief justice Marshall in *Garnet &c. v. Macon & al.* reported in 6 Call 308, and in 2 Brock. Rep. 185, for an able review of the cases, and a satisfactory exposition of the law upon this subject. In that case, the specific execution was refused under circumstances much weaker than those which exist in this case. The contract of sale in that case, as in this, was made in the year 1818. In that case, the vendor had the full legal and equitable title to the land, and the only objection on the part of the vendee was, that the land

might be subject to an old debt due to one Campbell, and for which one of *the former owners of the land was surety. The suit was brought in December 1818, and was heard in the year 1825. The chief justice was very doubtful whether the debt to Campbell was in fact a charge upon the land; yet as that claim was a cloud lowering over the title, which could not be dissipated but by the decree of a court of equity, and as, before such a decree was attainable, the value of the land had greatly changed, that circumstances created, in his opinion, a strong objection to a specific performance; and on that ground, and that only, he dismissed the bill. In our case, the objection is much stronger. It is not a mere cloud lowering over the title, that is complained of, but the total absence of any sort of title in Lofftus or his heirs, for more than eight years from the time when he had bound himself to make the title; during which time the land had fallen in value more than 50 per cent.

It is said that Bryan ought to have made known, at an earlier period, his desire to rescind the contract. The fact is, that he seems to have been willing to proceed with the contract, up to the time of Lofftus's death; for he paid an additional instalment after the time when he ought to have received a conveyance, notwithstanding he must have seen that his contract was a disadvantageous one; for it is well known that there was a considerable fall in the value of property between October 1818 and March 1820. It was, however, not so distinctly marked as it was afterwards. It was not for the heirs of Lofftus, who had always been in default, and who were never in a situation to comply with the contract of their ancestor, to object to the conduct of Bryan in not demanding a rescission of the contract. Although Bryan might, at an earlier period, have objected to going on with the contract, it was not too late for him to do so in 1825; the default of Lofftus's heirs still continuing. That default continued three years longer,

even if it were admitted that with the aid of the court *they were then able to make a good title. And that default, even if we could overlook what had occurred before, would be sufficient to bar their claim to specific execution.

It is said that Bryan, to entitle himself to a rescission of the contract, ought to have surrendered possession of the land. If that be true in general, I cannot think it was so in this case. He had paid nearly 4000 dollars of the purchase money, for the recovery of which he had no hope, Lofftus having died insolvent. I think he was therefore right in retaining the possession.

The view which I have thus taken of this case, renders it unnecessary to pronounce any opinion as to the sufficiency of the deeds made by the heirs of Lofftus, or to decide the question whether an unwilling vendee can be compelled, in any case, to accept a deed from the heirs of a vendor, who had contracted that he himself would make a deed with general warranty, but had failed to make it according to the contract, and then died, being still in default at the time of his death. For, conceding to the appellees all that they have contended for as to the sufficiency of those deeds; nay, admitting that Lofftus himself had been alive at the date of the decree, and had then been in a situation to make precisely such a deed as he had contracted to make, I should still be of opinion that his long continued default, and the change of circumstances which had occurred during its continuance, would be a sufficient objection to a specific performance of the contract.

I am therefore of opinion that the court of chancery erred in compelling Bryan to an execution of the contract. He should, however, be compelled to deliver up the land to the heirs of Lofftus, to account for its rents and profits during the time he held it, and to release all his rights under the contract with Lofftus and the deeds in the record contained; but he is entitled to a return of the purchase money paid by him, with

interest from *the time he paid it, and also to have the value of any permanent improvements which he may have put upon the land set off against the rents and profits, provided they do not exceed the amount of the said rents and profits. These matters should be referred to a commissioner, with directions to state an account between the parties on these principles. If, on the return of the report, it should appear that a balance is due from Bryan, he should be decreed to pay it; if in his favour, it should be decreed to him, and if there be no sufficient personal estate of Lofftus to pay the same, the land should be subjected to its payment: each party to pay his own costs, except as to taking the accounts, the costs of which should be equally divided between the parties.

Both decrees are therefore to be reversed with costs, and the cause remanded, to be proceeded in to a final decree, according to the principles now declared.

The other judges concurring, a decree was entered in the following terms:

"The court is of opinion that the chancery court erred in compelling the appellant to an execution of the contract with Lofftus, in the proceedings contained. He however should be compelled to deliver up the land to the heirs of Lofftus and to account for its rents and profits during the time he held it, and to release all his rights under the contract with Lofftus and the deeds in the record contained; but he is entitled to a return of the purchase money paid by him, with interest from the time he paid it, and also to have the value of any permanent improvements which he may have put upon the land set off against the rents and profits, provided they do not exceed the amount of the said rents and profits. These matters should be referred to a commissioner, with directions to state an account, between the parties on these principles. If, on the return of the report, it should appear that a balance is due

20 from the appellant, *he should be decreed to pay it; if in his favour, it should be decreed to him, and if there be no sufficient personal estate of Lofftus to pay the same, the land should be subjected to its payment: each party to pay his own costs, except as to taking the accounts, the costs of which should be equally divided between the parties. Therefore, decree reversed with costs, and cause remanded to circuit court of Augusta, to be finally proceeded in pursuant to the principles of the foregoing opinion and decree."

Cocke's Adm'r v. Gilpin.

May, 1842, Richmond.

(Absent STANARD,* J.)

Decree—Interlocutory.†—Question whether a decree was final or interlocutory. *Per* BALDWIN, J. Where the further action of the court in the cause is necessary to give completely the relief contemplated by the court, there the decree upon which the question arises is to be regarded not as final, but interlocutory.

*He had been counsel for the appellee.

†**Decree—Interlocutory—Final.**—The principal case is cited in *McKinney v. Kirk*, 9 W. Va. 29; *Camden v. Haymond*, 9 W. Va. 687, 689; *Gillespie v. Bailey*, 12 W. Va. 81; *Butler v. Butler*, 8 W. Va. 678; *Haymond v. Camden*, 22 W. Va. 188; *Manion v. Fahy*, 11 W. Va. 498; *Pumphry v. Brown*, 8 W. Va. 10; *Core v. Strickler*, 24 W. Va. 698; *Hinchman v. Ballard*, 7 W. Va. 187; *Williamson v. Jones*, 39 W. Va. 262, 19 S. E. Rep. 444; *Fowler v. Lewis*, 36 W. Va. 180, 14 S. E. Rep. 488; *Shirey v. Musgrave*, 29 W. Va. 141, 148, 11 S. E. Rep. 618; *Morgan v. Ohio River R. Co.*, 39 W. Va. 20, 19 S. E. Rep. 589; *Deaton v. Mitchell*, 45 W. Va. 671, 31 S. E. Rep. 988; *Sims v. Sims*, 94 Va. 581, 27 S. E. Rep. 436; *Spilman, Adams & Co. v. Gilpin*, 98 Va. 702, 25 S. E. Rep. 1004; *Dellinger v. Foltz*, 98 Va. 783, 25 S. E. Rep. 998; *Series v. Cromer*, 88 Va. 429, 18 S. E. Rep. 859; *Jameson v. Jameson*, 86 Va. 54, 9 S. E. Rep. 480; *Noel v. Noel*, 86 Va. 112, 9 S. E. Rep. 584; *Yates v. Wilson*, 86 Va. 627, 10 S. E. Rep. 976; *Miller v. Cook*, 77 Va. 817; *Rawlings v. Rawlings*, 76 Va. 83, 87; *Ryan v. McLeod*, 33 Gratt. 377; *Summers v. Darne*, 31

Same—Decree for Sale—Case Disapproved.‡—The opinion of the Supreme court of the United States in *Ray v. Law*, 3 Cranch 179, that a decree for a sale under a mortgage is a final decree, disapproved.

Same—Interlocutory—Review on Appeal—Case at Bar.

—In a suit by one partner against his copartner, for a settlement of the partnership accounts, and for a moiety of a tract of land purchased by the defendant in his own name, and paid for out of the partnership funds, a decree having been made declaring the land partnership property, and directing a settlement of the accounts, and the cause afterwards coming on to be further heard upon the report of the commissioner, the court decrees that the plaintiff pay to the defendant a sum of money appearing due by the report, and that the defendant thereupon convey to the plaintiff a moiety of the land; but if the plaintiff shall not, within six months from the date of the decree, pay the said money, that the marshal sell the moiety of the land, and out of the proceeds

21 *of sale, after defraying the expenses, pay to the defendant the money so decreed, and the residue, if any, to the plaintiff. And the court further decrees that the outstanding debts due to the firm be equally divided between the parties, and that the costs of the suit be equally borne by them. **HOLD**, this decree is interlocutory, and it may be reviewed upon an appeal, although there has been such lapse of time between the rendition of the decree and the appeal, as would preclude its being reviewed if the decree were final.

Gratt. 308; Ambrouse v. Keller, 22 Gratt. 774; *Fleming v. Bolling*, 8 Gratt. 298; *Kendrick v. Whitney*, 38 Gratt. 651; *Sexton v. Patterson*, 1 Va. Dec. 554; 1 Va. Law Reg. 36.

See *foot-notes* to *Fleming v. Bolling*, 8 Gratt. 292; *Vanmeter v. Vanmeters*, 8 Gratt. 148; *Rogers v. Strother*, 27 Gratt. 417; *Ryan v. McLeod*, 32 Gratt. 367.

See generally, monographic note on "Decrees" appended to *Evans v. Spurgin*, 11 Gratt. 615.

‡**Same—Same—Costs.**—The principal case is cited in *Noel v. Noel*, 86 Va. 109, 114, 9 S. E. Rep. 584, to the point that every decree that leaves anything to be done by the court is interlocutory as between the parties remaining in court, even though it disposes of the costs.

§**Same—Distinction between Action of Court "In" the Cause and "Beyond" the Cause.**—In *Crislip v. Cain*, 19 W. Va. 458, it is said: "There is a distinction between the action of the court *in* the cause, which the court has no right to take, unless all the parties are before it, and the action of the court *beyond* the cause. If any of the parties to the suit have died, the cause must be revived, before the court can take any action *in* the cause. By action of the court *beyond* the cause I mean those measures which are necessary for the execution of a decree, which has been pronounced, and which are properly to be regarded as adopted not *in* but *beyond* the cause as founded on the decree itself without respect to the relief, to which the party was primarily entitled upon the merits of the case. This kind of action *beyond* the cause may be had either before a final decree, as in this case, or after a final decree. This distinction is pointed out by JUDGE BALDWIN in the case of *Cocke v. Gilpin*, 1 Rob. 28, and has been recognized as a correct distinction by this court heretofore."

The principal case is cited on this point in *Series v. Cromer*, 88 Va. 429, 18 S. E. Rep. 859; *Noel v. Noel*, 86 Va. 112, 9 S. E. Rep. 584; *Yates v. Wilson*, 86 Va.

Appellate Jurisdiction—What May Be Reviewed by Appellate Court.—The land having been sold under the said interlocutory decree, and purchased by the defendant at a sacrifice; and then, after process of *scire facias* at the instance of the defendant to revive in the name of the plaintiff's administrator and heirs, and after taking an account of the administration, a final decree being rendered against the administrator personally, for so much of the money decreed to the defendant as was not satisfied by the sale of the land; and upon an appeal by the administrator, the court being of opinion that the interlocutory decree was for too large an amount, and therefore erroneous: **Held**, 1. That the sale of the land under the interlocutory decree, which had never been confirmed, ought to be set aside on the appeal by the administrator, although the heirs (who were infants) had not joined in the appeal. 2. That the revival of the suit as to the administrator, if regularly made, could only authorize a decree against him *de bonis testatoris*, and not a decree against him personally; for, if sought to be charged on the ground that he had wasted or failed to account for, or had in his hands, assets of the testator, he ought to have an

627, 10 S. E. Rep. 976; *Barker v. Jenkins*, 84 Va. 899, 6 S. E. Rep. 459; *Fowler v. Lewis*, 36 W. Va. 130, 14 S. E. Rep. 453.

Judicial Sales—When Absolute.—It is well settled that a sale by a commissioner under a decree in a court of equity is not an absolute sale, until it is confirmed by the court, and until this has been done, the purchaser has no fixed interest in the subject of the sale. *Childs v. Hurd*, 25 W. Va. 533, citing *Hartley v. Hoffe*, 13 W. Va. 401; *Cocke v. Gilpin*, 1 Rob. 39; *Crews v. Pendleton*, 1 Leigh 297; *Heywood v. Covington*, 4 Leigh 573; *Taylor v. Cooper*, 10 Leigh 317, and *Hudgins v. Marchant & Co.*, 28 Gratt. 177. The principal case is cited in *Kable v. Mitchell*, 9 W. Va. 515. See foot-note to *Hudgins v. Marchant & Co.*, 28 Gratt. 177, and monographic note on "Judicial Sales" appended to *Walker v. Page*, 21 Gratt. 689.

Same—Summoning Purchaser—Hearing Evidence.—In *Estill v. McClintic*, 11 W. Va. 424, the court said: "The purchasers at such sales, or their representatives, should be summoned to answer these petitions; all the evidence bearing on the justice or propriety of the sales should be heard, including evidence as to the value of said lands when sold, and what improvements on them had been made by the purchasers, and what taxes paid by them, as also what rents and profits had been received from them; and the court should then, with all the facts and parties before it, do justice by setting aside the sales on such terms as are right, or by refusing to set them aside. This was the course pursued in *Londons v. Echols*, 17 Gratt. 15; *Hughes v. Johnston*, 12 Gratt. 479. See also, as indicating that this is the proper course to be pursued: *Pierce v. Trigg*, 10 Leigh 408; *Parker v. McCoy*, 10 Gratt. 594; and also the cases: *Bank of the United States v. Ritchie*, 8 Pet. 128; *Coger v. Coger*, 2 Dana 270; *McKee v. Hammon*, 9 Dana 520; *Parker v. Anderson*, 5 Mon. 445. In *Huston v. Cantrill*, 11 Leigh 136; *Cocke v. Gilpin*, 1 Rob. 26; and *Buchanan v. Clark*, 10 Gratt. 164, no supplemental proceedings were taken, because the purchasers were in those cases already parties in the causes."

The principal case is cited in this connection in *Dunfee v. Childs*, 45 W. Va. 165, 30 S. E. Rep. 106; *Londons v. Echols*, 17 Gratt. 19.

opportunity of being heard on that subject, in answer to a bill with proper averments. & That upon the filing of such a bill, a sale of the land ought to be suspended, until the result of a settlement of the administration accounts should shew whether that property could not be relieved by the application of the personal assets to any balance in favour of the defendant.

James Cocke, in April 1816, filed a bill in the superior court of chancery formerly holden in Richmond, against *Alban Gilpin* and *John F. Cocke*, setting forth, that in 1805 he entered into partnership with defendants, under the firm of *Gilpin, Cocke & company*; that *Gilpin* was the acting partner; that the business of the partnership has been discontinued; but that, while the partnership existed, *Gilpin*, with a part of the capital stock *or funds of the partnership, purchased about 1100 acres of land lying near *Russelville* in the county of *Logan* and state of *Kentucky*, and fraudulently took a deed for the land in his own name. The bill prayed an account of the capital stock and profits of the partnership, and a decree compelling *Gilpin* to convey to the plaintiff his share of the land, or, on a sale thereof, to account to the plaintiff for his share of the proceeds.

Gilpin answered, admitting the copartnership, referring for the terms thereof to certain articles filed with his answer, and stating that the partnership was carried on from the 4th of April 1805 until about the 2d of September 1807. The land, he stated, he had purchased on his individual account, and he claimed it as his own.

It was charged in the bill, and admitted in the answer of *John F. Cocke*, that he contributed none of the capital of the firm, and was entitled to no part of the profits. He disclaimed all interest in the land.

The accounts were referred to a commissioner, and *Gilpin* was ordered to produce before the commissioner the books and papers of the firm.

On the 11th of January 1819, commissioner *Amos Ladd* made a report, stating, that he was not then able to make such a report as would enable the court to make a final decree, but that, at the suggestion of the parties, he had made such a statement as would enable the court to decide upon the rights of the parties to the land.

The cause coming on to be heard upon this report the 23d of June 1819, the chancellor was satisfied that the tract of land, though purchased by and conveyed to *Gilpin* in his own name, was paid for out of the funds of the copartnership. *Gilpin* was therefore held a trustee of the land for the benefit of the partnership, and it was declared that the said land, and the profits which had accrued therefrom, should be brought into the general account of the partnership property, for the common benefit of both partners

as tenants in common, in *like manner as if the land had been purchased in the name of the firm. The report was thereupon recommended to the commissioner.

The commissioner made another report the

28th of January 1820. This report was recommitted the 4th of February 1822, and another report made the 4th of March 1823.

The plaintiff excepted, because there was no account of the outstanding debts and credits of the partnership.

The cause came on to be further heard on the 26th of March 1825, when a supplemental report was made, and a decree entered according thereto. This decree was in the following terms:

"This cause came on this day to be further heard on the papers formerly read, and the report of commissioner Amos Ladd, made in pursuance of the decretal order of the 4th day of February 1822, with an exception thereto by the plaintiff, and was argued by counsel: on consideration whereof, and of the supplemental report of the 26th day of March 1825 now filed, the court, overruling the said exception and approving and confirming the said supplemental report, doth adjudge, order and decree that the plaintiff pay to the defendant Gilpin the sum of 5701 dollars 39 cents, with legal interest on 3361 dollars 70 cents, part thereof, from the 31st day of December 1822 until paid, and that the defendant Gilpin thereupon convey to the plaintiff Cocke one equal moiety of the Kentucky lands in the proceedings mentioned, by deed of bargain and sale with special warranty; but if the plaintiff shall not, within six months from the date hereof, pay to the defendant Gilpin the said sum of money and interest, the marshal of this court, after having advertised the time and place of sale for six weeks in some one of the newspapers published in the city of Richmond, do expose to sale at public auction to the highest bidder, for cash, one equal

24 but *undivided moiety of the said Kentucky land, and out of the proceeds of sale, after defraying the expenses attending the same, do pay to the defendant Gilpin the sum of money with the interest aforesaid, and the residue, if any, pay to the plaintiff. And the court doth further adjudge, order and decree that the outstanding debts due to the late concern of Gilpin, Cocke & co. be equally divided between the plaintiff and the defendant Alban Gilpin. And it being very probable that the apparent balance due from the said concern of Gilpin, Cocke & co. is not a real balance, the court doth adjudge, order and decree that the costs of this suit be equally borne by the parties.

After this, process of revivor was issued at the instance of the defendant, against Armistead A. Green administrator with the will annexed of James Cocke, and also against Cocke's widow and heirs. The process was returned with an affidavit of service as to the widow and each of the heirs. The heirs being infants, the marshal was assigned guardian for them, to shew cause why the suit should not be revived. The record contained no return or affidavit of service on Green; but there was an entry that the scire facias awarded in the cause being returned executed on the defendants therein named, and no cause being shewn to the contrary,

the court ordered that the suit be proceeded in to a final decree accordingly.

The marshal of the court reported, on the 1st of June 1826, that after having advertised the time and place of sale as directed by the decree, he exposed to sale at the front door of the Eagle hotel in the city of Richmond, at public auction to the highest bidder, for cash, one equal but undivided moiety of 1133½ acres of land in Logan county, Kentucky, when Alban Gilpin, being the highest bidder, became the purchaser thereof at 12½ cents per acre; to wit, for 566½ acres, equal to 70 dollars 81 cents. This was a very small

proportion of the price paid for the land 25 when Gilpin bought it. *On the 19th of January 1827, the court ordered Green to render an account of his administration of Cocke's estate, and an account of all the assets of the estate, and of the debts due from the estate.

Under this order, commissioner Baker made a report on the 13th of October 1827, which was recommitted on the 9th of January 1828, and another report made the 9th of June 1828. Afterwards the following decree was entered on the 25th of March 1829:

"This cause came on this day to be further and finally heard on the papers formerly read, and the report of commissioner Baker of the 9th of June 1828, made in pursuance of the order of the 9th of January in the same year, and to which there was no exception, and was argued by counsel: on consideration whereof, as it appears by the last mentioned report, and the report of the same commissioner on the 13th of October 1827, to which there was also no exception, that legal assets have come to the hands of Armistead A. Green administrator as aforesaid, more than sufficient to pay the sum of 5641 dollars 16 cents, with legal interest on 3061 dollars 71 cents, part thereof, from the 31st day of December 1822 until paid, that being the sum due to the defendant Gilpin after crediting the net proceeds of the sale of the land mentioned in the marshal's report of sale of the 1st of June 1826, and the defendant's costs in this suit; the court doth therefore adjudge, order and decree that the plaintiff Armistead A. Green do, out of the estate of the testator in his hands to be administered, if so much thereof he hath, but if not, then out of his own estate, pay to the defendant Alban Gilpin the said sum of 5641 dollars 16 cents, with interest after the rate of six per centum per annum from the 31st day of December 1822 until paid, and his costs by him about his defence in this behalf expended."

A writ of fieri facias having issued upon this decree, Green gave a forthcoming 26 bond with sureties, which was *forfeited, and then there was a decree awarding execution thereupon.

Green, as administrator with the will annexed of Cocke, presented a petition praying an appeal from the various decrees before mentioned, and the appeal was allowed.

The cause was argued by Rhodes and C. Johnson for the appellant, and by Robert G. Scott and Patton for the appellee. The

argument was chiefly upon the question whether the decree of the 26th of March 1825 was final or interlocutory; but it also embraced the merits of the controversy. That the argument was elaborate, may be inferred from the elaborate opinions of the judges.

BALDWIN, J. It is necessary in the first place to consider whether the decree of March 1825 was final or interlocutory; for if final, we cannot enquire into its merits, more than three years having elapsed from the time of its rendition prior to the appeal, by which, under the law then existing, the right of appeal was barred: and it follows, in that view of the case, that the proceedings subsequent to that decree (which treated it as interlocutory), including the decree of March 1829 and the decree on the forthcoming bond, were erroneous and must be reversed. On the other hand, if the decree of 1825 was interlocutory, we must examine its merits, as also those of the subsequent proceedings.

A decree is final, when it either refuses or grants the redress sought by the party complaining. The plaintiff being the party who ordinarily seeks relief, the refusal of the court to allow it is usually accomplished by dismissing the bill. That of course terminates the cause, and sends the parties out of court. On the other hand, the case is also terminated by the granting of the whole relief contemplated by the court. In regard

27 to that result, there can be no summary form by which it is to be *accomplished; and we must look to the nature of the relief granted, in order to ascertain whether it is the final action of the court. Hence the difficulty which sometimes occurs in ascertaining whether a decree is final or interlocutory. An interlocutory decree may be merely preparatory to a decision upon the merits, by directing an enquiry necessary to the elucidation thereof, as for example the ordering of an issue; or it may go further, and deciding the principles as then presented by the record, institute proceedings for the purpose of enabling the court thereafter to apply those principles to the details of the subject, as for example directing an account; or it may approach still more nearly to the nature of a final decree, by granting relief in part, and suspending the action of the court as to the residue for further investigation, or by directing measures for entire relief to a certain extent, with a view to perfecting them thereafter, upon the supposition of contingencies or emergencies which cannot be well provided for by anticipation; which last case may be illustrated by an order for the sale of property, without direction as to the application of the proceeds. And so, by various gradations, the interlocutory decree may be made to approximate the final determination, until the line of discrimination becomes too faint to be readily perceived. Thus it becomes necessary to resort to some criterion by which the distinction between the two kinds of decree may be preserved: and I regard it as comparatively of

but little importance what that criterion is, provided it be uniform, and capable of a certain application; for so soon as it becomes established, the courts of original cognizance, and the parties to the controversy, by conforming to the rule, will avoid the greatest inconvenience which can occur,—that of uncertainty whether further judicial action is to be had in the inferior or the appellate tribunal. For my own part, I am aware of

no proper criterion but this: Where the further action *of the court in the cause is necessary to give completely the relief contemplated by the court, there the decree upon which the question arises is to be regarded not as final, but interlocutory. I say the further action of the court in the cause, to distinguish it from that action of the court which is common to both final and interlocutory decrees, to wit, those measures which are necessary for the execution of a decree that has been pronounced, and which are properly to be regarded as adopted, not in, but beyond the cause, and as founded on the decree itself or mandate of the court, without respect to the relief to which the party was previously entitled upon the merits of his case. Any other criterion than this seems to me liable to the objection of ambiguity or uncertainty.

To apply this criterion to the present case: The court treated the defendant Gilpin as standing in the attitude of plaintiff, and decreed to him against his adversary Cocke the balance found in his favour, and that in the event of nonpayment, Cocke's moiety of the Kentucky land should be sold for satisfaction thereof. Now, the relief in part contemplated by the court clearly was, that Cocke's interest in the land should be sold without unnecessary sacrifice, which was the obvious interest of both parties, as it could not be foreseen that Gilpin was to become the purchaser. But how could this object be accomplished, unless by the adoption of means to give to the purchaser at the sale the title which had been acquired by the parties? It could not have been contemplated by the court that the land should be sacrificed, by withholding the title from the purchaser, and giving the bidders to understand, not only that the officer authorized to sell was without authority to convey, but that the court had disrobed itself of the power to cause a conveyance to be thereafter made. Such was the inevitable result of regarding the decree for sale as the final action of the court; for it gave no authority to

29 the *marshal to convey to the purchaser the title vested in the parties, and there being no title in the marshal, a deed from him would have been a mere nullity. Whereas, upon the supposition that the decree was interlocutory, the omission to direct a conveyance by the marshal was wholly unimportant, as the purchaser would buy under the confident expectation that the court would, at the accustomed period, exercise its unquestionable power of conferring upon him a title to the property. Thus it will be seen that the further action of the court in the cause was necessary to give completely the relief which

it contemplated: and we cannot suppose that the court intended to withhold the title from the purchaser, without subjecting it to the imputation of designing a sacrifice of the property.

The structure of the decree, it is true, in some of its parts, would seem to indicate at first view that the court supposed it to be final. Thus the balance due to Gilpin is directed to be paid to him by the marshal out of the proceeds of the sale, and the residue, if any, to be paid to the plaintiff; there is no direction to the marshal to report his proceedings to the court; and the costs of the suit are disposed of, by awarding them to be equally borne by the parties. But none of these circumstances, in my opinion, gave finality to the decree. Whatever may be thought of the expediency of disposing of the proceeds before a confirmation of the sale, it is certain that it would not deprive the court of its power to set aside the sale for irregularity or fraud; though it might occasion obstacles to replacing the parties in their previous condition. So the omission to require the officer to report his proceedings is a mere informality, as an order of that kind must be regarded as merely directory, if it be the accustomed duty of such a commissioner to inform the court of what he has done under its authority, as I think there can be no doubt it is. And as to the disposal of the costs, that is a matter (as concerns this question) altogether equivocal; for the court

30 has undoubtedly *the power to dispose of the costs which have accrued, from time to time, at any stage of the cause, or not to dispose of them at all, according to its discretion. These circumstances, therefore, can only tend to raise a probability that the court may have supposed the effect of its decree would be final instead of interlocutory; and even in that point of view can have no weight, if the substantial purpose and scope of the decree was, as I think I have shewn, of an interlocutory character. Such a supposition of the court would be a speculative inference from the provisions of the decree, unnecessary in the discharge of its duty, and in no wise obligatory upon its future conduct; in truth, an abstract opinion merely, which it was at liberty to disregard, and has in fact (if ever entertained) disregarded, in its subsequent action upon the subject.

It is obvious that the whole apparent difficulty upon this question has arisen from the omission in the decree, of a direction to the marshal to report his proceedings to the court. If that had been done, I presume no one would have questioned the interlocutory character of the decree. And yet nothing is clearer to my mind than that such a direction in a decree would not make it interlocutory, if it gave final relief by its provisions; and so, on the other hand, that the omission of such a direction would not make a decree final, if by its provisions the relief was interlocutory. Such an omission is not an error of judgment in the court, requiring the correction of an appellate tribunal, but is rather in the nature of a clerical misprision, which the court may at any time thereafter correct, and

which in fact it does correct by its subsequent treatment of the decree as interlocutory.

I can perceive no inconvenience whatever from my interpretation of the decree in question. It certainly cannot operate so as to defeat the justice of this case; but on the contrary must have the effect of promoting it, if the decree be erroneous upon its 31 merits. To *that desirable object, it is true, I would not sacrifice principles important and salutary in the general administration of justice; but the attainment of it can furnish no argument against the exercise of the appellate jurisdiction of this tribunal. The uniform establishment of the criterion to which I have resorted, can, in my estimation, be productive of none but beneficial results. The effect of discarding it would often times be to fix upon the inferior court an error by implication, and to occasion uncertainty as to the proper forum for obtaining redress. On the other hand, what harm can be done by extending to the court of original cognizance the indulgent belief, that it did not wilfully turn aside from the safe and beaten path of equitable administration, for the purpose of delegating an arbitrary and unrestrained judicial authority to a merely ministerial officer? Where can be the mischief or inconvenience, whenever the judicial action of the court itself in the cause has not been perfected, of permitting it to control the ministration of its servants, and even to turn back and correct its own errors of omission and commission, instead of driving the parties into an appellate forum? I admit the wisdom and obligation of the legislative policy which inhibits the re-examination of an adjudicated cause after the lapse of the prescribed period. But the policy and duty of preventing such re-examination in the appellate tribunal, before the final adjudication of the inferior jurisdiction, are equally apparent, save only in those cases, founded on peculiar reasons, which have been made exceptions by legislative enactment. Nor do I perceive the expediency of attempting to guard against injurious delays in the judicial action of the primary forum, after the merits of the cause have been there settled, by the necessity of encountering equal if not greater, and, it may be, repeated delays in the supervising tribunal.

32 *On this subject, but little light is to be obtained from the practice and decisions of the english chancery. There they have no practical distinction between interlocutory and final decrees, as regards the right of appeal. That right is not, as with us, regulated by statute, and from the time of its first introduction has existed as well in relation to interlocutory as to final decrees. It is somewhat remarkable that a misapprehension of that matter should have prevailed so extensively amongst us, as the english books of practice are quite explicit in regard to it: see 1 Harr. Ch. 454, 457, 2 Smith's Ch. Pract. 40. Seaton's Forms 3,—from which it is clear that an appeal lies to the house of lords from any interlocutory order. The right of appeal, according to the

english practice, does not depend upon the stage at which the cause has arrived, but upon an arbitrary regulation, equally applicable to interlocutory and final decrees, to wit, the enrolment of the decree or order. The enrolment is at the instance of a party, by a docket prepared from proceedings, papers and pleadings in the cause, which is examined and signed by the sixclerk, and left with the secretary of decrees for the signature of the lord chancellor, by which it is completed. 2 Smith's Ch. Pract. 4. Prior to enrolment, an order or decree, however final in its character, may be corrected or varied, on a petition for rehearing before the same judge, or of appeal to the lord chancellor, which is regarded as a rehearing and governed by the same rules. After enrolment there can be no rehearing of a decree or order, whatever may be its character; and the only appeal is to the house of lords. The enrolment may be made as soon as it can be prepared, but six months are allowed for it, and after that an order may be obtained from the lord chancellor, *nunc pro tunc*. It is not prevented by the death of a party, or abatement of the suit. If a party wishes to prevent a decree or order from being *re-

33 heard before the judge who pronounced it, or an appeal to the lord chancellor, he must enrol it; the effect of which is to make the decree or order of the vice-chancellor or the master of the rolls, that of the lord chancellor, and to deprive the latter of the power of rehearing, whether the decree or order be originally his own, or that of one of the other judges. But the enrolment may be prevented by a petition of rehearing, or appeal to the lord chancellor, or a caveat filed for the purpose of enabling a party so to proceed within a given time. On this subject see 2 Smith's Ch. Pract. 2, 3, 4, 14, 18, 27, 39, 426. 1 Harr. Ch. 439, 442, 481. The effect of an enrolment is the same in regard to a bill of review, whatever may be the character of the decree; so that if a party resorts to the same tribunal after enrolment, he must do it by bill of review, though the decree be merely interlocutory. 2 Madd. Ch. 454, 464. 2 Smith's Ch. Pract. 48, 49, 64. Thus it will be seen that though the enrolment does not depend upon the nature of the decree, yet it has the effect of giving it a decree of finality; and hence it is also resorted to by a party to give additional security to his title, to enable him to plead the decree against another suit for the same purpose, and to obtain the benefit of the limitation to an appeal by the standing order of the house of lords, which is computed from the enrolment, and not from the date of the decree. 2 Smith's Ch. Pract. 2, 3.

The practice of enrolment is unknown in Virginia, as are many other matters of practice in the multifarious and expensive system of the english chancery, requiring numerous officers, and calculated to promote accuracy and precision, and relieve the court from laborious details, by condensing and simplifying the questions submitted to its consideration. As we do not resort to the practice of enrolment, our course has been to look to the character of the decree, in reference to

34 rehearsals, *appeals, and bills of review. With us the right of appeal, from the foundation of the government, has been regulated by statute, and for a number of years was made to depend altogether upon the finality of the decree, in relation to appeals to the supreme court of appeals. Thus the acts of October 1778 and May 1779, establishing the court of appeals (9 Hen. stat. at large 523, 4, 10 Id. 90,) and the revised act of 1792, (13 Id. 406,) by their plain terms require the decree or decision of the court below to be final. The manifest meaning, *ex vi termini*, was that the cause should be terminated before its removal to the appellate jurisdiction; and the obvious policy was to prevent the delay and expense of unnecessary and reiterated appeals. Appeals were not allowed from interlocutory decrees to the court of appeals until January 1798, when, by an act of that date, a limited right of appeal from interlocutory decrees was introduced, which has been since continued under various modifications. 2 Rob. Prac. 421-5. But the right of appeal from final decrees still stands upon its original footing. 1 Rev. Code, ch. 66, § 50, 51, p. 206. Suppl. to Rev. Code, p. 146, 7.

The result of our legislative policy on this subject has been, that as a general rule, the jurisdiction of the supreme appellate tribunal does not begin until that of the inferior court has terminated; that an appeal properly allowed brings into discussion before the appellate court all the previous proceedings in the cause; and that pending an appeal, the further cognizance and proceedings of the court below are suspended in relation to any question involved in the cause, so far as its merits are concerned. In these respects we have departed from the rules of the english chancery. There, a decision of the chancellor which settles a principle, or gives relief to any extent, may be brought at once before the house of lords, if the decree or order has been enrolled: there the discussion

35 in the appellate forum is *confined to the decree or order appealed from, and cannot be extended to any previous proceeding, however much the justice of the case may require it, without a formal extension of the appeal, (2 Smith's Ch. Pract. 41. Bouchier v. Dillon, 5 Bligh 714): and there the appeal does not suspend proceedings upon the decree, without a special order, which is rarely granted. 2 Smith's Ch. Pract. 68, 69. Willan v. Willan, 16 Ves. 216. Walburn v. Ingilby, 1 Mylne & Keene 61, 6 Cond. Eng. Ch. Rep. 498.

It will be seen from an examination of the numerous decisions of this court on the subject of the finality of decrees, in reference to appeals, bills of review &c. that they have all been founded upon the idea, that a decree is not final unless the cause itself has been thereby terminated in the court below. Thus, though a decree decides upon the question of title, or otherwise settles the principles of the cause, *Young v. Skipwith*, 2 Wash. 300. *Grymes v. Pendleton*, 1 Call 54. *M'Call v. Peachy*, 1 Call 55. *Bowyer &c. v. Lewis*, 1 Hen & Munf. 553,—though it dismisses the

plaintiff's bill as to one of two separate subjects of controversy, and as to the other also determines the rights of the parties, *Templeman v. Steptoe*, 1 Munf. 339,—though a decree nisi directs that the tract of land in the bill mentioned be surveyed and part thereof allotted to the plaintiff, and that the defendant shall execute to him a conveyance for such part, and pay the costs of the suit, *Aldridge &c. v. Giles &c.*, 3 Hen. & Munf. 136,—though the decree directs the defendant to pay to the plaintiff hires to be ascertained by commissioners, and to deliver up the property, to be sold by the commissioners, and the proceeds applied to payment of the plaintiff's claim and the costs of suit, and the residue, if any, to be paid to the defendant, *Mackey v. Bell*, 2 Munf. 523,—though, at the suit of creditors against executors and devisees, it empowers the executors to sell such of the lands held by the devisees, 36 as, "after application of the testator's goods and credits, shall be necessary for the payment of his debts, *Goodwin v. Miller*, 2 Munf. 42,—though it awards to the plaintiff his principal money, interest and costs, if it directs, in the event of an unproductive execution, that certain trust property shall be delivered by the defendant to the marshal to be sold, and the proceeds, after deducting a sum to be deposited for another, to be applied to the satisfaction of the plaintiff, *Hill's ex'or v. Fox's adm'r*, 10 Leigh 587,—though, in a mortgage suit, it forecloses the mortgage and directs the sale of the property, *Fairfax v. Muse's ex'ors*, 2 Hen. & Munf. 558. *Ellzey v. Lane's ex'x*, Id. 592. *Allen v. Belches*, Id. 595,—yet in all these cases the decree is only interlocutory, if something yet remains to be done in the cause, and so the parties are not put out of court.

On the other hand, there is no case decided by this court, in which the decree has been held to be final where the judicial action of the court in the cause has not been exhausted. I do not mean that it is necessary the court by its decree should respond to all the questions in controversy, or to the whole relief prayed in the bill, its silence being often equally emphatic; but that this court has never held, where a given relief was contemplated, that the decree was final, if something remained to be done in the cause to render it effectual. The case of *Harvey & wife v. Branson*, 1 Leigh 108, has been strongly urged upon us by the appellee's counsel; but the principles of that case, in my opinion, are altogether different from those properly applicable to this. That case, and the case of *Borden v. Bowyer &c.* connected and determined with it, involved the distribution and appropriation of a fund arising out of the sales of detached fragments of what was originally an immense estate of unsettled lands, but the greater portion of which had been disposed of before the existence of the controversy. The suits were pending many years, *and the fund had accumulated under the management of an agent (appointed by the court and acting as commissioner and cura-

tor) from the proceeds of sales made by him from time to time, and accessions to it were to accrue indefinitely thereafter from like sales that he was to continue to make as opportunities should offer. The commissioner had ample powers to sell and convey by private contracts according to his discretion, and to loan out and secure the proceeds from time to time. Under these circumstances (which I derive not merely from the reported statement, but from my own recollection, having been counsel in the cause in the chancery court) the court undertook to dispose of the whole subject by a decree conformable to its views of the rights of the parties, and embracing not merely the moneys on hand, but also the increment thereafter from the future sales. That decree was substantially the ultimate judicial disposition of a continuing trust; and a final decree could not be made in the cause in any other mode than that adopted by the court. It gave the whole relief contemplated by the court, and no further action of the court in the cause was requisite. It distributed and appropriated not only the fund on hand, but all that was thereafter to accrue under the continued agency of the commissioner. If the commissioner performed his prescribed duties in good faith, the parties could sustain no prejudice from any want of authority on his part; and if he acted unfaithfully, he would be liable to the control of the court, in like manner as any other ministerial officer engaged in the execution of its decrees. It is true there were reservations in the decree, of leave to the parties, at any time thereafter, to apply to the court to supersede the commissioner, or to appoint any other commissioner or commissioners to act with or to succeed him, or to have the unsold lands divided amongst the parties according to their prescribed proportions. But those reservations for the more complete and 38 beneficial *execution of the decree, so far as they could be considered as transcending the incidental powers of the court, did not render the decree the less final, but were powers withdrawn from the cause and engrafted upon the decree, from which thenceforth they derived their whole force and efficacy. The case, it seems to me, is widely different from the one before us, which is rather that of the constitution of a new fund than the disposal of one then existing, and more like a decree for the sale of mortgaged premises without provision for conferring upon the purchaser at the sale directed the title to the property.

The other cases of decrees held by this court to be final require but little notice. Those of *Sheppard's ex'or v. Starke & wife*, 3 Munf. 29, and *Thorntons v. Fitzhugh*, 4 Leigh 209, turned upon reservations in the decree of a future resort to the court, which were decided not to affect their finality. That of *Royall's adm'rs v. Johnson, &c.*, 1 Rand. 421, presented the question whether a decree was final as to one defendant though interlocutory as to the rest; and it was, under the circumstances, decided in the affirmative. A similar question had arisen

in the case of *Alexander's heirs v. Coleman & wife*, 6 Munf. 328, in which the result of the opinions of a divided court was that the decree, under the circumstances, was interlocutory. These cases, though cited in the argument, have no bearing upon the present, except so far as the reasoning of the judges may be supposed to throw light upon the general subject.

It seems to me that the effect of treating such a decree as the one in question as final, is to impair the controlling power of the court of original cognizance over the execution of its own decree; for it is obvious that it would be nugatory for that court to set aside a sale under the decree, however great the sacrifice, because of an objection arising out of a defect in the decree itself, without at the same time correcting the decree,

39 *which cannot be done upon the supposition of its finality; though in such a case we have a right to suppose that the property was sacrificed, because the purchaser was not expected to obtain a conveyance of the title, or that injustice is done him by withholding the title after he has paid the value of the property. It cannot be doubted that a decree or order of the court at some stage of the cause is necessary to enable the purchaser to obtain the title; and if that decree or order be made subsequently to the sale, it is the final decree or order in the cause, and consequently the decree for sale interlocutory. It would derogate much from the power and dignity of that court, to treat the purchaser as having acquired a right to the property, and at the same time turn him round to a new suit for the purpose of obtaining a conveyance. In truth, however, the purchaser acquires no right until a confirmation of the sale by the court; and until the order confirming the report, he is only inchoately and not absolutely a purchaser, having till then no fixed interest in the subject. That such is the English doctrine is well settled: *Sugd. on Vend.* 50, 51, 52, 57. *Ex parte Minor*, 11 Ves. 559. *Twigg v. Fifield*, 13 Id. 517. *Anson v. Towgood*, 1 Jac. & Walk. 619. The same doctrine has been recognized by this court in several cases. *Crews v. Pendleton*, &c. 1 Leigh 297. *Heywood v. Covington's heirs*, 4 Id. 373. *Taylor v. Cooper*, 10 Id. 317, from the first of which it will be seen that before the confirmation of the report and conveyance of the title, the purchaser must resort to that tribunal in which the proceedings were had, for the adjustment and enforcement of his claims.

It has been suggested by one of the appellee's counsel, that in relation to mortgages this court has departed from the English doctrine, according to which he supposes the decree for foreclosure to be final, and that the English rule was followed by the supreme court of the United States, in the case 40 of *Ray v. Law*, 3 Cranch 179. *But upon consulting the authorities, it will be found that the English doctrine is directly the contrary; and it will be seen from the report of *Ray v. Law*, that it was decided without argument, and, it would seem, with-

out much consideration. The English rule is, that the final order to a decree of foreclosure is absolutely necessary to its perfection; so much so, that without its being obtained, a decree of foreclosure is not a good plea to a bill to redeem. 5 Bac. Abr. 733. *Coote on Mortg.* 527. *Senhouse v. Earl*, 2 Ves. 450. The length to which the rule has been carried appears from the case of *Thompson v. Grant*, 4 Madd. Ch. Rep. 438. There a question arose as to the effect of a decree of foreclosure in another cause. The decree had directed the master to take an account of principal, interest and costs, and that upon the defendant's payment thereof within six months after the making of the report, at such time and place as the master should appoint, the plaintiff should convey and reassign the mortgaged premises; but that in default of such payment by the time aforesaid, the defendant should thenceforth stand absolutely debarred and foreclosed of and from all right, title, interest and equity of redemption of and to the said mortgaged premises. The master reported the amount due to the plaintiff for principal, interest and costs, and appointed a day for payment thereof by the defendant to the plaintiff. Afterwards, on affidavit of nonpayment, a final order was made that the defendant should stand absolutely debarred and foreclosed of and from all right, title, interest and equity of redemption in and to the mortgaged premises. But the mortgagee, between the decree of foreclosure and the final order, made his will, by which he devised all lands which should be vested in him by mortgage at the time of his death, as part of his personal estate. He did not die until after the final order, and the question was whether the mortgaged premises passed by the devise; and it was held that they

41 *did not, the effect of the final order being to convert the mortgage chattel interest into a fee simple estate. Thus, notwithstanding the decree of foreclosure, the mortgage still remained a mortgage, and would have passed as such under the devise but for the intervention of the final order, which changed the character of the estate and took it out of the operative words of the devise, the foreclosure being completed by the final order, and the decree previously merely interlocutory and prospective. And upon this ground the cause was decided against the devisees, though there were other terms in the devise which would have embraced the estate, if after acquired lands could have passed by will.

If it should be supposed that purchasers under such a decree as the one we are considering would be liable to mischief by treating it as interlocutory instead of final, I would remark that the mischief, in my apprehension, lies the other way; for though the lapse of five years protects the decree, if final, from being reversed by appeal or bill of review, yet within that period it is infallibly liable to such reversal, because fatally erroneous from its very finality; and if so reversed, the purchaser's claim must, for the same reason, necessarily fall: whereas if

the decree be interlocutory, the purchaser has nothing to do but to obtain a confirmation of the report and a conveyance of the title, in which aspect there is no error nor irregularity in the proceeding, and he is then protected against all other irregularities in the cause, if the proper parties having title to the subject be before the court; the rule being, that a purchaser has a right to presume that the court has taken the steps necessary to investigate the rights of the parties, and on that investigation has properly decreed a sale. 2 Smith's Ch. Pract. 198. Bennet v. Harrell, 2 Sch. & Lef. 566. In fine, I cannot perceive the priority of construing a decree to be final, and thereby *rendering it erroneous, when the regarding it as interlocutory relieves it from the imputed error.

The foregoing views lead me to the conclusion that the decree of March 1825 was interlocutory.

Upon the merits, that decree is clearly erroneous. [The judge here pointed out the errors, but the correction of them involved no such general principle as would make a particular report thereof necessary, or indeed proper. After stating the nature and extent of each of the errors so pointed out, he proceeded as follows:]

For these errors the decree of 1825, and the final decree of 1829 of which it forms the basis, ought, in my opinion, to be reversed, and the sale made under the former of Cocke's moiety of the Kentucky land (which has never been confirmed) set aside, the property having been subjected for an improper amount, and purchased in by the appellee at a sacrifice. I cannot agree with appellee's counsel, that the infant heirs of Cocke not having appealed, the appellant has no right to complain of the improper sale of the land, on the ground that he has no interest in that matter. He has, as I conceive, an interest in it as the representative of his testator's personal estate, which being liable to make up, for satisfaction of the decree, any inadequacy of the proceeds of the sale, must be prejudiced by a sacrifice of the land. Another fatal error in the proceedings subsequent to the interlocutory decree is, that the appellant is personally subjected to the payment of the balance found against his testator, upon an account of his administration not warranted by the pleadings in the cause. The effect of a revival of the suit as to him, if it had been regularly made (though there seems to have been no order of revival against, nor process of revival executed upon him), would have been only to authorize a decree against him de bonis testatoris, for the balance ascertained against his testator,

and not a decree *against him personally on the ground that he had wasted or failed to account for, or had in his hands, assets of his testator, without giving him an opportunity of being heard on that subject, in answer to a bill with proper averments; and upon the filing of such a bill, a sale of the land ought to be suspended, until the result of a settlement of the admin-

istration accounts should shew whether that property could not be relieved by the application of the personal assets to any balance in favour of the defendant.

My opinion therefore is, that the decrees of 1825 and 1829, and all proceedings under them, should be reversed and annulled, and the cause remanded in order to be proceeded in according to the principles above indicated.

ALLEN, J., concurred.

BROOKE, J. There certainly is an important difference between an interlocutory and a final decree; it needs no ghost to tell us that: but what that difference is, is the question. I think a decree which settles all matters in controversy in the pleadings, and gives the costs, is a final decree. Any thing else which is necessary to execute the decree does not change its character: it may be necessary to come back to the court for its order, to perfect the execution of the decree, but that does not affect its finality. The case of Harvey & wife v. Branson, 1 Leigh 108, was a case in which a commissioner was appointed by the court to sell the unsold lands &c. and leave was reserved to the parties, at any time whatever, to apply to the court to supersede the appointment of the commissioner to make sale of the lands, or to appoint any other commissioner or commissioners to act with or succeed him, or to have the unsold lands divided among the parties: manifestly leaving much more to be done by the court in the execution of the *decree, than in the case before us.

In all cases, whether the decree be interlocutory or final, the parties have always a right to the aid of the court to carry its decree into effect, whether liberty to apply to the court be reserved or not, unless where the decree is regularly fulfilled in all its provisions. In the case cited I said, that I concurred in the opinion that the decree was final and conclusive as to all cases (for there were three) as well upon the former decisions of this court on like questions, as upon principle; that I considered the case of Shepherd v. Starke as in point; that the court there must have regarded the decree as final, else it could not have entertained the bill of review as regular and proper. As to the reservations in the decree, those and all similar reservations, in my view, were simply in execution of the decree. That case I think much stronger in the interlocutory features of it than the case before us; unless indeed, as seems to be supposed, errors in a decree make it interlocutory. If so, there are few decrees which come before this court, that are not interlocutory, though treated as final.

The great injury to the public in considering such decrees as the one before us to be interlocutory, consists in almost forbidding persons to purchase property under them, and in lessening the value of such property. The legislature has wisely limited appeals from final decrees to a shorter period than writs of error and supersedeas in the

perhaps in a single case, which will be hereafter noticed. Even in England, a decree for the sale of land is not regarded as final until the confirmation of the sale by the court; as is abundantly *shewn by the authorities which my brother Baldwin has referred to, and which I need not repeat. I am therefore of opinion that this part of the decree also (as to the sale of the land) is interlocutory.

Another part of the decree directs that the outstanding debts of the firm shall be divided between the parties to the concern. Can it be believed that the court intended this part of the decree to be final? The evidences of the debts, it is to be presumed, were in the hands of Gilpin; since he had been entrusted with their settlement and collection. Did the court mean to give to him, one of the parties interested, the same unlimited power as to the division of the debts, as has been claimed for the marshal in relation to the sale of the land? This can hardly be pretended. And if he was not to divide them, who was? Nobody is mentioned in the decree. This part of the decree, then, can only be regarded as an expression of opinion on the part of the court, as to what ought to be done with the outstanding debts; as a declaration or settlement of one of the principles of the case; leaving for adjudication, in some future stage of the cause, the manner in which that principle should be carried out.

It is apparent then, from every part of this decree, that the convenience and interest of the parties, and the very justice of the case, required the future action of the same court which pronounced it. Why should we deprive that court of the power of this necessary action, by pronouncing the decree final and not interlocutory? It is said that that court intended, by the decree which it pronounced, to make an end of the cause, and to put the parties out of court. If that was the intention of the court, we might be compelled to regard the decree as final. But where is the evidence of such intention? I think I may say confidently that no such intention is expressed. What are the circumstances from which it may be inferred? I am unable to perceive any

52 *thing in the decree which can serve as a ground for such inference, except the circumstances that costs are decreed, and that the court has failed to direct the marshal to report his proceedings. Now, as to the decreeing of costs, although that circumstance may be taken into consideration in aid of other matters, in determining the character of a decree, yet it is manifest that it is entitled to but little weight, and is very far from being conclusive. In the case of Hill's ex'or v. Fox's adm'r, the decree was held to be interlocutory, although the costs were decreed. So also in Mackey v. Bell, 2 Munf. 523, and probably in many others.

As to the failure to direct the marshal to report: Although the order to report would be conclusive evidence of an intention in the court to take future action in the case, yet it does not follow that the omission to make such an order is evidence of intention not to

proceed farther in the cause. The omission may have proceeded from mere inadvertence on the part of the court; or from the reflection that the marshal would be bound to report, although the decree contained no positive order. Look at the inconvenience which might result to the parties. The marshal may abuse the authority committed to him, and may make a sale which justice to all parties would imperiously require to be set aside. Yet if the decree be final, that measure of justice could only be effected by an appeal to this court, or by a new suit brought for the purpose. I cannot impute such gross error to the court below, on mere inference.

I have a word only as to Harvey & wife v. Branson. I have no doubt of the correctness of the decision; but it has no application to this case. In addition to the particular circumstances mentioned by judge Baldwin, the express reservation of liberty to the parties to apply to the court to supersede the commissioner, &c. proves that the court intended to put an end to that cause, and to

put the parties out of court, by pronouncing a final *decree; for, as judge Carr said, "if the case was still pending and the parties in court, what need could there be of leave to the parties to apply to the court?" This circumstance, to say nothing of other matters, distinguishes that case from this; and this circumstance will justify the remark of judge Carr, that the power to sell included the power to convey. The remark is true as applied to that case; but I am not prepared to assent to it as a general proposition. The court has the power to make that a final decree, which might otherwise be merely interlocutory.

Upon the whole, I am clearly of opinion that the decree of the 26th of March 1825 was only interlocutory. And this opens the door to an examination of the alleged improprieties of that decree. As to them, I concur in the opinion delivered by JUDGE BALDWIN.

Henry v. Bradford.

May, 1842, Richmond.

Case Approved.—The decision in *Maria and others v. Surbaugh*, 2 Rand. 228, adhered to.

Emancipation of Slaves—Increase.*—A testator by his will directs that his negro girl *Adah* "shall only serve ten years, and then have her freedom." During the ten years *Adah* has a daughter named *Eddy*. A son of *Eddy* sues for his freedom. *Held*, he is a slave.

In a suit for freedom in the county court of Accomac, by Henry son of *Eddy* against John Brown Bradford, the jury returned a special verdict, which found the following facts:

That by the will of Brown Bradford, admitted to record in the court of Accomac

***Emancipation of Slaves—Increase.**—On this subject, see quotation from *Wood v. Humphreys*, 12 Gratt. 334, where the principal case is cited, in foot-note to *Osborne v. Taylor*, 12 Gratt. 117.

county the 27th of January 1795, the testator devised and bequeathed as follows:

54 "I lend the use of my plantation and all the rest of my property unto my dear wife Peggy Bradford during her widowhood, to school and bring up my children on; but my will is that my negro girl Adah shall only serve ten years, and then have her freedom: likewise my negro boy Abraham shall serve twelve years, and then have his freedom." That the negro girl Adah, in the said will named, was a slave of the said Brown Bradford, and survived her said master. That the testator died the 5th of December 1794; and after his death, and before the expiration of ten years from his death, to wit, on the 15th of March 1798, the said Adah had a child named Ebby, born on the day last mentioned. That the said Ebby was the mother of the plaintiff, who was born on the 15th day of May 1815. That the plaintiff was born in the possession of the defendant, and that he has ever since been in his possession and held by him as his slave, and is still so held.

The county court, being of opinion that the law upon the special verdict was for the defendant, gave judgment in his favour.

Henry petitioned the circuit court of Accomac for a supersedeas, which was denied; and then he presented a petition to a judge of this court for a supersedeas to the judgment of the circuit court, which was allowed.

The cause was argued by Lyons for the plaintiff, and John F. May for the defendant. The plaintiff contended, that according to the principle of *Isaac v. West's ex'or*, 6 Rand. 652, the civil condition of Adah was, immediately on the death of the testator, changed from that of slavery to freedom, although she was to serve ten years; that Ebby, though born when her mother was bound to service, was born free, and consequently that the plaintiff was born free. The defendant contended, that according to the principle of *Maria and others v. Surbaugh*, 2 Rand. 228, Adah continued

55 a slave *until she had served the ten years, at the expiration of which time she became a free woman; that her children born during the ten years were born slaves; that Ebby therefore was born a slave, and the plaintiff also.

CABELL, P. The court is unanimously of opinion that this case is ruled by that of *Maria and others v. Surbaugh*, and that there is no error in the order of the circuit court. It is therefore considered that the same be affirmed.

Ashby v. Smith and Wife.

May, 1842. Richmond.

(Absent ALLEN, J.)

Wills—Unexecuted Trust to Purchase and Divide Lands—Rights of Cestui Que Trust—Case at Bar.—An inhabitant of *Frederick* county, *Virginia*, who

***Husband and Wife—Interest of Husband in Wife's Property.**—In *Cleek v. McGuffin*, 80 Va. 328, 15 S. E.

died in 1806, desired by his will, 1. that the tract of land on which he lived should be sold by his executors, at such time and upon such terms as they in their judgment might think would be most conducive to the advantage of his heirs; 2. that the money arising from the sale should be applied to the purchasing other lands upon the most advantageous terms, either in the state of *Kentucky*, or some other part of the western country that his executors might think would be most to the general interest of his heirs; and 3. that the lands so purchased should be divided amongst his five daughters and two sons, in the following manner: each of his daughters to have 400 acres, and the residue to be equally divided between the two sons; all of which divisions he desired should bear an equal proportion to each other in respect to the quality of land. The testator appointed his wife executrix, and one of the sons executor. The son qualified as executor a few months after the testator's death, and the widow died about two years afterwards. The husband of one of the daughters purchased the right of another daughter, and the three other daughters sold their rights to the son who was executor. In 1816,

56 a *bill was filed in the name of the husband and wife, to compel the executor to execute the trust by selling the land and distributing the proceeds. In 1827, a supplemental bill was filed, setting forth that in 1817 a sale was made, but the executor had taken no further step towards the execution of the trust; and praying that the plaintiffs might have a decree for their proportion of the proceeds of sale. The executor answered, that he had always been ready to purchase land in the western country for the complainants. **Held.** 1. That as the trustee has improperly delayed the execution of the trust, until a great change has taken place in the situation of the western country and the circumstances of the parties, the beneficiaries ought not now to be compelled to take lands in the western country, but should be allowed to take their just proportion of the money arising from the sale of the *Frederick* lands; and that the principle of equality in the division of the said money is in this case just and proper. 2. That the female complainant's portion of the money arising from the sale of the lands should be so secured and protected, as to prevent its being subjected to the control or debts of the husband to a greater extent than if it were land,

Rep. 896. It is said: "At common law, if the wife be seised of an estate of inheritance in land, the husband, upon the marriage, becomes seised of the freehold *jure uxoris*, and he takes the rents and profits during their joint lives, or for his own life, as tenant by the curtesy, in case he survives the wife, having had a child born alive by her. 2 Kent Comm. 180; *Ashby v. Smith*, 1 Rob. Rep. 55. Hence, in the present case, McGuffin was entitled to the profits only of the surplus after the debts were paid. He was not entitled to the surplus absolutely, because it continued impressed with the character of realty, in the absence of the wife's consent that it should be otherwise regarded. *Turner v. Dawson*, 80 Va. 841; *Ashby v. Smith*, 1 Rob. 55."

See also, citing the principal case on this subject, *Turner v. Dawson*, 80 Va. 845; *Pickens v. Kniseley*, 86 W. Va. 801, 15 S. E. Rep. 990.

See monographic note on "Husband and Wife" appended to *Cleland v. Watson*, 10 Gratt. 159.

unless the wife should consent that the money be paid to the husband absolutely; as to which she ought to be privily examined, separately and apart from her husband, in the same manner as in the conveyance of her real estate.

Decrees—Reversal—Costs.—A decree being reversed in consequence of an error committed against one of the appellees, costs decreed to be paid by the appellant to the appellees, as the parties substantially prevailing.

Lewis Ashby, of Frederick county, made his will on the 20th of March 1806, whereby he devised as follows:

"First, The tract of land I now live on, on Shenandoah river, together with the tract whereon my mill is situated, I desire may be sold at such time and upon such terms, by my executors, as they in their judgment may think will be most to the advantage of my heirs.

"Secondly, The money so arising from the sale of the above land, it is my will and desire may be applied to the purchasing other lands upon the most advantageous terms, either in the state of Kentucky, or some other part of the western country that my executors *may think will be most to the general interest of my heirs.

"Thirdly, It is my will and desire that the lands so purchased shall be divided amongst my daughters and my two sons Alfred and John, in the following manner; that each of my daughters to have four hundred acres, and the residue to be equally divided among my two sons Alfred and John; all of which divisions shall bear an equal proportion to each other in respect to quality of land."

By the fourth clause the testator devised a tract of land in Kentucky, derived by him from his father, to his youngest sons Buckner and Lewis. Fifthly, he stated that he had already given his two daughters, Lucy Lewis Catlett and Kitty Morehead, as much of his personal property as was intended for them. He bequeathed, sixthly, a negro girl to his daughter Judy; and seventhly, a negro boy to his son Buckner. By the eighth clause he gave the remainder of his property to his children of the following names, viz. Judy, Alfred, Mildred, Jenny, John, Buckner, Sidney and Lewis. And lastly he appointed his wife Leannah executrix, and his son Alfred D. executor.

On the 1st of September 1806, the will was admitted to record, and the widow in open court renounced the provision made for her. Alfred D. Ashby qualified as executor the 2d of December 1806.

The widow survived the testator only about two years. All the testator's children, being ten in number, are named in the will. His daughter Mildred married Lewis A. Smith.

By a deed of the 5th of February 1813, William Catlett and Lucy his wife conveyed their rights under the said devises, to Lewis A. Smith. On the 18th of November 1815, Joel Morehead and Kitty his wife conveyed their rights under the said devises, to Alfred D. Ashby. And on the 2d of September

58 ber 1816, Judy Ashby *and Jane Ashby (called in the will Jenny) conveyed their rights under the will to the said Alfred.

On the 28th of June 1816, Smith and wife commenced a suit in the superior court of chancery at Winchester, against Alfred D. Ashby, in his own right, and as executor and trustee. There were other defendants, amongst whom were John Ashby and Sidney Ashby, the only persons, besides the plaintiffs and Alfred D. Ashby, now interested under the devise of the land in Frederick county.

The bill, besides seeking an account of Alfred D. Ashby's transactions as executor and trustee, asked that he might be compelled to execute the trust reposed in him, by selling the land in Frederick county and distributing the proceeds, or that the parties interested might elect to hold their proportions of the said land.

A supplemental bill, filed in June 1827, set forth, that pending the suit, to wit, on the 5th of November 1817, the defendant Alfred D. Ashby had sold the lands devised by his father to be sold; that they were sold to the defendant John Ashby, for 10244 dollars, two thirds payable in cash, and the balance in two annual payments; and that since the sale, Alfred D. Ashby had taken no farther step towards the execution of the trust confided to him for the benefit of his sisters. The bill prayed that the plaintiffs might have a decree for their proportion of the rents and profits before the sale, and of the proceeds of said sale, with interest thereon.

Alfred D. Ashby answered, that he had always been ready to purchase 400 acres of good land, such as his testator intended, in the western country for complainants.

The death of John Ashby was suggested on the 3d of December 1828; and on the 5th of that month, by consent of Buckner Ashby executor and devisee of John, the suit was revived against him.

Numerous depositions were taken in the case.

59 *On the 6th of July 1832, the circuit court pronounced the following opinion:

"The court is of opinion that the will of the testator ought now to be construed as if it read thus: 'The proceeds of the Frederick lands to be invested in unseated lands in Kentucky, or some other part of the western country. The land to be selected with a view to the interest of all those of my children between whom it is divided. Of the lands so purchased, each of my daughters shall have 400 acres of an average quality, and my two sons Alfred and John the residue.' Before the testator could have determined on any particular number of acres for his daughters, he must have formed some estimate in his own mind of the relative value of the land to be sold and that to be purchased. What that estimate was, he has not informed us. As Kentucky lands seem to have been uppermost in his mind, it is probable that the price at that time of good unseated lands in that state was in his view. What was the value which he placed upon

*Costs.—See monographic note on "Costs" appended to Jones v. Tatum. 19 Gratt. 720.

his own lands might be ascertained with some probability by taking the opinions of his neighbours. Thus, if the trust had been executed immediately, or within a reasonable time, some approximation might have been made to such a division as the testator intended; but it is obvious that it would have been but an approximation. The difficulty existing at the death of the testator,—one which could not have been surmounted but by the exercise of a large discretion by the trustees, is now insurmountable. One of the trustees to whom this large discretion was confided (his widow, and the mother of the devisees) died about two years after him. He never could have intended to confide such a trust to his son alone, who was so deeply interested in abusing it. His scheme was to settle his children (most of whom were then young) in some of the new and growing

60 states; to provide for his daughters and two of his sons, by a *sale of his Virginia lands, and the investment of the proceeds in western lands, which were to be divided by some rule of which he himself could have had but a faint idea, and which we can only guess at. It is evident, however, that he meant to provide for them all; that they all had equal claim upon his bounty: and we have no right to presume that he meant to make any great departure from equality, if he meant to depart from it at all. In this state of uncertainty,—nay, when it is impossible to say in what proportion the testator intended that his children should share his bounty, the court must apply its own rule,—equality. The son who was one of the trustees having sold the land, and the plaintiffs having elected to affirm the sale, the court will confirm it. The proceeds, principal and interest, must therefore be divided equally between the daughters, or those entitled to their shares by purchase, and the two sons Alfred and John."

Whereupon the court proceeded to decree to the plaintiff Lewis A. Smith, as well the share of his wife, as the share to which he was entitled by purchase from Catlett and wife.

On the petition of Alfred D. Ashby, an appeal was allowed.

The cause was argued by C. and G. N. Johnson, for the appellant, and by Cooke, for the appellees.

CABELL, P., delivered the following as the resolution of the court.—If Alfred D. Ashby, executor and trustee of and under the will of Lewis Ashby deceased, had, in a reasonable time after the death of the testator, sold the Frederick lands, and vested the proceeds thereof in good lands, situated in the state of Kentucky, or any other part of the western country most conducive to the general interest of the beneficiaries under

61 the will, and had assigned to each of the daughters 400 acres thereof, *of the average value of the whole tract, this court is of opinion, considering the latitude of discretion confided to the trustee, that the daughters would have had no

right to complain of such investment and assignment, although it might have resulted in leaving to the two sons of Lewis Ashby a greater quantity than 400 acres each. But as the trustee has improperly delayed the execution of the trust until a great change has taken place in the situation of the western country and in the circumstances of the parties, the court is of opinion that the beneficiaries ought not now to be compelled to take lands in the western country, but should be allowed to elect to take their just proportion of the money arising from the sale of the Frederick lands, in lieu thereof: and as there is nothing in the will which clearly indicates an intention in the testator to give a preference to his sons over his daughters in relation to this fund, or, if a preference was intended, to indicate the extent of that preference, the court is of opinion that the principle of equality of right is the only just one applicable to this case. This court therefore approves of the decree of the chancellor in establishing the right of the beneficiaries to elect to take money instead of land, and in directing an equal division of the fund among the parties. But the decree is defective in not having so secured and protected mrs. Smith's portion of the money arising from the sale of the Frederick lands, as to prevent its being subjected to the control or debts of the husband to a greater extent than if it were land; in which case, the husband would be only entitled to the profits during the coverture, or for his own life as tenant by the curtesy, in case he survived the wife, having had a child by her, born alive; for this money, being in lieu of land to which the wife was entitled, ought to be regarded as land, and treated accordingly, unless indeed the wife should consent

62 that the money should be paid to the husband absolutely, as to which *she ought to be privily examined, separately and apart from her husband, in the same manner as in the conveyance of her real estate.

The decree is therefore reversed so far as it is in opposition to the principles declared above, and is affirmed as to the residue: and the cause is remanded, to be proceeded in to a final decree accordingly. But as this reversal is in consequence of error committed against one of the appellees, it is to be at the cost of the appellant.

STANARD, J., said, that as the decree of the circuit court required the appellant to make payment to the plaintiff Lewis A. Smith, of money which it was erroneous to require him so to pay, and which he could not, even with the authority of that decree, safely have paid; and as this court, by its decree, corrected the error of the circuit court, and provided for the appellant's paying in a way which would be safe, it seemed to him that the appellant ought not to be decreed to pay costs: and he therefore dissented from so much of the decree of this court as related to the costs. In all other respects, he concurred in that decree.

63 *Medley v. Pannill's Adm'r.

Same v. Tunis's Ex'ors.

May, 1842, Richmond.

(Absent BALDWIN,* J.)

Injunctions—Against Judgments—Irregular—Case at Bar.—Where, pending an injunction to a judgment for money, the judgment creditor dies, and there is a revival in the name of his administrator of the suit in equity, but not of the judgment at law, it is not regular, though the object be to avoid the delay that would take place after a dissolution of the injunction in reviving the judgment, to make a decree in the suit in equity for the money which will be payable to the creditor upon such dissolution. The court of equity is to dissolve or perpetuate the injunction, or perpetuate it in part and dissolve it for the balance, and it may in the latter case, if it shall appear just, direct that no damages shall be paid by the complainant; but it is not, in any injunction case, not even where the injunction is wholly dissolved, to make a decree for the damages payable to the creditor on the dissolution.

The decrees from which these appeals were allowed, were made by the circuit court of the town of Lynchburg. The causes were argued upon the merits by Grattan for the appellant, and Robinson for the appellees. But there was no point adjudged in them which deserves to be reported, except that stated in the following opinion.

ALLEN, J. The merits of the case of Medley v. Pannill's adm'r, it seems to me, are with the appellee. But a new mode of proceeding is adopted by the court in the decree rendered. The original parties to the judgment enjoined having died during the pendency of the injunction, the court, instead of dissolving the injunction, was of opinion that it would be more equitable at once to decree the amount due, than, by a dissolution of the injunction, to put the administrator of Pannill to the delay and expense of a
64 further proceeding at law *to revive the judgment, before it could be made available. A decree was therefore rendered for the amount of the debt, interest and damages, with a provision that if the decree was satisfied, the injunction was to stand perpetuated, but until satisfied, the rights of the

creditor under the judgment, and against the sureties in the injunction bond, were not to be impaired; and liberty was therefore reserved to the creditors, if the decree was ineffectual in whole or in part, to resort to the court for any further decree which might be proper. The proceeding, though novel, struck me at first as convenient; but upon further reflection and consultation, I am satisfied the innovation upon the accustomed modes of procedure ought not to be sanctioned. Passing by the incongruity of giving a decree for that for which the party already has his judgment at law, and waiving the enquiry as to the power of a court of equity to decree damages, which are allowed by statute only upon the dissolution of the injunction, whereas the decree continues the injunction, and upon a certain contingency perpetuates it,—there are other difficulties in the way. The decree, though it contemplates a resort to the court in a certain contingency, is in effect final. The whole matter in controversy is settled; debt, interest, damages and costs decreed. Is it competent for the court, after having so disposed of the subject, to revive, at any distance of time thereafter, the lien of the original judgment, so as to affect intermediate purchasers? If it can do this, purchasers would be always insecure. If it cannot, the judgment creditor would lose one of his securities. Of that perhaps he would not be permitted to complain, as he takes the decree. But he retains all his rights against the surety in the injunction bond. These he never waived; and probably he would not have consented to take such a decree, unless the court had professed to preserve his securities unimpaired. If, too, the lien of the judgment has been lost, the sureties in the injunction bond might

65 be materially *injured. Again, the lien of the judgment results from the capacity to sue out an elegit, or to revive it. Here the creditor has not, and may never have, the right to do either. In what condition would the purchaser of lands prior to the decree, which otherwise would have been bound by the judgment, be placed by such a decree? Again, the law gives the sureties in the injunction bond a remedy over against those in the appeal bond. The injunction is not dissolved, and neither the surety in the injunction bond, nor the surety in the appeal bond, can be rendered liable primarily. If subsequently the court undertakes to give relief, it must set aside the first decree (the power to do which in such a case as this might be questioned) and then give a new decree dissolving the injunction, in order to revive the liability of the surety in the injunction bond, and by so doing revive that of the surety in the appeal bond. If it cannot do both, it does injustice to the sureties in one bond, and ought not to revive the liabilities of either set. And even if it could do both, great injustice might be done to one set of sureties by the intervening insolvency of the others. The old and recognized mode involves none of these difficulties. If the party desires to be ready with his execution

*The cases were argued in this court before his appointment.

Injunctions—Against Judgments—Death of Judgment Creditor—Revival.—The right to sue out an execution upon the dissolution of an injunction, is the very condition of an injunction to a judgment; and if the judgment creditor die pending the injunction, the court of equity will in a summary way impose it as a condition on the complainant to consent to revive at law, under the penalty of having his injunction dissolved if he refuse. Richardson v. Prince George Justices, 11 Gratt. 198. The principal case is cited and distinguished in Kraker v. Shields, 20 Gratt. 397. See monographic note on "Injunctions" appended to Claytor v. Anthony, 15 Gratt. 518.

as soon as the injunction is dissolved, the chancery court would impose it as a condition on the complainant to consent to revive at law, under the penalty of having the injunction dissolved for that cause. And the revival itself, if the party be driven to that course, is attended with but little delay or expense. For this reason, I think the decree must be reversed with costs.

The other judges concurring, the decree of the court of appeals, in *Medley v. Pannill's adm'r*, declared that there was error in the decree, in proceeding to decree against the appellant for the amount of the judgment enjoined, with damages and
66 interest, instead of dissolving *the injunction and dismissing the bill with costs: Therefore, decree reversed with costs, and injunction dissolved and bill dismissed with costs.

In *Medley v. Tunis's ex'ors*, the circuit court and this court held that the appellant was entitled to a credit against the judgment. But the decree of this court declared that the circuit court erred in rendering a decree for the balance due, instead of perpetuating the injunction for the amount of the credit, with costs, and dissolving it as to the residue, without damages: Therefore, decree reversed with costs, and decree entered perpetuating the injunction for the credit, with costs, and dissolving it as to the residue, without damages.*

*Where any injunction shall be hereafter obtained, to stay proceedings on any judgment rendered in any of the courts of this commonwealth, for money or tobacco, and such injunction shall be dissolved wholly or in part, damages at the rate of ten per centum per annum, from the time the injunction was awarded until the dissolution, shall be paid to the party on whose behalf such judgment shall be obtained, on such sum as appears to be due, including the costs; and where any such injunction shall be depending in the circuit superior courts of law and chancery, the clerk of such court shall, on dissolution thereof, certify to the clerk of the court wherein the judgment was obtained, the order of dissolution, as also the time of granting and dissolving such injunction, and the clerk shall issue the execution according to the provisions of this act; and in all cases where a forthcoming bond has been executed by the complainant in such injunction, and no judgment rendered thereupon, the court in which execution is awarded shall direct the said damages to be included in the judgment, which shall be in satisfaction of all interest and damages during the time aforesaid: *provided nevertheless*, that where the injunction is granted in order to obtain a discovery, or any part of the judgment shall remain enjoined, the court wherein the injunction shall be depending may, if it appear just, direct that no such damages shall be paid by the complainant, or such proportion as according to equity the court may deem expedient; and the clerk of the court where the judgment was rendered, or the court by whom execution shall be awarded, shall govern themselves accordingly. Acts of 1830-31, ch. 11, § 43. Suppl. to Rev. Code, p. 152, taken from 1 Rev. Code, ch. 66, § 61, p. 209.

67 *Winchester and Potomac Railroad Company v. Washington.

May, 1842, Richmond.

(Absent ALLEN* and BALDWIN,† J.)

Debt—Railroad Company—Condemned Land—Assessment of Damages.—Under the act passed April 8, 1831, to incorporate the Winchester and Potomac railroad company, the freeholders appointed by an order of the county court for the purpose of ascertaining the damages which would be sustained by the proprietor of certain lands through which the railroad was to be opened, certified, in the form prescribed by the act, that they assessed the damages at the sum of 972 dollars; and then subjoined the following words: "We further declare that if the railroad company shall refuse to pass the water from the south side of the road to the north side, by a culvert west of the lane, the thoroughfare of the farm, and return the same by a culvert on the east side of the lane, she (the proprietor) shall receive the additional sum of 2000 dollars." The report, upon being returned to the county court, was ordered to be recorded. An action of debt was afterwards brought to recover the 2000 dollars: the declaration averring that the company, although requested so to do, had refused to pass the water as aforesaid. Upon demurrer to the declaration, **Held**, the action cannot be maintained. *Per STANARD, J.*, the charter of the company does not warrant a contingent assessment of damages by the commissioners, and does not authorize the county court to render a conditional judgment therefor: the court is authorized to render such judgment only as would authorize the clerk to issue an execution thereon.

In an action of debt in the circuit court of Jefferson, in the name of Louisa Washington, who sues for the use of herself and children, against the Winchester and Potomac railroad company, for 2000 dollars, the declaration contained three counts.

The first count was in these words:

"For that whereas, by an act of general assembly of Virginia passed on the 8th
68 day of April 1831, *entitled 'an act to incorporate the Winchester and Potomac railroad company,' among other things it is provided and enacted, in substance, as follows:" [Here the 9th, 10th and 11th sections of the company's charter were set forth verbatim as in the session acts of 1830-31, ch. 122, § 9, 10, 11, p. 189-91.] "And whereas, in pursuance of said act, George Reynolds, Henry S. Turner, Edward Lucas

*He was a connection of the defendant in error.

†The cause was argued before his appointment.

‡**Assessment of Damages.**—The principal case is cited in *S. V. R. Co. v. Robinson*, 82 Va. 545, to the point that if the case is proceeded in in the county court to final judgment, the amount of the damages fixed and paid and acquiesced in, paid on the one side and accepted without exception on the other, there is no authority in law for the circuit court to set aside these proceedings; or, without, setting them aside, proceed to appoint a new set of commissioners to assess other damages for the same land, upon the ground that the defendant company did not comply with its promise.

senior, William Hurst and Joseph M'Murran, freeholders, or any three of them, were appointed, on the motion of the said Winchester and Potomac railroad company, by an order of the county court of Jefferson county in the state of Virginia, for the purpose of ascertaining the damages which would be sustained by said Louisa Washington and her children, as the proprietors of certain lands in the said county through which the Winchester and Potomac railroad company proposed to open a railroad; and George Reynolds, Edward Lucas, William Hurst and Joseph M'Murran, four of the said freeholders, having been first duly sworn, as required by the said act, impartially and justly to the best of their ability to ascertain the damages which would be sustained by said Louisa Washington and children from opening of said railroad through their land, and that they would certify their proceedings thereupon to the county court for the said county of Jefferson, did, on the 19th day of November 1833, under their hands and seals, certify and report to the said county court of Jefferson county aforesaid, that they had met together on the aforesaid land on the 1st day of November 1833, the day to which they were regularly adjourned from the day appointed by the said order for their meeting, and having been duly sworn, and having viewed the premises, they proceeded to estimate the quantity and quality of the land aforesaid which would be occupied by the said railroad, the quantity of additional fencing or gates which would probably be occasioned thereby, and all other inconveniences which seemed to them

69 *likely to result therefrom to said land; that they combined with these considerations, as far as they could, a just regard to the advantages which would be derived by the proprietor of the said land from the opening of the said railroad through the same; that under the influence of these considerations, they had estimated and did thereby assess the damages aforesaid at the sum of 972 dollars, and did further declare that if the said railroad company should refuse to pass the water from the south side of the road to the north side of the road, by a culvert west of the lane, the thoroughfare of the farm, and return the same by a culvert on the east side of the same, she the said Louisa Washington should receive the additional sum of 2000 dollars: which said report, together with the certificate of magistrate before whom the said freeholders were sworn, having forthwith been returned to the county court of Jefferson, and no good cause having been shewn against the said report, the same was, on the 20th of November 1833, affirmed by said court, and entered of record; as by the record and proceedings thereof, still remaining in said county court of Jefferson county, Virginia, more fully appears. And the said plaintiff avers, that on the 19th day of July 1835, she demanded and required of the president of the said Winchester and Potomac railroad company, that the said Winchester and Potomac railroad company should pass the water from the south side of the road

to the north side, by a culvert west of the lane, the thoroughfare of the farm, and return the same by a culvert on the east side of the lane. Yet the said Winchester and Potomac railroad company, although then and often since requested so to do, have refused and still do refuse to pass the water from the south side of the road to the north side, by a culvert west of the lane, the thoroughfare of the farm, and return the same by a culvert on the east side of the same, nor have they paid to the said Louisa Washington (proprietor of the said land referred to in said proceedings, and, *under the terms of the aforesaid act, entitled to the said damages) the aforesaid sum of 2000 dollars, according to the form and effect of the said report, and the judgment of the court aforesaid affirming the same, which still remains in full force and effect, and is in nowise satisfied, vacated or discharged; and the said Louisa Washington hath not as yet obtained execution for the same 2000 dollars. Whereby an action hath accrued to the said Louisa Washington to have and receive from the said Winchester and Potomac railroad company the said sum of 2000 dollars."

The second count was exactly like the first, with the exception of this difference in the breach: In averring nonpayment to Mrs. Washington of the 2000 dollars, it omitted the allegation that she was "proprietor of the said lands referred to in said proceedings, and, under the terms of the aforesaid act, entitled to the said damages."

The third count omitted the recital of the provisions of the charter, and differed from the two other counts, moreover, in alleging in general terms what is alleged in those two counts in detail.

The company filed general demurrers, in which the plaintiff joined. Upon argument, the circuit court sustained the demurrer to the third count, but overruled the demurrers to the first and second counts. A trial was then had upon plea of nil debet.

Upon the trial, the plaintiff offered in evidence the record of the county court of Jefferson, whereby it appeared, that on the 1st day of October 1833, the president of the company addressed to "Mrs. Louisa Washington widow of Samuel W. Washington deceased, for herself and children," a notice in writing, informing her that on the 21st of that month, application would be made by the company to the county court of Jefferson, in pursuance of the provisions of the charter,

71 to appoint five freeholders to assess the damages which "you will sustain from the opening of a way for the said railroad through your land;" that at a court held for Jefferson county, on the 21st of October 1833, "on the motion of the plaintiffs, suggesting that the defendants are the owners of a tract of land in the county of Jefferson, through which it is proposed to open the said railroad, and that they cannot agree with the said owners," an order was made appointing the freeholders; that George Reynolds, Edward Lucas, William Hurst and Joseph M'Murran, four of the freeholders appointed, were sworn or affirmed in the

manner prescribed by the charter, to "ascertain the damages which would be sustained by the above named Louisa Washington and children;" that on the 19th day of November 1833, the said freeholders made a report under their hands and seals, whereby, after setting forth that they were appointed "for the purpose of ascertaining the damages which would be sustained by Louisa Washington and children, the proprietors of certain lands in the said county through which the Winchester and Potomac railroad company proposed to open a railroad," and that they met together on the land aforesaid on the first day of November 1833, they certified, in the form prescribed by the charter, that they assessed the damages at the sum of 972 dollars; at the end of which report, after the words "Given under our hands and seals this 19th day of November 1833," and before the signatures and scrolls, were these words: "And we further declare that if the railroad company shall refuse to pass the water from the south side of the road to the north side, by a culvert west of the lane, the thoroughfare of the farm, and return the same by a culvert on the east side of the lane, she shall receive the additional sum of 2000 dollars;" and that at a court held for Jefferson county on the 20th of November 1833, the following order was entered: "George Reynolds, Edward Lucas,

72 William Hurst and Joseph M'Murran, four of the five commissioners *appointed at the last term of this court for the purpose of ascertaining the damages which would be sustained by Louisa Washington and her children, the proprietors of certain land in this county through which the Winchester and Potomac railroad company propose to open a railroad, this day returned a report, which is ordered to be recorded, and is in the words and figures following:" [here it was copied]. To this evidence the defendants objected, because it did not shew that the report of the freeholders had been affirmed by the court; but the objection was overruled by the court, and the evidence allowed to go to the jury. To which the defendants excepted.

A second bill of exceptions stated, that on the trial, the defendants introduced a witness to prove the actual amount of damages sustained by the plaintiff, by reason of the alleged failure on the part of the defendant to pass the water, mentioned in the report of the commissioners and the declaration, from the south side of the road to the north side, by a culvert west of the lane, the thoroughfare of the farm, and to return the same by a culvert on the east side of the lane, as in the declaration averred; that the plaintiff objected to the evidence, and moved the court to exclude the same; and that the court sustained the objection, and excluded the evidence from the jury: to which the defendants excepted.

The jury found for the plaintiff on the issue, and allowed interest on the debt from the 8th of August 1835; and judgment was rendered accordingly for the debt and interest, with costs. To which judgment a supersedeas was awarded.

Leigh, for plaintiffs in error. I. The demurrers to the first two counts of the declaration ought to have been sustained. 1st. According to the shewing of those counts, truly understood, the conditional damages claimed as having been assessed by 73 the commissioner, and adjudged *by the county court, were assessed and adjudged to mrs. Washington and her children, as proprietors of the land condemned for the road, and she alone cannot maintain the action for the use of herself and children. Or, 2dly, if the conditional damages assessed for the lands of mrs. Washington and her children are to be considered as assessed to her alone, such assessment of damages was plainly contrary to the provisions of the charter of the company, and to the order of the county court, under which the commissioners acted. And 3dly, the assessment of such conditional damages is wholly unauthorized by the company's charter, and no judgment could be given by the county court upon the report for such conditional damages. The 12th section of the charter, which provides that for the damages, when ascertained by a confirmation of the report, the clerk of the court shall, after the adjournment of the court, on the application of the party entitled to the damages, issue an execution, manifestly contemplates the case of an unconditional assessment of damages. At all events the action of debt will not lie in such a case.

II. The declaration avers that the report, on which the action was founded, was affirmed and entered of record, and counts on the affirmation of the report as on a judgment; but the record produced in evidence does not shew that the county court affirmed the report, but that the report was returned and ordered to be recorded; so that here the record produced in evidence shews that there was in fact no manner of judgment for the conditional damages, besides being liable to the objection that it is variant from the record pleaded. 1 Chitty's Pl. 305, 6, 355, 6. Moore v. Fenwick, Gilm. 214. Crawford & al. v. Jarrett's adm'r, 2 Leigh 630. Wood v. The Commonwealth, 4 Rand. 329.

74 III. If it be true that there was no judgment given by the county court for the conditional damages, or at *least no judgment for those damages to mrs. Washington alone, then she could not recover the whole amount of damages assessed by the commissioners, but could only, in a proper form of action, recover, pro interesse suo, the actual damages which could be proved to have been sustained by her; and therefore the evidence on that point, offered by the company, ought not to have been excluded.

Robinson, for defendant in error. I. The demurrers to the first and second counts were properly overruled. 1st, According to the shewing of those counts, the conditional damages were assessed and adjudged to mrs. Washington alone. 2ndly, Such assessment is not contrary to the charter. For that in terms declares that the commissioners "shall

consider the proprietor of the land as being the owner of the whole fee simple interest." And the first count states her to be proprietor of the land, and, under the terms of the act, entitled to the damages. But, independently of this averment, the report shewing that the damages were assessed to her, and both counts averring that the report was affirmed by the court and entered of record, this court, when the question comes before it in this collateral manner, is bound to suppose that such a state of facts existed as authorized the assessment, if, under any state of facts, such assessment could be authorized. Now, if she appear to the commissioners to be the proprietor of the land, they might make the assessment of damages to her, although they were sworn to ascertain the damages sustained by Louisa Washington and her children. The objection that in consequence of the order and of their oath, they could not properly assess damages to Louisa Washington alone, is an objection at most going only to shew irregularity, which might have been corrected upon appeal or supersedeas; not matter which makes

75 *the proceedings before the commissioners and in court, void. 3dly, The commissioners have estimated the whole damages at 2972 dollars, and if they had made the assessment in one entire sum, there could be no doubt of their authority. Now, whether the assessment is made in one entire sum of 2972 dollars, or in one sum of 2000 dollars and another of 972 dollars, can make no manner of difference. Nor can the company with any reason object, that a clause is inserted allowing it to be relieved from part of the estimated damages upon the performance of a specific act, and that the assessment thus made is affirmed and entered of record. If the assessment for the whole amount had been absolute and unqualified, it might have been affirmed and entered of record. And the county court, in affirming a report which permits the company, if it pleases, to be relieved from part of the estimated damages upon the performance of a specific act, does that which operates in favour of the company, and of which the company should not afterwards be permitted to complain. It may be, that such conditional damages as were assessed in this case, cannot, even after the report is affirmed and entered of record, be considered to be so ascertained by a confirmation of the report, as to authorize the clerk to issue an execution for the same under the 12th section of the charter. But though an execution may not lawfully issue for such conditional damages under that section, it does not follow that the assessment itself should be considered as unauthorized. It was made by commissioners appointed at the instance of the company, and the report containing it has been affirmed by a court which undoubtedly had competent jurisdiction to act upon that report. The company having been a party to the case in which the report was made, and the judgment affirming the report never having been reversed on appeal or supersedeas, that

76 report ought now to be binding *on the

company. If it is binding, and the specific act has not been performed, there is a duty on the defendants to pay the plaintiff a determinate sum of money, and the action of debt is properly brought for that money. *Bullard v. Bell*, 1 Mason 299.

II. The statute provides, that unless good cause be shewn against the report, it shall be affirmed by the court and entered of record. The order directing it to be entered of record is, under the statute, to follow the affirmance. And when such an order is made, it necessarily imports that the report is affirmed. But secondly, the evidence was clearly admissible and proper, as far as it went: and though it might have been competent to the defendants to move the court to instruct the jury, that the plaintiffs could not succeed without producing an order of affirmance, yet as no such motion was made, an appellate court can take cognizance of no such question.

III. The other bill of exceptions must be considered with reference to the case stated in the declaration. That states a regular assessment of damages, and a regular confirmation thereof: and considering that assessment as valid, its effect could not be impaired in a collateral proceeding, by evidence going to shew that the commissioners made too high an estimate. The time for such an objection was in the county court, before the report was affirmed.

STANARD, J. The title to this action, as for a debt due by judgment, is founded on those provisions of the charter of the company, which prescribe the manner of assessing damages to the proprietors of lands through which the railroad might run; providing, in effect, that the affirmance of a report assessing the damages, and entering it of record, shall be a judgment in favour of the proprietor against the company for the amount of the damages: and it

77 is contended that the order recording *the report is in effect an affirmance thereof, and a judgment for the damages. Supposing this to be so, the next question presented (and which may justly be regarded as preliminary to many others arising on the record in this case, and ably discussed at the bar,) is, What are the damages for which such judgment is or can be rendered? Do the provisions of the charter warrant a contingent assessment of damages by the commissioners, and authorize the court to render a contingent or conditional judgment therefor, so that the title thereto may depend on some future act in pais? If so, the anomaly might be presented of a judgment without certainty as to the time in which, or the amount for which, it could be enforced, and not capable of being enforced without a new action, the recovery in which would also be uncertain, as the performance of the act in pais on which it was made to depend might be more or less perfect. The terms of the statute must be very distinct and imperative, to justify the court to introduce, by its construction thereof, such an anomaly. The statute in this case, so far from requiring such construction, seems to me by inevitable

implication to for id it. The latter part of the 12th section provides, that for the damages when ascertained by a confirmation of the report, the party may have execution as on a judgment; and the necessary implication is, that the court is authorized to render such judgment only as would justify the emanation of an execution thereon. Now, for contingent damages such execution certainly could not issue, since by the very terms of such judgment, if full expression be given to it, the party is not entitled to damages but in a future and contingent event; and as such future event may more or less imperfectly occur, the damages may in whole, or in part only, be justly demandable. These considerations present an insuperable difficulty to the recovery in this action, and shew, in my opinion, that the court below ought to have sustained *the demurrer to the first and second counts of the declaration.

I deem it proper to add, that according to the legal effect of the report in this case, especially when coupled with the subsequent action of the company, the damages that were effectively assessed, to wit, the 972 dollars, are to be regarded as the damages for a road constructed with proper culverts to pass the water in the manner specified in that part of the report assessing the contingent damages; that the company had no right to construct the road in any other manner, and is liable to the actions of the parties injured by a deviation from that mode of construction which has governed the amount of the unconditional assessment of damages, for the injury resulting from such deviation; and that such actions may be repeated toties quoties, as long as such injury is continued by such deviation.

The other judges concurring, the judgment of the court of appeals was entered as follows:

The court is of opinion that the said circuit superior court erred in overruling the demurrers of the plaintiffs here to the first and second counts in the defendant's declaration: therefore judgment reversed with costs, and judgment entered for the said plaintiffs upon said demurrers.

79 *Coalter v. Coalter.

July, 1842, Lewisburg.

(Absent BALDWIN,* J.)

Partnership—Suit for Account—Statute of Limitations.*

—An action of account by one partner against his copartner, for a settlement of the partnership accounts, must be commenced within five years next after the cause of action, and unless so commenced, will be barred by the statute of limitations, 1 R. C. 1819, ch. 128, § 4, p. 488, for such accounts do not concern the trade of merchandise between merchant and merchant, and therefore are not

*He had been counsel for the appellant.

***Partnership—Suit for Account—Statute of Limitations.**—The principal case is cited in *Foster v. Rison*, 17 Gratt. 323, 334, 335, and *Jordan v. Miller*, 75 Va. 449. See foot-note to *Marsteller v. Weaver*, 1 Gratt. 391.

embraced by the exception to the statute. *Accord, Patterson v. Brown*, 6 Monroe 10.

Same—Same—Same.—A suit in equity by one partner against his copartner, for a settlement of the partnership accounts, being a substitute for the action of account, should, like that action, be brought within five years, and if not brought within that time, will be barred by the statute of limitations. *Accord, Patterson v. Brown*, 6 Monroe 10.

Same—Same—Same—Exception—Cessation of Dealings.—Question whether the exception made by the statute of limitations, of accounts which concern the trade of merchandise between merchant and merchant, prevents the statute from barring an action upon such accounts, when there has been a cessation of dealings between the parties for five years. *Per STANARD and ALLEN, J.*, the statute is no bar in such a case. *Accord, Mandeville &c. v. Wilson*, 5 Cranch 15, and *Robinson v. Alexander*, 8 Bligh 352.

Same—Same—Same—Same—Who Are Merchants.—Question whether persons engaged as partners in the business of farming, distilling, and purchasing and selling cattle, can properly be considered merchants within the meaning of the said exception. It seems, from opinions of STANARD and ALLEN, J., they cannot be so considered. *Accord, Lansdale v. Brashear*, 8 Monroe 330, and *Forbes v. Skelton*, 8 Simons 335, 11 Cond. Eng. Ch. Rep. 466.

William B. Coalter filed a bill in the circuit court of Augusta against John Coalter, setting forth a partnership between them in the business of farming, distilling, and purchasing and selling cattle &c. and praying for a settlement of the partnership accounts. It appeared by *the bill, that the partnership was entered into in December 1828, to continue for four years, so that the partnership was ended in December 1832. Yet the bill was not filed until December 1838. It stated, that in the summer of 1833, the parties referred the settlement of the accounts to two friends, who found a balance due the plaintiff upon the operations of the partnership; but there being at that time a crop of grain growing, the value of which could not then be ascertained, the referees did not close the account, and no final settlement had since been made. The defendant, in his answer, admitted that there had been a partnership between him and the plaintiff, though he stated it somewhat differently from the plaintiff. He admitted also that there had been no final adjustment of the accounts of the partnership, but relied on various grounds of defence, one of which was the statute of limitations. The statement of the partnership accounts made by the referees, bore date the 27th of June 1833, and it stated that they had been unable to settle as to the grain then growing. One of the referees deposed.

***Same—Same—Same—Construction.**—The principal case is cited in *Boggs v. Johnson*, 26 W. Va. 827, to the point that the statute, regulating the time within which an action by one partner against his copartner for a settlement of the partnership accounts may be brought, applies to suits in equity as well as actions at law. See foot-note to *Marsteller v. Weaver*, 1 Gratt. 391.

that as they went on, item by item, each one was agreed to by the parties, until they came to the item of the grain in the ground, upon which they could not agree, John Coalter claiming the whole of the grain in the ground, and William B. Coalter claiming one third part of it. The sums agreed upon being then added up, John Coalter refused to sign a paper acknowledging the amount to be correct.

The circuit court referred the accounts to one of its commissioners; and a report thereof being made, a decree was pronounced in favor of the plaintiff. From which decree, on the petition of the defendant, an appeal was allowed.

Michie and John B. Baldwin, for appellant.

Accounts between partners, though not particularly mentioned in *the statute of limitations, 1 R. C. 1819, p. 488. ch. 128. § 4. are embraced within the limitation of actions of account. Courts of equity having taken cognizance of matters of account, and being better able to settle them, the action of account has fallen into disuse: but it may still be maintained. *Gow on Partnership* 83. And by the rules of equity, where there is concurrent jurisdiction, the statute of limitations is as good a plea in equity as at law. 2 Tuck. Comm. 388. Indeed the statute is never disregarded by courts of equity, except in cases of technical trusts, of which equity has exclusive and peculiar cognizance; and even in those cases the trust must be continuing. *Ibid.* 389. *Kane v. Bloodgood*, 7 John. Ch. Rep. 90. There seems to be no reason why the statute should not run between partners after dissolution, as well as between other persons. Upon the dissolution, the balance due to either partner becomes an individual demand against his copartner; a demand which he ought to be bound to prosecute with as much diligence as any other. All the reasons which led to the enactment of the statute of limitations apply with full force to such a claim. And accordingly, it has uniformly been held that the statute is a good plea between partners. *Gow on Partn.* 117. *Barber v. Barber*, 18 Ves. 286. *Foster v. Hodgson*, 19 Ves. 180. See also *Union Bank v. Knapp*, 3 Pick. 112. and *Lansdale v. Brashear*, 3 Monroe 330.

This case does not fall either within the letter or the reason of the exception in the statute. A construction by which these partners should be held to be merchants within the meaning of the exception, would virtually repeal the statute; for there is hardly any one who would not be a merchant under such a construction. The word merchant applies to those who are such in the ordinary acceptance of the term, and perhaps to some others, the similarity of whose pursuits brings them clearly within the reason of the exception. See *Lansdale*

82 **v. Brashear*, 3 Monroe 330. Where the objects of the partnership are such as existed in this case, the parties cannot be considered merchants at all. But if they could not be so considered as between their

firm and another firm, they cannot be so regarded in this case; for the two partners constitute, in fact, but one merchant. If, however, they should be held to be strictly within the exception, still all dealings having ceased for more than five years, the statute would be a bar to the recovery. In *Coster v. Murray*, 5 Johns. Ch. Rep. 522, chancellor Kent, after reviewing the English cases, concludes that the weight of authority is in favour of this position. See also 1 Rob. Prac. 101.

Peyton, for appellee. This is not a case in which an action at law could have been maintained by the plaintiff. The association between the parties, from its nature and character, created such an unity of interest between them, that neither of them, whatever share of the stock or profits he might have been entitled to, or in whatever sum the firm might have been indebted to him, could exercise an exclusive right to enjoy or receive it, until a balance had been struck between them. *Holmes v. Higgins*, 1 Barn. & Cress. 74. 8 Eng. Com. Law Rep. 27. *Bovill &c. v. Hammond*, 6 Barn. & Cress. 149. 13 Eng. Com. Law Rep. 126. *Milburn v. Codd &c.* 7 Barn. & Cress. 419. 14 Eng. Com. Law Rep. 67. *Bac. Abr. tit. Merchant. letter C.* If one partner cannot sue his copartner till a settlement is had and a balance struck, then the action does not accrue till such settlement. In the present case, no settlement was ever made before this suit was brought; and therefore the statute cannot bar the suit.

But the statute excepts such accounts as concern the trade of merchandise between merchant and merchant, their factors or servants. And this exception applies to all accounts current, which concern the trade of merchandise. *Webber v. Tivill*, 2 83 *Saund.* 124. and cases *cited p. 127. note 6. If lord Hardwicke said what is reported in *Welford v. Liddell*, 2 Ves. 400. he is not sustained by the authorities, either English or American. The contrary is held in *Franklin v. Camp's ex'ors*, 1 Cox's Rep. 196. and *Mandeville &c. v. Wilson*, 5 Cranch 15. The cases further shew that all persons will be embraced within the exception, whether merchants or not, provided the accounts be open and current. *Cotes v. Harris*, Bull. N. P. 149. *Cranch v. Kirkman, Peak's N. P. C.* 121. *Catling &c. v. Skoulding &c.* 6 T. R. 189. *Wilkinson on Lim.* 21. Moreover, persons associated for such purposes as those for which the parties were associated in this case, are to be considered as merchants. The old idea was, that a merchant meant one who traded to and from foreign parts. But this definition is too narrow. *Wilkinson* (p. 21.) refers to an old case where it is said, "There are four sorts of merchants; that is, merchants adventurers, merchants dormants, merchants travelling, and merchants residents." *Hamond v. Jethro*, 2 Brownl. 99. The English bankrupt law, passed in the same year with the statute of limitations, defines a trader to be one who uses the trade of merchandise by way of

bargaining, exchange, re-exchange, bartering, chevisance or otherwise, by gross or retail, or making a living by buying and selling. In *Com. Dig.* title Merchant. A. a merchant is defined to one who traffics by way of buying and selling any goods, within the realm or in foreign parts. Lord Holt, in *The Mayor &c. v. Wilks*, Salk. 445. says, a merchant includes all sorts of traders, as well and as properly as merchant adventurers. In the present case, the partnership extending to farming, to distilling, and to the purchase and sale of cattle, hogs and other stock, the parties come within the definition of merchants.

ALLEN, J. Supposing the complainant to be entitled to his proportion of the grain crop growing at the *time of the reference, that must have been gathered in the summer of 1833. There is nothing to shew that any debts have been collected or paid by the firm since that period. The partnership had terminated, and all its transactions with others would seem to have been closed, more than five years before the institution of this suit. As early at least as the summer of 1833, there might have been a full settlement of the accounts, so as to ascertain the rights and liabilities of the different partners. The attempt which had been made, with the assistance of their mutual friends, to settle, had failed; the parties disagreeing. This occurred more than five years before the bill was filed; and from that period they stood, in regard to the partnership, in a hostile attitude towards each other. Upon this state of facts, it becomes necessary to determine whether the statute of limitations is a bar to the relief sought.

The counsel for the appellee has contended, That the exception "of such accounts as concern the trade of merchandise between merchant and merchant, their factors and servants," extends to all such accounts, although there may be no item within five years: That a partnership for the purposes disclosed in this record, constituted these persons merchants within the meaning of that clause: and That the statute cannot be pleaded in bar to an unsettled account between partners.

On the first point, there seems to have been much diversity of opinion amongst the english judges, and the question until recently was considered as an open one in that country. On the one hand, the courts held, that as between parties not merchants, where some of the items of a mutual account are within the period of limitation, the case is taken out of the statute: whilst on the other hand it has been determined, that as between merchant and merchant, where all accounts had ceased for six years, the statute

was a bar. These decisions *destroyed all distinction between accounts concerning the trade of merchandise between merchant and merchant, and other open mutual accounts. The various cases upon this subject are reviewed and commented upon by chancellor Kent in *Coster v. Murray*, 5 Johns. Ch. Rep. 522. He seems inclined in

that case to adopt the construction given by the english courts in the earlier cases, which would, in effect, repeal the exception contained in the statute altogether. Since these cases were reported, the question has been decided in the house of lords, and the construction of the exception settled in opposition to the earlier opinions; the house of lords holding that the account was not barred, though none of the items were within the six years. *Robinson v. Alexander*, 8 Bligh 352. The supreme court of the United States, in the case of *Mandeville &c. v. Wilson*, 5 Cranch 15. has adopted the same construction. Chief justice Marshall, delivering the opinion of the court in that case, says—"The exception extends to all accounts current which concern the trade of merchandise between merchant and merchant. An account closed by the cessation of dealings between the parties is not an account stated, and it is not necessary that any of the items should come within five years." The same construction has been given to the statute by the courts of some of our sister states. In our own courts the question has not been decided. It was discussed in the case of *Watson &c. v. Lyle's adm'r*, 4 Leigh 236. but the case went off on other grounds. Judge Tucker however, in the opinion delivered, concurs with judge Marshall. After referring to the contradictory decisions in England, he quotes the opinion in *Mandeville &c. v. Wilson*, and adds, "This is the reasonable doctrine; for otherwise there would be no perceivable difference between merchants' accounts and others." It seems to me to be the clear intention of the statute to except

such accounts from its operation *altogether. Independent of the statute, there is no bar to personal actions, except the presumption arising from the lapse of time. The law was passed to remedy this evil; but, by express words, exempted certain accounts from its operation. Such accounts stand as though the statute had never been enacted; and the courts, in requiring some of the items to be within the period of five years, bring within the operation of the statute a subject which the legislature had intended to exclude.

Were these parties, from the facts disclosed in the record, merchants within the meaning of that clause of the statute? I have not thought it necessary to consider the question whether a partnership for carrying on such business as these parties were engaged in, would constitute them merchants in the proper sense of the word. In the view I have taken, it is not necessary to decide whether persons engaged in such transactions can properly be styled merchants; though I have a very strong conviction that such accounts do not fall within the description of accounts concerning the trade of merchandise. But waiving that question, is there any authority for the position that accounts between partners in merchandise are embraced in the exception, and that they are to be treated, in regard to their mutual accounts, as merchant and merchant? No such authority has been produced; nor have I been able to find any

case in the english reports, where the questions has been much considered. It arose in 1726, in the case of *Bridges v. Mitchell*, *Bunbury's Rep.* 217. but was not adjudged. This case is referred to as a very important authority upon the point decided by it, by the lord chancellor in *Foster v. Hodgson*, 19 Ves. 180. In *Bridges v. Mitchell*, the bill set forth that the plaintiff and defendant, many years before, were partners as merchants; and prayed a discovery, account and satisfaction.

The defendant relied on the statute of limitations. *The plea was allowed on the long acquiescence of the party.

And it is stated that "the court seemed to think this was not a merchant's account within the statute, these persons not dealing as merchants with one another, but as one merchant with others; but gave no opinion on this head." Notwithstanding the intimation thus given at so early a period, the subject seems not to have been again adverted to in any of the english cases. Our own reports are silent respecting it. But in the case of *Patterson v. Brown*, 6 Monroe 10. the precise question was decided by the court of appeals of Kentucky. There the complainant charged, that he and the defendant were partners in a grocery store: that they had long since dissolved, and had never settled their accounts. The defendant admitted the partnership and its dissolution, denied any balance, and relied on the statute. The court held, that accounts between the partners of this mercantile firm were not embraced by the terms "accounts concerning the trade of merchandise &c." and therefore that such demands were barred by the lapse of five years. The court say, that the first clause of the exception would seem to meet the case, and the mutual accounts of the parties with each other might be considered as accounts concerning the trade of merchandise: but that this clause alone cannot give the construction: that the whole exception must be taken together, otherwise all accounts between a merchant and his ordinary customers would fall within the exception, for they are accounts concerning the trade of merchandise: that the accounts must not only be concerning the trade of merchandise, but they must be between merchant and merchant: that both parties must be merchants dealing in their several businesses with each other; and that partners cannot be regarded as occupying such a relation to each other. On this head, their reasoning is but an amplification of the suggestion contained in the case of *Bridges*

88 *v. Mitchell*, that "these persons *do not deal as merchants with one another, but as one merchant with others." And it seems to me that no other conclusion could have been arrived at. Whilst the partnership subsists, the individuality of each partner, for the purposes of the partnership, is merged. Their mutual accounts grow out of the dealings of the firm, as a unit, with third persons, and do not arise out of individual dealings with each other. When the business has closed, they stand, in respect to such accounts, in the same situation as others having unsettled accounts to adjust; and I do not per-

ceive how such accounts can be considered as accounts between merchant and merchant.

If the parties are not to be treated as merchants, is there any thing in the mere relation of partners, which would exempt their unsettled accounts, after the business of the firm has entirely closed, from the operation of the statute? No case has been cited, in which it has been held that the existence of such an unsettled account constitutes an exception. Most of the cases, indeed, have proceeded upon the presumption that no such exception exists. The case of *Barber v. Barber*, 18 Ves. 286. was a case of partnership. The bill prayed an account against the representative of a deceased partner. The dealings having ceased for more than six years, the court held the case to be within the statute. The plaintiff relied upon the exception: but if the mere fact of there being unsettled accounts between partners had been sufficient to take the case out of the statute, it was unnecessary to rely on the exception, and the court should have entertained the case. The same remark applies to the case of *Patterson v. Brown*, 6 Monroe 10. In *Coster v. Murray*, 5 Johns. C. R. 522. chancellor Kent entertained the bill, upon the ground of a trust between the parties. But his argument goes to establish that the parties did not stand in the relation of debtor and creditor, or of joint

89 partners, but in that of agent or factor and principal, and so the *statute did not apply: from which it may be inferred that in his opinion it did apply to joint partners. The words of the statute embrace the accounts of partners, as well as others; and if they cannot be treated as merchant and merchant trading with each other, the exception cannot apply to them.

Nor can I perceive any thing in the policy of the law, which should lead us to create a new exception, not contained in the statute. Looking to the period at which the exception was introduced, there can be little doubt that it was intended to apply principally to cases of merchants resident in England, and their correspondents, servants and factors abroad. Owing to their distance, the difficulty of communication, and the necessity of an extended credit for the transaction of their business with each other, it was deemed improper to subject them to the operation of the statute. But none of the reasons which apply to them are applicable to the case of partners. They are ordinarily in the habit of communication with each other: the business having closed, there is no necessity for an extended credit: and the risk of doing injustice, from the death of witnesses, loss of vouchers, and failure of evidence, is as great in their case as in the case of ordinary accounts. Upon the close of the business, each partner is entitled to his share of the partnership effects; and for the balance which may be due from one to the other, they stand in the situation of ordinary debtor and creditor. They should also be held to the same degree of diligence.

In the case under consideration, there was every motive to urge the partners to an immediate settlement. As early as the

spring of 1833, when the partnership had terminated, and its concerns been closed (according to the pretensions of both parties) except as to one inconsiderable item, the grain which was then growing, 90 *they made an effort to settle, but disagreed. The pretensions on the one hand and the other were controverted. But though apprized that his claim to any balance would be resisted, the complainant seems to have abandoned the subject for more than five years. Under these circumstances, the statute, it seems to me, was a complete bar to any investigation of these accounts, and the court should have dismissed the bill.

STANARD, J. The claim of the appellee, under its most favourable aspect so far as it is affected by the defence on the statute of limitations, is that of one partner against another, arising from a partnership in the cultivation of a farm, the purchase and sale of stock, and the conducting of a distillery; the partnership having ceased, and the claim asserted by the bill having been resisted by the partner sued, more than five years before the suit commenced; and there having been no item of debit or credit to either partner, nor any claim by or against the partnership outstanding, within five years before suit. The first question is, does the statute of limitations present an effectual defence to such a claim?

The argument on the part of the appellee is, that an account between mercantile partners is embraced by the exception in the statute, of accounts "relating to the trade of merchandise between merchant and merchant, their factors or servants:" that such a partnership as that which existed between these parties, is, within the intent and meaning of the statute, a mercantile partnership: and that while the accounts between such partners remain open and unsettled, the statute of limitations is no defence to a suit for the settlement of them.

It is remarkable that the question, whether the accounts between partners who are confessedly partners as merchants, are embraced by the exception in the *statute 91 of limitations, seems never to have been adjudicated by our own courts, and has never been distinctly decided by the courts of Westminster hall. In the case of *Bridges v. Mitchell*, Bunb. 217. the reporter states, that "the court seemed to think that this was not a merchant's account within the statute of limitations, these persons not dealing as merchants with one another, but as one merchant with others; but gave no opinion on this head:" and I have found no case in the reports of the decisions of Westminster hall, in which an opinion on that question is more strongly intimated.

The absence of decisions of this question is to be ascribed to the operation of the decisions of two other questions, the combined effect of which rendered the decision of this supererogatory.

These were, 1st, That where there had been mutual dealings between parties, whether

merchants or others, and whether the dealings related to the trade of merchandise or not, if one of the items of the current account was within the term of limitation of the statute, the claim for the balance that might be ascertained on the adjustment of the account embracing that and the other items, was not barred by the statute: and 2dly, That although the account were confessedly between merchant and merchant, relating to the trade of merchandise, yet if the dealings had ceased for the term of limitation, and there were no item within that term, the claim on such account was subject to the bar of the statute. Although there was some fluctuation in the decisions upon this second question, I think with chancellor Kent in *Coster v. Murray*, 5 Johns. C. R. 522. that up to the time when he decided that case, the preponderance of authority of the courts of Westminster was in favour of the decision. A different (and, I presume, final) decision has been since made by the house of lords in the case of *Robinson v. Alexander*, 8 Bligh 352. and the law as now settled in Eng-

92 land, leaves the case *of accounts between merchant and merchant, relating to the trade of merchandise, within the exception of the statute, though the dealings may have ceased for more than the term of limitation, and there be no item within the term.

Were the decree of the court in this case to be governed by the decisions of the english courts prior to the case in 8 Bligh, they requiring that in respect to claims on accounts, even between merchant and merchant, relating to the trade of merchandise, some item should be within the term of limitation, to prevent the bar of the statute, it would sustain the defence in this case.

The objection (and I think a most cogent one) to those decisions in the combined effect, is, that that effect renders the exception in the statute practically superfluous and inoperative. My opinion is, that accounts between merchant and merchant, relating to the trade of merchandise, being expressly excepted from the effect of the statute, suits on them while they continue open and current are not liable to the bar of the statute, even though the dealing may have ceased for more than five years, and there be no item within that time. This opinion rests on the plain language of the statute, and is sustained by the case in Bligh, which finally settles that question in England, and the authority of the supreme court of Massachusetts, *Bass v. Bass*, 6 Pick. 362. S. C. 8 Pick. 187. and of the supreme court of the United States, *Mandeville &c. v. Wilson*, 5 Cranch 19.

The question remaining to be solved is, are accounts between merchant partners embraced by the exception? The absence of decisions on this point both in England and in this state has already been noticed. The question has, however, been expressly decided in the negative by the supreme court of Massachusetts, *Cotman v. Rogers*, 10 Pick. 93 112. and in Kentucky, 3 Monroe *330. 6 Id. 10. The result of my examination of the question is a concurrence in those de-

cisions. It is hardly necessary to remark, that according to this opinion, to subject a suit for the settlement of partnership accounts to the bar of the statute, it must not only appear that the partnership has ceased more than five years, but that there were no valid claims of debit or credit against or in favour of the partnership, paid or received, or outstanding, within that time. For, as any such claim paid or received by either partner would form an item in the account between them, that might protect the claim on the account from the bar of the statute, on the principle applicable to mutual accounts, whatever may be the subject of such accounts, or whatever the vocation of the parties.

It is not necessary to decide the third proposition which it was incumbent on the appellee to sustain: that is, whether, within the meaning of the exception, the partnership in question is a mercantile one, and its dealings to be regarded as dealings relating to the trade of merchandise. My impression is, that it is not: but, for the reasons assigned, I forbear to express a definitive opinion on the point.

The other judges concurring, decree reversed and bill dismissed with costs.

94 ***Bryan v. Hyre and Others.**

August, 1842, Lewisburg.

(Absent CABELL, P. and BROOKS, J.)

Ejectment—Parol Disclaimer.*—In ejectment by the heirs of the devisee of an estate in fee, the defendant introduced evidence tending to shew a parol disclaimer by the devisee, of the land devised to him, and moved the court to instruct the jury, that if they believed, from the facts proved, and there was such parol disclaimer of the land devised, they must find for the defendant. The court refused to give this instruction to the jury, and instructed them that the disclaimer must be by writing.

***Ejectment—Parol Disclaimer.**—In *Corbett v. Nutt*, 18 Gratt. 647. It is said: "Whether an estate of freehold in land can be effectually disclaimed by parol, so as to divest the title of the devisee, has not been settled by the decisions of this court. In *Bryan v. Hyre*, 1 Rob. 94. It was conceded that the question did not arise. The case cannot be regarded, therefore, as settling the question against the validity of such a disclaimer, though the opinion of JUDGE ALLEN is said by the report, in general terms, to have been concurred in by the other judges who sat in the case. It is not necessary to determine that question in this case."

But in *Suttle v. Richmond, F. & P. R. Co.*, 76 Va. 286. It was said, it has been long settled in this state that the disclaimer of the freehold can only be by deed or in a court of record, citing *Bryan v. Hyre*, 1 Rob. 101, as conclusive authority upon the subject.

Also in *Fisher v. Camp*, 26 W. Va. 580, the principal case is cited as authority upon the same proposition as in the latter case. See monographic note on "Ejectment" appended to *Tapscott v. Cobbs*, 11 Gratt. 172.

Freehold Estate—Parol Disclaimer.—The opinion of HOLBOYD, J. in *Townson v. Tickell &c.*, 3 Barn. & Ald. 31, 5 Eng. Com. Law Rep. 219. that it is not necessary that a party, "should be at the trouble or expense of executing a deed to shew that he did not assent to the devise" of a freehold estate, disapproved.

Ejectment in the circuit court of Hardy county, by John Doe lessee of Elijah Hyre, Elihu Vandeventer, Solomon Bean, Benjamin H. Bean, Peter J. S. Hyre, and Cornelius Vandeventer and Susanna his wife, heirs at law of Peter Hyre deceased, against William Bryan.

At the trial, the plaintiff introduced as evidence the will of Valentine Power, which had been duly admitted to record, and contained the following clause:

"Providing Peter Hyre pays two hundred pounds unto the fatherless and motherless children of Henry and Magdaline Fink deceased, and likewise maintain his father in law Valentine Power and his wife Mary, with meat, drink, washing, lodging, needful apparel, and every thing that is necessary for to support human life, during his natural life, then for a true reward he shall have my plantation whereon I now live, with the two surveys adjoining the said plantation and the spurs of New Creek mountain. I say, I give and bequeath the said land to the said Peter Hyre, and his heirs and assigns forever."

95 *It was agreed between the parties, that the lessors of the plaintiff were the heirs at law both of Peter Hyre and of Susanna his wife; that Valentine Power died leaving eleven children and heirs at law, of whom the said Susanna was one; and that Amelia Power, one of the said children and heirs at law of Valentine Power, had died intestate and without issue. The lessors of the plaintiff rested their claim to the land devised to Peter Hyre, upon the said will, and on testimony adduced by them to prove that Peter Hyre had complied with the conditions of the will. The defendant moved the court to instruct the jury, that the provision of the will by which Valentine Power devised his land to Peter Hyre, created a precedent condition that Peter Hyre should maintain the testator and his wife Mary, during their lives, with meat, drink, washing, lodging, needful apparel, and every thing necessary to support human life; and that unless the jury believed it had been proved that Peter Hyre, or some person at his instance and procurement, did maintain the said Valentine Power and his wife during their lives, as above stated, then they ought to find for the plaintiff only one tenth of the lands set forth in the declaration. The court refused to give this instruction, but instructed the jury as follows: that the provision of the will by which Valentine Power devised his land to Peter Hyre, created a precedent condition that Peter Hyre should maintain the testator and his wife Mary, during the life of the said Valentine Power, with meat, drink, washing, lodging, needful apparel, and every thing necessary to support human life; and that unless the jury believed

it had been proved that Peter Hyre, or some person at his instance and procurement, did maintain the said Valentine Power and his wife during the life of said Valentine Power, as above stated; or, if they believed that there was only a partial compliance, unless they believed that such partial compliance was accepted as a performance of the

96 *condition precedent in the lifetime of the testator, then they ought to find for the plaintiff only one tenth of the land set forth in the declaration. To which opinion of the court the defendant excepted, and his bill of exceptions was signed and sealed.

A second bill of exceptions, after stating that the plaintiff gave in evidence a copy of the will of Valentine Power, set forth that the defendant introduced evidence tending to shew a parol disclaimer by Peter Hyre the devisee, and moved the court to instruct the jury, that if they believed, from the facts proved, that there was a parol disclaimer of the land devised to him, they must find for the defendant: which instruction the court refused to give, but instructed them that the disclaimer must be by writing. To which opinion of the court the defendant also excepted.

A verdict being found against the defendant, he moved for a new trial; which motion was overruled, and judgment entered for the plaintiff.

Whereupon Bryan presented a petition to a judge of this court for a supersedeas, insisting that whatever might be the true construction of the will in reference to the condition precedent, yet the will could pass no title to Peter Hyre if he disclaimed the devise, whether that disclaimer was by parol or in writing; that the title to the land under the will never could vest unless the devise were assented to, and though such assent would be presumed in the absence of all proof, yet it could not be presumed in opposition to an express disclaimer, although that disclaimer were by parol. The supersedeas was awarded.

G. N. Johnson for plaintiff in error. In relation to other modes of conveyance, the assent of two minds is necessary to complete the act. And it is equally necessary in relation to devises. The devisee must assent, to make the devise effectual. Where the

97 devise purports *to confer a benefit, it is admitted that assent will be presumed until dissent be shewn. But here it is alleged that the devisee has dissented. And the question whether he has dissented or not, is a question of fact, to be determined on the evidence. Then we have to enquire, whether this fact may not, like other facts, be established by parol as well as by written evidence. Parol evidence must be received, unless forbidden by some sound principle of law. None such is known to exist. It may perhaps be thought that evidence of this description is of too uncertain a nature. But a declaration of disclaimer may be as clearly made by words as in writing; and after being made, its effect cannot be destroyed by a declaration of a different nature, whether it has been made by words or in writing. Upon the authorities,

there is no difficulty. In *Townson v. Tickell &c.* 3 Barn. & Ald. 31. 5 Eng. Com. Law Rep. 219. the earlier cases are reviewed, and the court decide the disclaimer there, which was by deed, to be good: but the determination is upon reasoning which is equally applicable to a disclaimer by parol. *Holroyd, J.*, says, he "cannot think that it is necessary for a party to go through the form of disclaiming in a court of record, nor that he should be at the trouble or expense of executing a deed to shew that he did not assent to the devise." Chief justice Abbott cites, as a strong authority, the case of *Thompson v. Leach*, 2 Ventris 198. in which Mr. Justice Ventris said, a man "cannot have an estate put in him in spite of his teeth." S. C. 3 Mod. 296. 1 Show. 296. Show. Par. Cas. 150. *Holroyd, J.*, refers to *Bonifaut v. Greenfield*, 1 Leon. 60. Cro. Eliz. 80. There the devise was to four executors. One of the executors refused to take out letters of probat, and it was objected that the sale was not good; to which it was answered, that as it was devised unto him for the intent to sell, if he refused to sell, he refused to take the estate, and so it was unnecessary

98 that he should *join in the sale. The court held the sale good, although the devisee had not renounced the estate, either by matter of record or by deed. The cases of *Townson v. Tickell &c.* and *Thompson v. Leach*, are cited with approbation, in *Skipwith's ex'or v. Cunningham &c.* 8 Leigh 282. by judge Tucker, who says (p. 285.) he presumes "nothing more would be requisite than simple evidence of the fact of disclaimer." The case of *Bonifaut v. Greenfield*, which seems to be to the very point, is sustained by other respectable authority. In *Sheppard's Touchstone*, p. 452. it is laid down, that "if one devise his land to another in fee simple, fee tail, for life or years, and the devisee, after the death of the testator, doth refuse and waive the estate devised to him, in this case and by this means the devise to him is become void. And it seems, a verbal waiver is sufficient in this case." The counsel for the plaintiff in *Crewe v. Dicken*, 4 Ves. 98. cited *sir Thompson Rumbold's* case as one in which *Bonifaut v. Greenfield* had been followed. And in *Nicloson v. Wordsworth*, 2 Swanst. 371. the opinion is expressed, that *Crewe v. Dicken* proceeded upon a distinction between a disclaimer and a release, which is untenable. Disclaimer is implied from acts inconsistent with claim under the will. There is an implied waiver where the devisee does an act from which it is inferred that he does not accept. 1 *Powell on Devises* (Jarman's ed.) 429. 21 *Law Library* 252. *Paramour v. Yardley*, Plowd. 543. And where one refuses, it is the same as if he had never been named. *Smith v. Wheeler*, 2 Ventris 128. Evidence of acts of election by parol is sufficient. And evidence of acts of dissent by parol should be equally sufficient. Surely, in the case at bar, if there had been evidence to shew that Peter Hyre had refused to pay the £200. that would be evidence from which dissent might be presumed.

G. B. Samuels for defendant in error. All deeds, whether deriving their effect

99 from the common law or *the statute of uses, do, immediately upon their execution by the grantors, divest the estate out of them, and put it in the party to whom the conveyance is made, though in his absence and without his notice, till some disagreement to such estate appears. 4 Cruise 12. tit. 32. ch. 1. § 25. Thompson v. Leach, 2 Salk. 618. Skipwith's ex'or v. Cunningham &c. 8 Leigh 271. In the case of a devise, the freehold is in the devisee before entry. 2 Tho. Co. Lit. 645. The effect then of the will of Valentine Power was, immediately upon his death, to invest Peter Hyre with the estate devised. This suit being brought to recover that estate, and the recovery being resisted upon the ground that the estate was disclaimed, the question is whether parol evidence shall be received to prove the disclaimer. On this question it is material that the will itself is required to be in writing, and to be recorded. It is required to be written, in order that authentic evidence of the testator's intention may be had, and it is required to be recorded, that it may be preserved, and afford correct information to creditors and purchasers, and to the commonwealth herself for purposes of revenue. If nothing be done by the devisee, the estate is vested and perfect in him. If, however, a valid disclaimer be made, the estate is divested, and transferred to the heir at law, who, by relation, is regarded as seized from the death of the ancestor. A disclaimer, then, is in its essence and operation a conveyance. Why should it not in form also be a conveyance? Why shall there be withheld from devisees, the safeguards provided by the statutes regulating other conveyances of land, whether by deed or by will? If words alone can divest and transfer an estate devised, it will repeal, in practice, the statute of wills. After a will has been executed, conforming in all particulars to the statute, its operation may be divested by parol proof.

100 The law forbids that wills, deeds, and even less formal instruments, shall *be restricted in their operation by parol proof, and yet it is proposed in this case that a will shall be—not explained, not curtailed, but in effect entirely abrogated and destroyed, by parol. In guarding the devisee against the trouble and possible expense of making a written disclaimer, the law could not have fallen into the indiscretion of committing the whole mass of real estate devised, to the recollection and integrity of witnesses. Perhaps 999 out of 1000 devisees accept the devise: it is supposed, however, that the estates of the 999 are to be committed to the precarious issues of trials upon parol proof, lest the one may be put to the trouble of making a written disclaimer. Such a decision as that asked by the plaintiff in error would open a wide door to frauds and perjuries. No reason for such a course can be found in the policy of the law,—that jealous policy by which all assurances of land are required to be in writing. And no authority can be produced in its support. There is no case in which a parol disclaimer of a fee simple estate has been adjudged valid in law.

The decision in Bonifaut v. Greenfield, that if a devise of land be to four executors to sell, and three of them execute the will, that is sufficient, is not in point. In Townson v. Tickell &c. there being a deed of disclaimer, the question did not arise. And the dictum in Sheppard's Touchstone, relied upon on the other side, is wholly unsupported. In the London edition of 1826, by Atherley, the editor has brought together the authorities which sustain him in opposition to the text. He says, "with respect to estates of freehold, verbal waiver or disclaimer would not be sufficient. With respect to an estate of freehold, it was held in Butler and Baker's case, 3 Co. Rep. 26. that it could only be disclaimed by matter of record. But in a late case (Townson v. Tickell, 3 Barn. & Ald. 31.) it was held that it might be disclaimed by deed in pais." The authorities, then,

101 which are cited on the other side, *in no wise conflict with others which establish that a parol disclaimer is not valid. Co. Lit. 111 a. 2 b. 3 a. 4 Cruise 436. tit. 32. ch. 26. § 5. 5 Vin. Abr. tit. Contract and Agreement. D. pl. 1. 8 Vin. Abr. tit. Disagreement. 22 Vin. Abr. tit. Waiver. A.

C. Johnson in reply. All agree that a devisee has a right to accept or reject that which is tendered to him. Where the estate is for his benefit, the law proceeds upon the presumption that he accepts, until he dissents. But when the fact is ascertained that he has not consented, the estate has never been in him. The simple question then is, how this fact is to be ascertained. According to the common law, every fact susceptible of proof may be proved by a single witness deposing to the fact. Wherever the policy of the law requires higher proof, such proof is prescribed by statute. The statute of frauds is framed upon this policy, and so likewise the statute of conveyances. But can any one say that any of these statutes, fairly interpreted, embraces this case? It has not been so contended. It is only insisted that the case falls within the same policy; a proposition which cannot be maintained, any more than the other. With respect to the cases, there is not one which has ever ascertained that the disclaimer must be in writing. The passage from Sheppard's Touchstone 285. is referred to in Thomas's edition of Coke's reports, note E. to Butler and Baker's case, and the editor, after citing the modern decisions, concludes by saying, "It appears to be the better opinion that the disclaimer need not be either by matter of record or by deed."

ALLEN, J. The point arising upon the first bill of exceptions has not been pressed in the argument here, and as there does not appear to be any thing in it, I shall pass it over, with the remark, that I think the opinion thereby excepted to was strictly correct. *It is not very clearly perceived how the question propounded by the second bill of exceptions could arise under the will of Valentine Power. He devises his land upon a condition precedent. The estate could vest only by shewing a performance.

To make out their case, it was incumbent on the lessors of the plaintiff to prove a performance by their ancestors of this condition. When this was shewn, his assent to the devise was thereby also proved. The estate, by his own act, vested absolutely in him, and could not be divested except in the mode prescribed by law. The only question (as it seems to me) arising on this branch of the case was, Has the condition been performed? If it has, the devisee, by performing, has accepted the devise, and the estate has vested. The case of *Crewe v. Dicken*, 4 Ves. 97. is somewhat analogous. There a conveyance was made to trustees, upon trust to sell, and receive the purchase money. One of the trustees conveyed and released to his cotrustee all his interest in the estate. If the trustee had simply declined to act, and executed an instrument declaring his disclaimer, the estate would have vested in the other trustee. The release was considered as an instrument by a person thinking he had an interest to part with, and as furnishing evidence of his acceptance of the trust. If a party intending to refuse the trust could be held to have assented to the conveyance to himself, by the form of instrument he adopted to manifest his refusal, how much stronger is the case of the devisee or alienee upon a condition precedent, who shews a performance!

Supposing, however, that the question did properly arise, it seems to me there is no error in the instruction of which the defendant can complain. It is laid down in *Co. Litt. 111.* that "in the case of a devise of lands whereof the devisor is seised in fee, the freehold or interest in law is in the devisee before he doth enter, and in that case nothing

103 (having regard to the interest or *estate devised) descends to the heir." The case of *Thompson v. Leach*, 2 Salk. 618. decided that a surrender immediately divests the estate out of the surrenderor, and vests it in the surrenderee; for that although every grant implies a contract, yet a gift implies a benefit, and consent is presumed. But although the estate vests by presumption of law before entry, it is clear that a man cannot be compelled to take it against his own consent: and there must be some mode by which he may renounce and disclaim it. In the earlier cases it was held, with respect to an estate of freehold, that the disclaimer must be by matter of record. *Butler and Baker's case*, 3 Co. Rep. 26. And the reason assigned is, that a freehold ought not to be easily divested, to the intent a tenant to the præcipe might be the better known. In *Townson v. Tickell &c.* 3 Barn. & Ald. 31. the devisee in fee renounced and disclaimed by a deed, and it was decided that such a renunciation was sufficient. One of the judges states it as his opinion, that such disclaimer need not be either by matter of record or by deed. The case did not require a decision of this question, and the authority cited does not, as it seems to me, warrant the conclusion. The judge cites *Bonifant v. Greenfield*, *Cro. Eliz. 80.* That was a devise to J. S. and three others, to sell, and these persons were

made executors. One refused to meddle with the will, or sell. The other three sold in the lifetime of the fourth; and the sale was sustained. The court said, the sale by the three was good either by the common law or the statute 21 Hen. 8. ch. 4.; that when the testator devised the land to four to sell, and made them executors, it was as if, at the first, he had devised that such his executors should sell; and in such case, by the common law, a sale by three, the fourth refusing, was good. In *Co. Litt. 236 a.* it is said that where lands are devised to the executors to be sold, the devise taketh away the descent, and vesteth the estate in the executors; and 104 *that when he devises his tenements to be sold by his executors, it is all one as if he had devised his tenements to his executors to be sold. And in the same book, 112 b. 113 a. it is laid down, that where executors have but a naked power of sale, all must join, but where a man devises his lands to his executors to sell, and one dieth, the survivor may sell; in the one case it being a bare trust, in the other a trust coupled with an interest. This distinction has been questioned in modern times, but was the received law when the case in *Cro. Eliz. 80.* was decided. The devise there was of the land to the four persons named; they were, in another part of the will, named as executors; and the court adjudged that it was the same as if at the first he devised to his executors. The fact that the devise was to them by name in one clause, and that they were made executors in another, did not change their charter; and the land being devised to them to sell, they took, according to *Coke*, not a bare trust, but a trust coupled with an interest, in which case, by the common law, those who acted could sell. The decision proceeded upon the peculiar doctrines of the common law respecting the relation of executors to their testator's estate, and has no application to a case like the one under consideration. The last case in which the question arose is that of *Smith v. Smith*, 6 Barn. & Cress. 112. in which there was a devise to one for life, who refused to take it, saying, she claimed the estate as heir at law, and would not accept any benefit by the will of the devisor. It was held that this was not such a disclaimer as prevented her from afterwards bringing her ejectment, and relying on her title as devisee. The court decided that this was not a disclaimer of any estate in the land, but only of benefit under the will, accompanied with the assertion of a right to the land by a higher and better title: that this proceeded under a mistake, and did not preclude the party from acting 105 under her improved *judgment, and taking as devisee. They therefore did not determine whether such disclaimer should be by parol or deed; for, in whatever form made, it must be a disclaimer of any estate in the land.

No case has been cited which establishes the doctrine that a parol disclaimer can be set up against the devisee claiming a freehold estate; nor have I been able to find the rule so laid down in any of the elementary

books, except Sheppard's Touchstone. It is there said (p. 452.) that a verbal waiver is sufficient: but this position is controverted by Atherly the editor, who says that a verbal waiver would not be sufficient in relation to freehold estates. The authority referred to (Plowden 543.) does not sustain the position taken in the text. That was the devise of a term, and involved the doctrine of the election of the legatee to take as executor or legatee. That the disclaimer of a freehold estate must be made in a court of record, is laid down in 4 Cruise tit. 32. ch. 26, and in 8 Vin. Abr. tit. Disagreement. And the only modification of the ancient rule is the permission to disclaim by deed. Upon authority, then, it seems to me that the disclaimer, to defeat the devise claiming under the devise of a freehold estate, cannot be made by parol.

The policy of our laws would seem to demand in this case an adherence to the common law rule, as modified by the more recent decisions. The records with us are relied on as disclosing the chain of title. The commonwealth (as it was properly remarked in argument) has an interest in the question, for the purposes of revenue. The law requires wills to be executed with certain solemnities; and it would present a strange anomaly, if a devise, required to be in writing and executed with such solemnities, could be defeated, and in effect abrogated, by the testimony of a single witness proving some verbal disclaimer. Difficulties, too, would constantly present themselves in the

106 practical application of the rule. Should one disclaimer conclude the party? That would seem to be the necessary consequence, since upon the disclaimer the estate passes to the heir. If so, testimony of some loose expression, carelessly uttered and imperfectly remembered, forgotten by the devisee as soon as pronounced, might defeat his estate. If more than one disclaimer is required, where is the limit, or when does the privilege of retracting determine? By requiring the disclaimer to be by deed, at least when set up against the devisee asserting his title under the will, these difficulties are avoided.

I think the judgment should be affirmed.

The other judges concurring, judgment affirmed.

107 *Jackson and Others v. Updegraffe and Others.

August, 1842, Lewisburg.

(Absent ALLEN and BALDWIN, J.*)

Wills—Direction That Executor Should Receive and Pay Over Legacy Charged on Devisee—Case at Bar.—A testator, besides bequeathing a sum of money to his wife, and another sum to his daughter Rebecca, bequeathed to his daughter Susanna \$4000. to be paid by his executors in equal payments of \$1000. each after his decease. He devised lands to certain devisees, provided they should pay into the

hands of his executors the sum of \$1000. per annum for eleven years. He made a bequest to two sons John and Samuel, they making themselves answerable for certain payments to his wife and his daughter Rebecca. And he directed his executors to receive \$1000. annually from the devisees before mentioned for five years, to be paid over by them to his daughter Susanna. The remaining \$6000. as it should become due, he gave to his sons John and Samuel. Under this will a question arose as to the quality and extent of the power conferred on the executors over the fund of \$1000. per annum, charged on the devisees. *Per* STANARD, J., the proposition that this fund is identified with the personal estate of the testator, and passes to the executors subject in all respects to the executorial power over personal estate, and to all the liabilities of such estate, cannot be maintained: the legacy of \$6000. for the daughter Susanna is not a general one, payable out of the personal assets, with the charge on the land as an auxiliary security, but is a legacy to be paid only by means of the charge; and the fund arising from this charge has no more the quality of personalty, than a fund arising from land directed to be sold to pay a legacy.

Executors and Administrators—Application of Assets to Discharge Individual Liability—Effect.—Parties dealing with an executor or trustee, and co-operating with him in the misapplication of assets or trust funds, in violation of the duties of the executor, or in breach of the trust, cannot use such transactions as a defence against the claim of creditors, legatees, or *cestuis que trust*. And the application of assets or trust funds, by the executor or trustee, to the discharge of his individual responsibilities, is, unless the estate or trust be indebted to the executor or trustee, a violation of duty or breach of trust.

108 Samuel Jackson of Fayette county, Pennsylvania, who died in July 1818, by his will, after desiring that all his just debts should be duly satisfied as soon as convenient after his decease, devised to his wife certain real property for life, and bequeathed to her certain personal property absolutely, and also the sum of 5000 dollars in cash or current bank notes, to be paid by his executors as follows, viz. 1000 dollars to be paid as soon as possible after his decease, and the remainder to be paid in yearly instalments of 500 dollars each, to commence two years after his decease. Then, after devising certain real estate to his sons John and Samuel, he made the following bequest: "I give and bequeath to my daughter Susanna Updegraffe, wife of James Updegraffe, the sum of 4000 dollars in full of her portion, to be paid by my executors to her or her heirs in equal payments of 1000 dollars each after my decease." The reversion of the real property devised by him to his wife for life, was devised to his daughter Rebecca, and he

†Executors and Administrators—Breach of Trust.—

On this subject, see the principal case cited in *Barksdale v. Finney*, 14 Gratt. 338; *Davis v. Christian*, 15 Gratt. 49; *foot-note* to *Jones v. Clark*, 26 Gratt. 642; *Edmunds v. Venable*, 1 P. & H. 140; *Bolsseau v. Bolsseau*, 79 Va. 77. See monographic note on "Executors and Administrators" appended to *Rosser v. Depriest*, 5 Gratt. 6.

*The former had been consulted by the appellee: the latter was counsel for him in this court.

also bequeathed to his said daughter Rebecca the sum of 2000 dollars in cash, one half of which was to be paid by his executors as soon as she might want it and as soon as possible after his decease, and the other half to be paid in two years after his decease. He then devised and bequeathed as follows: "I give and bequeath unto my son Josiah Jackson and my daughter Ruth Dixon, wife of Henry Dixon, all my lands and other property in Monongalia county, Virginia, consisting of forge, slitting and rolling mill, grist and saw mill, with sundry other improvements: provided nevertheless, that they jointly and severally pay or cause to be paid into the hands of my executors the sum of 1000 dollars per annum for the space of eleven years, to be by them appropriated as shall be hereafter mentioned." After a devise and bequest to his son Jesse Jackson, and after directing certain property to be sold and the proceeds appropriated towards completing and finishing the glass works establishment then progressing, and also

109 directing certain other property *to be sold and a payment out of the proceeds of sale of 500 dollars to his daughter Rebecca, he bequeathed as follows: "It is my will and desire that the stock I hold in the Monongalia bank of Brownsville, and my stock in Clarksville manufacturing company, and all debts due me at my death, shall after my decease belong to, and I hereby bequeath the same to my sons John and Samuel, they making themselves answerable and paying the dower herein given to my wife, and the balance of the legacy herein granted to my daughter Rebecca. Item, My will and desire is, and I order it so to be done, that my executors receive annually 1000 dollars, as is herein mentioned and expressed, from my son Josiah and my son in law Henry Dixon, for the space of five years, which sum, as soon as may be after its reception, shall be by them paid over to my daughter Susanna or her heirs. The remaining 6000 dollars, as it becomes due, I give and bequeath to my sons John and Samuel, in order to compensate them for making advances of moneys to pay debts that I may owe, and to enable them more effectually to complete their glass manufactory." Then, after authorizing his executors to make sale of his real property not before enumerated, and divide the proceeds amongst all his children, he appointed his sons John Jackson and Samuel Jackson executors of his will. The testator, by a codicil, revoked the devise and bequest to his son John, and in lieu thereof devised and bequeathed the same property to John's children. The death of the testator occurred before the 28th of July 1818.

The executors took probat of the will in Pennsylvania, and one of them (John Jackson) also qualified in Virginia. The testator's daughter Susanna died in 1823, leaving six children, Anne, Joseph, Rebecca, Maria, Samuel and Nathan. Anne married Jourden Parker, who afterwards died. Their father qualified in Pennsylvania as guardian
110 of the others, and brought an *action there for the legacy against the execu-

tors. This action having proved unavailing, a suit was brought in Virginia, in the superior court of chancery formerly holden at Clarksburg. The original bill was in the name of the surviving husband and children of the legatee Susanna, but an amended bill was afterwards filed, making the husband a party plaintiff in the character of administrator of his deceased wife. The defendants were John and Samuel Jackson the executors, and Josiah Jackson and Henry Dixon and Ruth his wife, and the bill prayed that unless the legacy should be paid in such time as the court might direct, such part of the real estate charged therewith might be decreed to be sold, as might be sufficient to pay the same.

Josiah Jackson, in his answer, insisted that he had paid the legacy in full to the executors. The suit was proceeded in against the other defendants in the mode prescribed by law as to absent defendants.

The circuit court of Monongalia (to which court the case had been removed) made an order directing a commissioner to ascertain how much, if any, of the legacy had been paid by the devisees to the executors, and how much of what was paid to the executors, had been paid over by them to the parties entitled.

A report was made, to which the plaintiffs filed exceptions; and the circuit court, sustaining the exceptions, recommitted the report.

A second report was made, stating that no part of the legacy appeared to have been paid the executors, unless certain vouchers referred to in the previous report, and decided by the court to be insufficient, were received as evidence of payment. To this report exceptions were filed on the part of the defendants. And the cause came on to be heard the 19th of April 1836, upon the said report and exceptions.

The payments alleged to have been made to the executor John Jackson rested
111 for proof on certain papers *purporting to be his receipts, and on two depositions of Thompson Neave. One item was a charge of 902 dollars 25 cents, which Neave stated was the amount paid by Neave & son, between the 20th of March 1818 and the 10th of May 1819, to John Jackson for the proceeds of the sales of paper deposited with them by Jackson & Sharpless. The defendant Josiah Jackson had exhibited with his answer an account professing to embrace all the claims of Josiah Jackson in transactions with the executors or either of them, but the account so exhibited did not include this sum of 902 dollars 25 cents, though it comprehended all the other claims resulting from the transactions with Neave & son. In respect to another item, of 1763 dollars 13 cents, for nails and brads delivered to John Jackson between June 1820 and June 1823, which was attempted to be sustained by the evidence of Neave, there was no ground to conclude that the nails and brads were the same mentioned in two receipts of John Jackson separately charged. Both of these receipts shewed that John Jackson re-

ceived the nails for Josiah Jackson, and bound himself to pay over to the said Josiah the proceeds of the sales of the same when sold. Another charge was a debt of John Jackson to Neave & son, charged to Josiah Jackson. Another was a draft of Josiah Jackson on Neave, on nail account, in favour of John Jackson. Only one other payment to John Jackson was alleged, and of that there was no evidence except a paper purporting to be a receipt, but which was not proved.

The evidence of payments to or claims on the executor Samuel Jackson, is (in the view taken thereof by the court of appeals) unnecessary to be stated, with a single exception. There was a paper marked F. importing that Samuel Jackson received, the 26th of March 1825, of Josiah Jackson, 3969 pounds cut nails, in full of the last 6000 dollars due John & Samuel Jackson from the estate of Samuel Jackson deceased,
112 as devised in his *will. The genuineness of this paper was drawn in question.

The circuit court overruled* the defendants' exceptions, and by consent of James Updegraffe administrator of his deceased wife, decreed that the defendants Josiah Jackson and Henry Dixon and Ruth his wife pay to the plaintiffs who were children of Susanna Updegraffe, the sum of 5000 dollars, with legal interest on 1000 dollars parcel thereof from the 28th of July 1819, on 1000 dollars other parcel thereof from the 28th of July 1820, on 1000 dollars other parcel thereof

*JUDGE FRY, who pronounced the decree in the circuit court, delivered a very elaborate opinion. He considered that the executors were, as to the legacy, trustees, and their authority over this fund more limited than that of an executor over assets; citing, to shew the difference between an executor and a trustee, *Graff &c. v. Castleman &c.* 5 Rand. 208-9. He declared it to be a principle, that a trustee cannot apply the trust fund either to the payment of his own debt, or to his private trade or business, and that all persons who are privy to and aiding him in so doing, are precluded from taking any benefit from their act; citing, in support of this proposition, and to shew the extent to which it is carried, *Wilson v. Moore*, 1 Mylne & Keene 387. 7 Cond. Eng. Ch. Rep. 78. *Graff &c. v. Castleman &c.* 5 Rand. 201. Then the judge examined the evidence, and from it came to the conclusion, that the alleged payments to and receipts of Samuel Jackson were confined to his own legacy, and to his private dealings and business with Josiah Jackson, and that it was fraud to attempt to make them serve the double purpose of discharging the legacy of Mrs. Updegraffe. Proceeding further to examine the case as to the alleged payments to John Jackson, it seemed to him that the sum of 902 dollars 25 cents, composed of payments which had commenced before the testator's death, was manifestly the private debt of John Jackson; that the sum of 1763 dollars 18 cents was for the same nails and brads mentioned in two receipts of John Jackson separately charged, and must moreover be altogether excluded upon the principles before mentioned; and that the want of sufficient evidence to support the other claims, and the principles aforesaid, required the rejection of the same.

from 28th of July 1821, on 1000 dollars other parcel thereof from the 28th of July 1822, and on 1000 dollars the residue thereof from the 28th of July 1823, until paid, and
113 the *costs of suit; and the decree provided that unless the said sum of 5000 dollars, with the interest and costs, should be paid within 120 days from the date of the decree, the lands devised to Josiah Jackson and Ruth Dixon, or so much thereof as might be necessary, should be sold.

On the petition of Josiah Jackson and Henry Dixon and Ruth his wife, an appeal was allowed from the decree.

The cause was argued in August 1840, before Tucker, P., and Brooke and Stanard, J., by C. Johnson for the appellants, and Baldwin for the appellees.

Johnson said, the court below seemed to have thought that the trust to receive the annual sum of 1000 dollars was a personal joint authority to the executors, which could only be discharged by their joint act. But he insisted it was an official trust, which could be performed as any other executorial trust. It is created by the official designation. The clause in the first part of the will containing the bequest directs the payment by the executors, and under that clause it must have been payable out of the general assets. The subsequent provision in the will only creates a specific fund to be received by the executors, to enable them to discharge the legacy given by the previous clause. As executors, then, they are to receive, and as executors they are to pay, by the express terms of the will. Suppose the executors had not qualified, they surely would have had no right to receive the money. Having qualified, they are entitled to receive the same, and may receive it in equivalents or commutables, as well as money. The case of *Wilkinson & Co. v. Holloway*, 7 Leigh 277. in which it was held that an attorney employed to collect money cannot receive bonds or other things under that authority, has no application to this. Here the executors gave an official bond, and have
114 all the power *of the testator where they act bona fide. And surely neither the debtor who gives, nor the executor who receives money's worth in discharge of a debt, is chargeable with bad faith. The principle of the case of *Graff &c. v. Castleman &c.* 5 Rand. 201. applies only to a few items of disbursements claimed by Josiah Jackson as made to the executors. And even in respect to these, there is pregnant proof in the deposition of Neave, that those debts were the result of a previous authority given by Josiah Jackson to the ostensible creditor, to make advances to the executors on account of their claim as such. The objection is made, that none of the receipts but that marked F. import to be given as executors, or on account of the sums payable by Josiah Jackson under the will, and that they were private transactions, having no connection with the claim of the executors or the responsibility of

the devisees. There was, however, no running account between the parties; no claim on Josiah Jackson but for the sums payable under the will. And the only effect of the omission to state, on the face of the receipts, that the executors received in that character, is to throw the burden of proof on the party paying. The last receipt is avowedly for what was payable under the will, yet that is not subscribed as executor. (The counsel then examined the evidence in the cause, and endeavoured to shew that it established all that was necessary on the part of the appellants.)

Baldwin for the appellees. The executors were entitled to the 6000 dollars for their own use. Over that they had full dominion, and against that Josiah Jackson was entitled to credit for any liabilities they might incur to him. Not so as to the 5000 dollars. As to this, they stood in a fiduciary character, with the limited and special authority of trustees, liable themselves for a breach of the trust, and with a liability on the part of others concurring in that breach of trust. The power given in this case to the two trustees could not be lawfully

115 *executed by one. 2 Story's Eq. 322. § 1062. On this ground alone the alleged payments are no discharge; for both have not joined in the receipts, and in the case of trustees, as distinguished from executors, this is indispensable. Id. 521. § 1280. But another objection to the validity of the alleged payments arises from the duty of trustees to keep the funds of their trust distinct from other funds. 2 Fonb. Eq. 187. (Philad. ed. of 1831, p. 474. note.) They are not permitted to apply the trust funds to their own debts, trade or business. To the authorities cited by the judge of the circuit court may be added the case since decided of Fisher v. Bassett and others, 9 Leigh 119. Furthermore, the trust in this case was created by a will containing special directions, which should have been faithfully followed. 2 Story's Eq. 517. § 1276. There was no right to receive payment but in money. The decision in Wilkinson & Co. v. Holloway is quite apposite to the case. (Having laid down these principles, the counsel proceeded to examine the evidence, and to shew, upon each ground, the invalidity of the alleged payments.)

The cause not having been decided before the resignation of Tucker, P., was again argued in August 1842, before Cabel, P., and Brooke and Stanard, J., by C. and G. N. Johnson for the appellants, and Guy R. C. Allen for the appellees. The argument on this occasion was chiefly upon the evidence, to shew the proper inferences therefrom. But in the course of the argument, G. N. Johnson, for the appellants, maintained, 1. That the thing given to the executors being money, though they had a right to charge the land for it, they took it as executors, and not as trustees. 2. That being executors, a payment of nails and iron to one of them was good, if ac-

cepted by him in satisfaction; (citing Sallee v. Yates, 1 Wash. 226. in which payments in paper money were held good, in accordance with the custom of 116 the country, *though before the act of assembly authorizing such payments.) 3. That even if the executors were to be considered as trustees, one might make a valid contract, and the assent of the other be presumed. Nelson v. Carrington & others, 4 Munf. 332. He also, in noticing the doctrine of Graff & c. v. Castleman & c. 5 Rand. 201. cited and commented on Landley v. Merrifield, 7 Leigh 360, 61. The counsel for the appellees referred to the authorities relied on by the judge of the circuit court, and to the case of Wilkinson & Co. v. Holloway. He insisted that the trustees here were as limited in their authority as the attorney at law in that case. He insisted further, that the trustees could not give a release in consideration of a debt due from themselves individually. As well might they give such release for no consideration, as for a consideration ensuring entirely to their own individual benefit.

STANARD, J. The fate of this case depends on the fact and validity of the payment, alleged by the defendant Josiah Jackson to have been made, of the annual instalments intended for the daughter Susanna.

It requires but a brief examination of the record, though the mind of the enquirer be disposed to make the most charitable construction, to find the most convincing proof that the defendant Josiah Jackson, in his efforts to sustain the defence, has been betrayed into gross inconsistencies, has made many misstatements, has in numerous instances duplicated his claims of credit, and has put forward unfounded pretensions or suppressed material facts. But all this, though it may cover the defence with suspicion, does not necessarily doom it to unconditional condemnation. The judicial annals of this and other countries are not without examples of attempts to vindicate innocence by falsehood, nor of a resort to fraud and misstatement to sustain claims or defences intrinsically 117 sound and sustainable *without such auxiliaries; and though a court of equity may refuse its aid to a plaintiff who has resorted to fraudulent misstatements or suppressions to obtain it, it has no right to inflict the forfeiture of a defence, if otherwise good, because resort has been attempted to such reprobated auxiliaries. Such an infliction would be a punishment of the delinquent, not perhaps undeserved, but would not fulfil the appropriate function of a court of equity, which is to administer justice between the parties. The detection of misstatements, inconsistencies, and efforts to deceive by concealing facts or by unfounded suggestions, while it justly subjects the defence to strict scrutiny, should also warn us to conduct the scrutiny with jealous caution against the preposses-

sions that such detection is calculated to produce.

That the traits I have suggested as characterizing the defence have not been overcharged, a short survey of the facts developed by the record will evince. [Here the judge went into some specifications, to shew the general traits which mark and cast suspicion on the defence; and he then proceeded as follows:]

Without adding to the number of these specifications, which might easily be done, I proceed to the enquiry how far the evidence in the record affords satisfactory proof of valid payment, in whole or in part, to either or both of the executors, of the annual sums charged on the devisees in favour of the daughter Susanna.

[The judge examined first the evidence of payments to, or claims on, the executor Samuel. If the receipt F. was genuine, he considered the fair construction thereof to be, that it was for a small sum as a balance of the 6000 dollars payable to John and Samuel Jackson, as contradistinguished from the 5000 dollars to which the daughter Susanna was entitled. And upon the whole evidence in relation to said payments 118 or claims, his *conclusion was, that they were not only not shewn to be for Susanna's annuity, but were affirmatively shewn to be on a different account, and ought not to affect the claim of her representatives on the devisees.]

Next investigating the alleged payments to the executor John, the judge identified the item of 1763 dollars 13 cents, attempted to be sustained by Neave's deposition, with the nails and brads mentioned in two receipts of John Jackson separately charged, the effect of which identification was to limit the charge, at all events, to the said sum of 1763 dollars 13 cents, and not permit any additional charge on account of the receipts. And then he proceeded as follows:]

To the decision of the question touching the efficacy of the transactions of the devisee Jackson with the respective executors, as payments or discharges of the instalments to which the daughter Susanna was entitled, it was deemed by the counsel, especially on the former argument of this cause, important to determine preliminarily the quality and extent of the powers conferred by the will on the executors, over the fund provided by the charge on the devisees. On behalf of the appellants it was contended, that the executors took this fund as personal property, and that their power over the fund was as plenary in all respects as it was over the personal property of their testator. On the other hand it was contended, that this fund was the issue of real estate dedicated by the will of the testator to a specific object, not forming a part of the personal estate of the testator, and not chargeable in the hands of the executors with debts, or other liabilities of personal estate; and that the power of the executors was in the nature of a trust, which could be duly exercised only by their joint act. In my view, it is not necessary

to the decision of the case that this question should be solved. I may say however, in passing, that I have examined the question with care, and that that examination 119 *has left a deep impression that the general proposition, that this fund is identified with the personal estate of the testator, and passes to the executors subject in all respects to the executorial power over personal estate, and to all the liabilities of such estate, cannot be maintained. The just construction of the will, taking all its provisions together, is, according to my impression, that the legacy is not a general one, payable out of the personal assets, with the charge on the land as an auxiliary security, but is a legacy to be paid by the proceeds of the charge on the land, and that the charge supplies the only fund for its payment. The consequence of this construction is, to divest the fund of the quality of personality ascribed to it by the appellants' counsel. No proposition is better settled than this, that a devise of real estate to executors to be sold, or that real estate be sold by executors, for the payment of legacies, does not impress on the proceeds of sale in the hands of the executors the quality or subject them to the liability, of personality: and it would be difficult to distinguish between a fund issuing from realty by a charge and by a sale, both coming to the hands of the executors for the same specific purpose. In respect to such a fund, the most that could be said is, that when the will directs it to the hands of persons nominatum, who are not executors, the construction is that the power is to be exercised in the terms and manner it is given, that is, jointly, and it would not even survive; but when it is given to executors, the power is expounded by the nature of the executorial power, and as that is a joint and several power and survives, the inferred intention is that such should be the quality of the power under such a disposition, and the construction gives effect to this inferred intention. In such case, the executors take the power, not *virtute officii*, but *ratione officii*. The question, however, touching the validity of the alleged payments, will be con- 120 sidered on *the hypothesis that the power, in respect to the receipt of the instalments charged on the land for the daughter Susanna, was as plenary as that of executors over personal estate.

Thus considering it, one general principle need only be premised; and that is, that parties dealing with an executor or trustee, and co-operating with him in the misapplication of assets of trust funds, in violation of the duties of the executor or in breach of the trust, cannot use such transactions as a defence against the claim of creditors, legatees or cestuis que trust: and the application of assets of trust funds by the executor or trustee to the discharge of his individual responsibilities, is, unless the estate or trust be indebted to the executor or trustee, a violation of duty or breach of trust. This principle rests on the firmest

foundation of authority, and indeed is not contested.

The evidence to sustain the first charge of 902 dollars 25 cents, shews a liability of John Jackson to Jackson & Sharpless, arising from receipts under an authority which originated at a date antecedent to the death of the testator, and which therefore could have no reference to the rights and responsibilities resulting from the will. Standing on the simple fact of the receipt of the funds of Jackson & Sharpless (and that is all that is proved), it made John Jackson indebted to Jackson & Sharpless, and without some farther posterior agreement between Jackson & Sharpless and John Jackson, could not be set off even against a claim of John Jackson on Josiah Jackson. But suppose there was distinct proof of such posterior agreement, that these receipts should be considered a payment on account of the annuity which the executors were to receive for the daughter Susanna; it would be an application of the instalments for the daughter to the discharge of a debt of John Jackson to Jackson & Sharpless, and therefore, on the general principle pre-

121 ised, wholly invalid. Besides, *the claim on this transaction as connected with the liabilities of the devisees, is exposed to strong suspicion, if not certain condemnation, on another ground. The account exhibited with the answer, professing to embrace all the claims of Josiah Jackson connected with those of the executors or either of them, does not include this, though it comprehends all the other claims resulting from the transactions with Neave & son; and while this shews a liability of John Jackson to Jackson & Sharpless in its origin, no account of any kind between them is exhibited. The implication is, that there were accounts between those parties, and that they have been suppressed. To my mind it is clear that this item ought to be excluded, not only as a credit against the instalments to which Susanna was entitled, but from the accounts between Josiah Jackson and the executors, or either of them.

Having identified the item of 1763 dollars 13 cents with the nails and brads mentioned in the two receipts of John Jackson before adverted to, the delivery of these nails and brads is not referrible to the general authority of Josiah Jackson to Neave & son to honour the calls of John Jackson (spoken of in Neave's deposition), but to the authority derived from John Jackson's possession of the receipts. The effect of the receipts was to create a personal liability of John Jackson to Josiah Jackson, for the nails or the proceeds of them. There is no proof, or attempt to prove, that this original liability has, by subsequent agreement, been changed. Standing on that footing, had John Jackson, as executor, sued for the annual instalments, this personal demand on him could not be set off, and had he been sued on it, he could not have set off the claim for the annual instalments.

But suppose the subsequent agreement that this personal liability should pro tanto be a satisfaction of the annual instalments; it would be an application of the annual *instalments to the discharge of the debt of one of the executors, and, on the principle before stated, invalid.

The debt of John Jackson to Neave & son, charged to Josiah Jackson is confessedly within the principle aforesaid, and invalid as a payment or discharge pro tanto of the annual instalments.

The draft of Josiah Jackson on Neave, on nail account, in favour of John Jackson, is on its face a transaction between the said John Jackson and Josiah Jackson, having no connection with the estate of Samuel Jackson. It is a matter between them personally. It was not paid by Neave under the general authority spoken of in his deposition, but on the specific draft of Josiah Jackson. All the other items with which it is associated arise from dealings shewn to be personal to the parties, and in their own individual names; and that still more distinctly impresses on it the character it bears on its face; and upon sound principles of evidence, that character only can be safely ascribed to it.

We thus ascertain that not one of the charges drawn from Neave's account, and attempted to be sustained by his deposition, can be considered as a payment to John Jackson of, or on account of, the annual instalments to which Susanna was entitled.

The other pretended payment to John Jackson is attempted to be sustained by a receipt, which is not authenticated by proof; and if it were, it is like the two other receipts before mentioned, and, as a payment, would share the same fate.

The conclusion from a scrutiny of the alleged payments is, that not one of them can be applied to the yearly instalments for Susanna. A general survey of the whole matter in proof fortifies this conclusion. Excluding the item of 902 dollars 25 cents received by John Jackson for Jackson & Sharpless, (as it ought to be, for the reason before given,) from the transactions between Josiah Jackson and the ex- 123 ecutors and each of *them, the amount of all the claims of Josiah Jackson on either and both of the executors, on all these transactions, established by adequate proof in this case, falls short of 6000 dollars, unless resort be had to receipt F.; and with the aid of that receipt, only reaches that sum. I have forborne any special notice of that receipt, or to ascertain the extent or depth of the shadow that the circumstances under which it appears in the record should cast on the defence. I am satisfied that in whatever light it is viewed, whether as genuine or antedated or fabricated, it cannot aid the defence; and all that the defendant can with any reason hope for, is that it should not prejudice it.

The three judges concurred in opinion that the decree should be affirmed.

Hutchison and Others v. Kelly.

August, 1842, Lewisburg.

[39 Am. Dec. 250.]

(Absent BROOKE, J.)

Fraudulent Conveyances—Subsequent Creditors.*—The policy of the statute of 18 Eliz. ch. 5. (substantially adopted in the act of *Virginia* to prevent frauds and perjuries) investigated by BALDWIN, J., and the true principle declared by him to be, that a fraudulent intent of the grantor against one or more creditors is fraudulent against all, and that no distinction exists between prior and subsequent creditors, other than that which arises from the necessity of shewing a fraudulent intent against some creditor, which cannot be done in behalf of creditors not in existence at the time of the conveyance, but by proving either a prior indebtedness, or a prospective fraud against them only.

Same—Indebtedness of Donor—Presumption of Fraud.

The conclusion drawn from the cases by KENT, chancellor, in *Reed v. Livingston & others*, 3 Johns. Ch. Rep. 500. that if a grantor be indebted at the time of a voluntary conveyance, it is presumed to be fraudulent in respect to debts then exist-

***Voluntary Conveyances—Prior and Subsequent Creditors—Rights of—Opposing Views.**—See extensive *foot-note* to *Hunters v. Walte*, 3 Gratt. 26. The principal case is cited in *Lockhard v. Beckley*, 10 W. Va. 98, 99, 100, 103; *Hunter v. Hunter*, 10 W. Va. 344; *Dickinson v. Railroad Co.*, 7 W. Va. 442; *Johnston v. Zane*, 11 Gratt. 569, 566; *Lewis v. Overby*, 31 Gratt. 601; *Bickle v. Chrisman*, 76 Va. 683.

Same—Same—Fraudulent Intent.—In *Hunter v. Hunter*, 10 W. Va. 346, the court said: "JUDGE BALDWIN, in *Hutchison v. Kelly*, 1 Rob. 123, says: 'The true principle, I conceive to be this, that a fraudulent intent against one or more creditors is fraudulent against all; and the statute justifies no other distinction between prior and subsequent creditors than that which arises from the necessity of showing a fraudulent intent against some creditor.' Since the statute imposing the limitation of five years, in certain cases, and since the second section of chapter 74 of the Code of West Virginia has been a part of the law against fraudulent conveyancing, when more than five years have elapsed since the deed was made; the same rule applies to such an existing creditor and a subsequent creditor; in both cases fraud in fact must be shown."

The principal case is cited in *Johnston v. Zane*, 11 Gratt. 566, to the point that subsequent creditors will be let in upon a fund fraudulently alienated, wherever the conveyance has been or might be successfully assailed upon the ground of actual fraud.

Same—Same—Proof of Fraud.—The principal case is cited in *Lockhard v. Beckley*, 10 W. Va. 107; *Johnston v. Zane*, 11 Gratt. 561. See *foot-note* to *Johnston v. Zane*, 11 Gratt. 562.

Effect of Grantor's Remaining in Possession.—For the proposition that the grantor's remaining in possession of the property conveyed, is not *per se* fraudulent, the principal case is cited in *Sutherland v. March*, 75 Va. 236.

Imputing Fraud as Matter of Law.—The principal case is cited in *Cribbins v. Markwood*, 13 Gratt. 496, in support of the proposition that the doctrine of imputing fraud as a matter of law has been repudiated.

Present Rule—Effect of Statute.—In *Johnston v.*

124 *Ing*, and *no circumstances will permit those debts to be affected by the conveyance, or repel the legal presumption of fraud, approved by STANARD, J., and disapproved by BALDWIN, J. The principle declared by the latter to be, that while the indebtedness of the grantor at the time of a voluntary conveyance raises a legal presumption against its validity, that presumption is only *prima facie* and not conclusive.

Same—Voluntary Conveyance to Children—Right of Purchaser at Sheriff's Sale—Case at Bar.—A father made a deed, whereby, in consideration of natural love and affection, he conveyed to his four children, who were infants living with him, all of his property both real and personal. He had another child afterwards. The real property was transferred to the grantees on the commissioner's books, and the taxes charged to them. But the taxes were paid by the father, who continued to reside on the lands and cultivate them, and to use the personal property as his own. A small part of the land was sold by him after the deed. One of the tracts of land conveyed by the deed was afterwards levied upon and sold under an execution at the suit of the commonwealth against the father, for money for which he was liable as

Gill, 27 Gratt. 592, it is said: "At this day it is unnecessary to consider the question, so long and so ably discussed by former judges of this court, how far a voluntary conveyance without actual fraud is valid against the claims of existing creditors. That question, it is believed, was finally put at rest by the provision incorporated in the revision of 1849-'50; which declares that every gift, conveyance, &c., which is not upon consideration deemed valuable in law, shall be void as to creditors whose debts shall have been contracted at the time it was made. See section 2, chapter 118, page 565, Code of 1860. This provision excludes all inquiry into the motives and circumstances of the grantor; it adopts the views of JUDGE STANARD in *Hutchison v. Kelly*, 1 Rob. 123, and of CHANCELLOR KENT in *Reade v. Livingston*, 3 Johns. Ch. R. 481, 500, that if the grantor be indebted at the time of the voluntary settlement, it is presumed to be fraudulent in respect to such debts; and no circumstances will permit those debts to be affected by the settlement, or repel the legal presumption of fraud. The effect of the statute is to disable the debtor from making any voluntary settlement of his estate to stand in the way of his creditors whose debts were contracted at the time." See also, 6 Va. Law Reg. 62, 63.

In *Crawford v. Carper*, 4 W. Va. 68, it is said: "The common law is the basis of the statutory provisions relative to frauds against creditors. These are intended to embody the principles of most general application. *Hamilton v. Russel*, 1 Cranch 316; *Fitzhugh v. Anderson*, 2 H. & M. 302; *Hutchison v. Kelly*, 1 Rob. 123-128; 13 Howard 92-98."

Who is a Creditor—Contingent Liability.—The principal case is cited in *Wolf v. McGugin*, 37 W. Va. 564, 16 S. E. Rep. 800, to the point that a person contingently liable as surety of indorser is a creditor of the principal debtor.

The principal case is also cited for this proposition in *Scraggs v. Hill*, 43 W. Va. 172, 27 S. E. Rep. 314; *First Nat. Bank v. Parsons*, 45 W. Va. 700, 32 S. E. Rep. 276; *Humphrey v. Spencer*, 36 W. Va. 18, 14 S. E. Rep. 413.

The above cases also cite *Bump, Fraud. Con.*, sec. 503.

sheriff. The father was still residing on the land at the time of the sale; and on the day of the sale, the father and one of the sons offered to sell the land and make a good title; but the son forbade the sale by the sheriff. The purchaser from the sheriff obtained possession by virtue of a judgment against the father upon a complaint for unlawful detainer. And then ejectment was brought against the purchaser by the grantees, all of whom were infants at the time of the sheriff's sale. In the action of ejectment, a special verdict was returned, finding the foregoing facts, and also the additional fact, that the deed made by the father to his children was executed for the purpose of avoiding a liability to which he might be subjected in consequence of being the surety of a deputy sheriff. HELD, the deed made by the father is void as to his creditors, and the purchaser at the sheriff's sale is entitled to hold the tract of land so purchased by him. But it appearing that the commonwealth was satisfied by the proceeds of that tract of land, and the conveyance by the sheriff being not only of that tract, but of another, which was neither levied upon nor sold, HELD further, the conveyance by the sheriff presents no obstacle to a recovery by the lessors of the plaintiff of the last mentioned tract.

Special Verdict—Judgment for Plaintiff in Part and for Defendant in Part.—In ejectment, the jury having returned a special verdict, which finds facts in relation to two tracts of land, and concludes by saying, that if the law arising upon the facts be for the plaintiff, they find for the plaintiff the lands in the declaration mentioned, and one cent damages, but if the law be for the defendant, they find for the defendant; and the court being of opinion that the law is for the plaintiff as to one of the tracts of land, and for the defendant as to the other; HELD, it was unnecessary to award a *venire de novo*, but judgment may be given on the special verdict, for the plaintiff for one tract, and for the defendant for the other.

By deed bearing date the 8th of March 1820, between Samuel Hutchison of the county of Nicholas of the one part, and his children Eusebius Robinson Hutchison, David Campbell Hutchison, Lemira Henderson Hutchison and Junius Robert Hutchison of the other part, the said Samuel, in consideration of the natural love and affection which he bore unto his said children, conveyed to them the tract of land on which he then lived, five hundred acres whereof were held by him under a deed, and one hundred acres under a patent; also an entry of two hundred acres adjoining, and "two head of horse beasts, ten head of cattle, eighteen head of sheep, thirty head of hogs, and all the household furniture and the farming utensils, one loom and tackling, and all the grain on hand, either in crop or otherwise." This deed, on the day of its date, was acknowledged by Hutchison in the court of Nicholas county, and admitted to record.

The deed embraced all of the property, both real and personal, belonging to Samuel Hutchison at the time it was executed. The grantees were infants residing with their father, and he continued to reside on

the lands until the 10th of November 1830, when he was removed from the premises by virtue of the judgment on the proceeding for unlawful detainer hereinafter mentioned. The lands embraced in the deed were regularly transferred to the grantees on the commissioner's books, and the taxes were thereafter charged to them. The taxes so charged were regularly paid; but the payment was made by Samuel Hutchison. He continued to use the personal property as his own, and to cultivate the lands by himself and others. After making the deed, he sold a small part of the land to another.

126 *On the 16th of June 1826, several judgments were rendered in the general court against Samuel Hutchison as sheriff of Nicholas county; one for 304 dollars 61 cents, the balance due of the revenue taxes collected in the said county for the year 1825, with interest thereon from the first of November 1825 till payment, and 45 dollars and 69 cents damages, and the costs of the motion; another for 90 dollars and 1 cent, the balance due of the militia fines collected in the said county for the year 1824, with interest thereon from the 15th of December 1825 till payment, and 13 dollars 50 cents damages, and the costs; and another for 10 dollars 83 cents, due on executions, with interest thereon from the first day of November 1825 till payment, and 1 dollar 62 cents damages, and the costs. On these judgments, executions were issued against the lands and tenements, goods and chattels of Samuel Hutchison, on which returns were made, that the same were levied, the 9th of October 1826, on five hundred acres of land, and that the land was not sold for want of time. The judgment on account of the militia fines was afterwards paid the 12th of January 1827. On the judgment for the balance of the revenue taxes, a writ of *venditioni exponas* issued, on which a return was made, that the land was sold at three months credit to Robert Kelly for 1500 dollars, and that the balance of purchase money in favour of the defendant amounted to 1019 dollars 19 cents. The land levied on and sold was the tract of 500 acres mentioned in the deed from Samuel Hutchison of the 8th of March 1820; but Isaac Gregory, the sheriff who made the sale, executed a deed to Kelly on the 13th of May 1830, conveying not only the tract of 500 acres, but also the other tract of 100 acres, stating both as having been sold by virtue of the execution and purchased by Kelly. At the time of the levy under the executions, and at the time of the sale, Samuel Hutchison was residing on the lands; and at the time of the sale, 127 *Eusebius R. Hutchison, one of the grantees, was present, and forbade the sale, claiming the lands under the said deed of the 8th of March 1820, for himself and his co-grantees.

After the conveyance to Kelly, he instituted a proceeding for unlawful detainer against Samuel Hutchison, for the 600 acres of land, and recovered judgment therein;

by virtue of which judgment, Kelly obtained possession.

Afterwards an action of ejectment was brought in the circuit court of Nicholas, in the name of John Doe lessee of David Campbell Hutchison, Junius Robert Hutchison, and David Bair and Lemira Henderson his wife, against the said Kelly. The jury returned a special verdict, finding all the facts before mentioned, and also the following: that after the deed of the 8th of March 1820 was made, the said Samuel Hutchison and wife had another child; that the said deed "was executed by Samuel Hutchison for the purpose of avoiding a liability to which he might be subjected in consequence of being the security of Robert Hamilton, deputy sheriff;" that on the day of the sale of the land by the sheriff, Samuel Hutchison and wife and Eusebius R. Hutchison offered to sell these lands and make a good title; and that neither the said Eusebius R. Hutchison, nor either of the lessors of the plaintiff, was of full age at the time of the sale by the sheriff. The ejectment was commenced in December 1837.

The jury concluded the special verdict as follows: "If the law arising upon the foregoing facts be for the plaintiff, we find for the plaintiff the lands in the declaration mentioned, and one cent damages. But if the law be for the defendant, we then find for the defendant."

The circuit court, being of opinion that the law was for the defendant, gave judgment that the plaintiff take nothing, and that the defendant recover of the lessors of the plaintiff his costs.

128 *On the petition of the lessors of the plaintiff, a supersedeas was awarded.

The cause was argued by Peyton for the plaintiffs in error, and Price for the defendant in error. The authorities on which they respectively relied are reviewed in the following opinion.

BALDWIN, J. The principles of the common law denounced all frauds perpetrated against the subsisting rights of others, and gave relief to the party injured. In regard to frauds upon creditors, the mode of redress was to treat the fraudulent act as a nullity, and permit the creditor to prosecute his legal remedies for the recovery of his demand, in like manner as if the fraudulent act had never been done. The statute of 13 Eliz., ch. 5 (substantially adopted into our code) was passed in aid of the common law, and sprang from the great and growing mischiefs occasioned by the covin and ingenious devices of fraudulent debtors. It is highly remedial and beneficial in its nature, and is entitled to a free and liberal interpretation. It has often been said to be declaratory of the principles of the common law; and this is certainly true; but it is moreover true that its operation is more extensive and salutary than the rules of the common law, at least as they were understood at the time of the

enactment of the statute. In fact it introduced a principle which had not theretofore been recognized by the courts, that of extending relief to rights not in existence at the time of the fraudulent transaction; for it was agreed in *Twyne's case*, 3 Rep. 83, that by common law, an estate made by fraud shall be avoided only by him who had a former right, title, interest, debt or demand, and not by one more *puise*. But the statute embraces all creditors, whether existing at the date of the fraudulent conveyance &c. or thereafter arising; for it

will be seen on examination, that it 129 *looks more to the fraudulent intent with which the act is done than to the immediate consequences; regarding creditors as a class of persons entitled to the protection of the law, and contemplating not merely actions, suits, debts, damages &c. which should actually be, but those also which might be, in any wise disturbed, hindered, delayed or defrauded; and declaring all gifts, grants, conveyances &c. made with the prescribed purpose of intent, to be clearly and utterly void, frustrate and of none effect, as against all such persons. The result has been to admit subsequent creditors to relief against a fund fraudulently alienated, where the conveyance has been or might be successfully impeached by prior creditors. This is the fair conclusion from the current of decisions, (see *Walker v. Burroughs*, 1 Atk. 93. *Taylor v. Jones*, 2 Atk. 600. *Russell v. Hammond*, 1 Atk. 15. *St. Amand v. Countess of Jersey*, 1 Com. Rep. 255. *Lord Townshend v. Windham*, 2 Ves. sen. 1. *Montague v. Lord Sandwich*, cited in 12 Ves. 136n. *Beaumont v. Thorpe*, 1 Ves. sen. 27. *Reade v. Livingston*, 3 John. Ch. R. 497) and must be regarded as the established doctrine, though contrary to the opinion of sir William Grant in *Kidney v. Coussmaker*, 12 Ves. 136, in which he professed to follow an opinion of lord Rosslyn in *Montague v. Lord Sandwich*, not reported, but which opinion, it would seem from a note to the same page, he had misunderstood.

The principle, it is true, upon which the subsequent creditor has been admitted to such relief, has not always been distinctly or correctly stated. Lord Rosslyn in particular, in the case of *Montague v. Lord Sandwich*, fell into the error of supposing the ground to be, that the subject was thrown into assets, and the subsequent creditors so let in. But how can the subsequent creditors be let in, unless the conveyance be fraudulent as to them? and what propriety can there be in placing the right of the subsequent creditor to relief, upon the will and pleasure of the prior 130 creditors in regard *to impeaching the fraudulent alienation? The true principle I conceive to be, that a fraudulent intent of the grantor against one or more creditors is fraudulent against all, and the statute justifies no other distinction between prior and subsequent creditors, than that which arises from the necessity of shewing a fraudulent intent against some creditor;

which cannot be done in behalf of creditors not in existence at the time of the conveyance, but by proving either a prior indebtedness, or a prospective fraud against them only. I would moreover, on this part of the subject, refer to the conclusive reasoning of Mr. Atherley in his able treatise on *Marriage Settlements*, p. 213, and of Sir Thomas Plumer, master of the rolls, in *Richardson v. Smallwood*, 1 Jacobs Rep. 556.

It is the fraudulent intent, therefore, in relation to creditors generally, which forms the substance of enquiry in all questions of fraudulent alienation; and the courts have, of necessity, resorted to a legal presumption arising out of the general nature of the case, and to marks or badges of fraud furnished by the particular circumstances. The legal presumption is founded upon a comparison of the consideration for the conveyance &c. with that which constitutes the just claims of creditors; and though voluntary conveyances are not mentioned in the statute, their true character and effect are necessarily involved in its application. This leads to a construction natural and wholesome, and not justly liable, it seems to me, to the imputation of Eyre, B., in *Jones v. Boulter*, 1 Cox's Ch. R. 288, of being artificial and puzzling. Upon the question of fraudulent intent where the conveyance is voluntary, the law, following the dictates of common sense, gives, on the one hand, due weight to the meritorious considerations arising out of the natural duty of the grantor to make provision for his children and family; and, on the other, to the paramount obligation of

131 *creditors. Where the grantor, discharging the just demands of regarding an obvious moral and social duty, withdraws the means necessary for the payment of his debts, for the ostensible purpose of advancing the interests of those connected with him by ties of blood or marriage, the transaction speaks for itself; it is properly regarded by the laws as fraudulent, and requires no special marks or badges of a fraudulent purpose. But where there are no interfering claims of creditors, there can be no propriety in restraining the grantor's dominion over his own property, especially when exercised for meritorious purposes, because he may thereafter contract pecuniary engagements beyond his ability to discharge. The presumption therefore against a voluntary conveyance, though fair upon its face, derived from the grantor's indebtedness at the time, I regard as wise and salutary, adapted to the promotion of justice, and conceived in the true spirit of the statute.

I can perceive no objection to this legal presumption in all cases of prior indebtedness; but the weight of it is another matter, depending, it seems to me, upon the extent of that indebtedness. There is high authority for treating the presumption as conclusive in relation to all creditors existing at the time of the voluntary conveyance, without regard to the amount of

their demands or the circumstances of the grantor. It was so held by Chancellor Kent in the case of *Reade v. Livingston*, 3 Johns. Ch. R. 492, in which the authorities are elaborately reviewed, but to my apprehension, not with his usual success. His opinion is supported by that of Mr. Atherley, in his work above referred to, p. 212. The rule would no doubt be a convenient one in its practical application, and cut up by the roots many perplexing controversies. But the objection to it is, that it would not unfrequently be harsh and unreasonable in its operation, converting a laudable into a fraudulent purpose, and too often 132 involving innocent children in the ruin of their parents. Where a parent is in prosperous or unembarrassed circumstances, and makes advancements to his children adapted to their wants and justified by his means, leaving ample funds for the payment of all his just debts, there can be no propriety in treating his conduct as fraudulent, in behalf of creditors who have delayed the prosecution of their demands until those means have become exhausted. The preponderating weight of authority is in favour of this view of the subject. Such is the opinion of Judge Story, after a careful examination of the cases. 1 Story's Eq. 349, &c. It was so held by the supreme court of the United States in the case of *Hinde's lessee v. Longworth*, 11 Wheat. 199. That decision is in conformity with the doctrine of Lord Mansfield in *Cadogan v. Kennett*, Cowp. 432. To the same purpose is the case of *Salmon v. Bennett*, 1 Conn. R. 525,—Judge Spencer's opinion in *Verplanck v. Sterry*, 12 Johns. Rep. 557,—and the case of *Jackson v. Town*, 4 Cowp. N. Y. Rep. 604, cited 1 Story's Eq. 359. And see Newl. on Contr. 385.

Thus, while I regard the indebtedness of the grantor at the time of a voluntary settlement or conveyance, as raising a legal presumption against its validity, that presumption I consider only *prima facie*, and not conclusive. It is liable to be repelled by the particular circumstances of the case; as where it appears that the then existing debts were secured by mortgage, *Stephens v. Olive*, 2 Bro. C. C. 93, or by the settlement or conveyance itself, *George v. Milbanke*, 9 Ves. 193, or that the grantor was in prosperous and unembarrassed circumstances, and the provision made for his children or family a reasonable one according to his state and condition in life, and leaving enough for the payment of his debts; *Hinde's lessee v. Longworth*, above cited. On the other hand, the legal presumption may be strengthened by particular circumstances, and rendered conclusive by a degree of indebtedness amounting or approaching to insolvency.

133 *This legal *prima facie* presumption depends, I think, upon the general nature of the case, as presented by a comparison of the considerations recognized by law, and not upon the particular circumstances, for example, the degree of the grantor's indebtedness, or the extent of

his resources. These and others circumstances may be resorted to for the purpose of confirming or repelling the legal presumption, the weight of which must always be left to the sound discretion of the court, and applied with a single eye to the truth and justice of the cause. I am aware that in *Holloway v. Millard*, 1 Madd. Ch. Rep. 413, (am. ed. p. 225,) sir Thomas Plumer, in speaking of a voluntary conveyance, says, its being voluntary is *prima facie* evidence, where the grantor is loaded with debt at the time, of an intent to defeat subsequent creditors. But surely, unless the debts be secured to the creditors, such a degree of indebtedness would be conclusive against the fairness of the conveyance; for what conceivable circumstance could in such a state of things repel the presumption of a fraudulent purpose? And in *George v. Milbanke*, 9 Ves. 194, lord Eldon states the doctrine to be, that in general cases, *prima facie*, a voluntary settlement will be taken to be fraudulent; but shews that case to be an exception, because the settlement provided for the payment of the grantor's debts, which made it good against subsequent creditors. Nor can I admit that there is any distinction in the application of the presumption to prior or subsequent creditors, as suggested in *Reade v. Livingston*, by chancellor Kent, who approves of it as to the former, but is disposed to reject it as to the latter; a distinction acted upon by the supreme court of Massachusetts in *Bennett v. Bedford Bank*, 11 Mass. R. 421, but repudiated by Mr. Atherley in his work on *Marriage Settlements*, p. 215, 217, 218. For my part, I cannot conceive how, on a question turning upon the same fact, to wit, that of prior indebtedness, a distinction can be drawn between antecedent
134 *and subsequent creditors, in the construction of a statute denouncing the alienation of the grantor as fraudulent against his creditors generally.

The foregoing remarks tend to shew, that though the legal presumption arising from prior indebtedness is highly useful in the application of the statute, yet it would not always be sufficient or safe, without resorting at the same time to the particular circumstances of the case, furnishing, on the one hand, a guide to an innocent and honest purpose on the part of the grantor, or, on the other, marks or badges of a fraudulent intent. It would of course have no application to the case of subsequent creditors, where the grantor was free from indebtedness at the time of the conveyance or settlement. And yet there can be no doubt that the alienation may still be fraudulent within the true intent and meaning of the statute, as springing from a fraudulent purpose directed exclusively against subsequent creditors. The conveyance may be made with a view to future indebtedness, and in order to shield the grantor against its consequences. *Stileman v. Ashdown*, 2 Atk. 481. *Fitzer v. Fitzer*, 2 Atk. 511. *Richardson v. Smallwood*, Jacob's R. 552. *Sexton v. Wheaton*, 8 Wheat. 246. And

where such an intent can be shewn, the conveyance will be void, whether the grantor was indebted or not. *Ibid.* *Salmon v. Bennett*, 1 Conn. R. 525. Nor is it necessary that an actual or express intent should be proved; for that would be impracticable in many instances where the conveyance ought not to be established. It may be collected from the circumstances of the case, *ibid.* *Lord Townshend v. Windham*, 2 Ves. sen. 1, and the enquiry will be aided by bearing in mind what have usually been regarded by the courts as marks or badges of fraud. Amongst these, are the unreasonableness of the gift, compared with the circumstances of the grantor; his continuing in possession of the property against the terms of the conveyance, exercising *acts of ownership over it, paying the taxes, receiving the rents, or otherwise enjoying the proceeds. *Twyne's case*, 3 Rep. 83. *Stone v. Grubbum*, 2 Bulst. 225. 3 Dyer 294. *Oakover v. Pettus*, Cas. Temp. Finch 270. *Bates v. Graves*, 2 Ves. jun. 292. *Perine v. Dunn*, 3 Johns. Ch. R. 516. *Salmon v. Bennett*, 1 Conn. R. 525. And in estimating the weight of such circumstances, I cannot doubt that the proviso of the statute, in favour of conveyances or assurances upon good consideration and bona fide, ought to have an important influence; for it serves to shew (what is perfectly reasonable in itself) that the legislature intended to avoid all conveyances &c. to the prejudice of creditors, whether prior or subsequent, which were not made in good faith, and therefore all which were incompatible with the avowed or ostensible consideration. And this idea I understand to be intimated by lord Hardwicke in *Taylor v. Jones*, 2 Atk. 603, when he says, "But the material consideration is whether it" [the conveyance] "be within the proviso of the statute 13 Eliz. for if it is not, the court will not require a strict proof of its being fraudulent."

I have thus, in consequence of the conflict amongst some of the authorities, and the imperfect manner in which some of the decisions have been reported, endeavoured to ascertain the true principles belonging to the subject; and if I have been successful, there will be but little difficulty in the application of them to the case before us.

If the case were free from any special marks or badges of fraud, the deed in question would still appear upon its face to have been a voluntary conveyance in consideration only of natural love and affection; and if it be ascertained that the grantor was indebted at the time, must be liable to the *prima facie* legal presumption against its validity. But here it has been strongly urged by the appellant's counsel, that the special verdict does not find any indebtedness of the grantor at
136 *the time of the conveyance, but a mere possibility of collateral liability, arising out of his having been surety for a deputy sheriff. I cannot concur in this view of the matter. The finding of the

special verdict is, "that the deed under which the plaintiffs claim was executed by Samuel Hutchison for the purpose of avoiding a liability to which he might be subjected in consequence of being the security of Robert Hamilton, deputy sheriff." This, according to my apprehension, ascertains a liability which he had incurred, but to which he had not yet been subjected. The jury do not find merely the fact that the grantor was surety for Hamilton, but find substantially, as I understand them, a liability in consequence of that suretyship. This was a debt; in my opinion, if not within the words, clearly within the spirit of the statute. The language of the statute is, "actions, suits, debts, accounts, damages, penalties, forfeitures," &c. which "shall or might be in any wise disturbed, hindered or defrauded." It embraces all pecuniary damages incurred by reason of the obligation of a contract; whether of an ascertained amount or sounding only in damages; whether as principal or surety; whether actually asserted, or only demandable. The failure of a party entitled to a debt or damages, to prosecute his demand to a recovery, could not alter or affect the intent with which the conveyance was made. A liberal construction in allowing to persons who are or might be injured by fraudulent conveyance, the character of creditors, ought to be and has been given to the statute, which follows and goes beyond the common law in this respect. In *Twyne's case*, 3 Rep. 82, it is said to have been resolved by all the barons, "that the statute of 13 Eliz. ch. 5, extends not only to creditors, but to all others who had cause of action or suit, or any penalty or forfeiture." In *Mountford v. Raine*, or *Lenthall's case*, 2 Keb. 499, there was a bond or recognizance in which Lenthall was bound *for the imprisonment of Drake, and a judgment on a scire facias, awarding execution thereupon against the heir and tenants, in consequence of an escape of the principal. A voluntary conveyance had been made by Lenthall, fourteen years prior to the recognizance; and Kelynge, chief justice, and Raynsford held, on the trial of an ejectment, that the conveyance was fraudulent, though the plaintiff was but a creditor by way of escape. Twysden, on the contrary, was of opinion that there could be no fraudulent intent at the time of making the conveyance, the party not being any ways indebted, and still but collaterally, which he could not divine at first. The verdict was in conformity with Twysden's opinion: but it will be seen that that opinion was founded upon the fact that the escape was subsequent to the conveyance; for if it had been prior, he must, upon his own principles, have concurred with the other judges. The case therefore establishes, that a liability incurred upon a collateral undertaking, though not yet enforced, gives to the claimant the character of a creditor. In *Luckner v. Freeman*, 1 Eq. Cas. Abr. 149, though the court upheld a

conveyance intended to secure the payment of honest creditors, made before the trial of a cause founded in maleficio, yet the plaintiff in the suit was let in upon the surplus after the debts were paid. In *Jackson ex dem. Van Buren v. Myers*, 18 Johns. Rep. 425, it was held that a conveyance made to defeat the recovery, by a third person, of damages in an action then pending for a tort, and before trial and judgment, is fraudulent and void within the New York statute, which conforms to that of 13 Eliz. And in *Fox v. Hills*, 1 Conn. R. 295, four out of the nine judges were of opinion, that a voluntary conveyance to defeat a cause of action for a tort (though, it would seem, no action was pending) was within their statute against fraudulent alienations, though far less comprehensive than the English statute, the operative words *being merely "debt or duty:" and all concurred in holding it void at common law.

The counsel for the appellants has relied much upon the case of *Farley v. Briant*, 3 Adolph. & Ell. 839, 30 Eng. C. L. R. 239, in which it was held, upon the construction of the statute 3 & 4 Will. & Mary, against fraudulent devises, that the devisee of a surety who had united with the principal in covenants for the payment of rents, which covenants were not broken in the lifetime of the devisor, was not liable in an action of debt for rents accruing after his death. The statute avoids devises as against bond and other specialty creditors, and gives to the creditor an action of debt upon the bond or specialty, against the heir and devisee of the obligor jointly. In the case of *Wilson v. Knubley*, 7 East 128, it had been previously held, that an action of covenant not having been given by the statute, such action would not lie against the devisee upon a covenant of seisin contained in a deed of conveyance from the covenantor, to recover damage for the loss and the land, of the expenses of defending an ejectment in which it was recovered. The two cases, taken together, shew that covenant would not lie though there was a breach in the lifetime of the devisor, and that debt would not lie where there was no breach till after his death; but not that debt cannot be maintained where the breach was in the life of the obligor. The remedy given by that statute is a personal action, of a particular form, against the devisee, who was not liable at common law, and an action upon a bond or specialty merely; whereas the statute against fraudulent alienations gives no personal remedy, but declares in the most comprehensive terms, applicable to all damages, as well as debts of whatever nature, (what had been before provided by the common law, at least to a great extent,) that all conveyances &c. made with the proscribed fraudulent intent, shall be void against all *such creditors. The two statutes, it seems to me, are radically different in all respects, and the decisions upon the one can throw no light whatever upon the construction of the other.

I cannot therefore but think, if I am right in my understanding of the finding in the special verdict, that the grantor had incurred a liability at the time of his voluntary conveyance, which created an indebtedness within the true spirit and meaning of the statute, and the principles of the common law: and if so, the extent of that indebtedness is wholly immaterial; for the prima facie legal presumption attaches, and is rendered conclusive by the finding of the jury that the conveyance was made for the purpose of avoiding that liability; which fraudulent intent nullifies the deed in regard to all creditors, whether prior or subsequent. It will hardly be said, that, the jury having only found the fraudulent intent in regard to that liability, the idea of its existence in relation to others is excluded: for a fraudulent intent against one creditor is, as I think I have shewn, fraudulent as to all; and it was not necessary to find that comprehensive intent, which would have rendered the verdict general, instead of special, the province of the latter being to find the material facts of the case, leaving the general conclusion of law, or more properly the general conclusion of both law and fact, to the judgment of the court. 8 Bac. Abr. London ed. of 1832, p. 101. *Monkhouse v. Hay*, 8 Price 256, 3 Eng. Exch. Rep. 368.

But if it were even conceded that the liability found by the jury does not shew an indebtedness of the grantor at the time of the conveyance, still it shews that the deed was made to defeat a legal and just responsibility, to wit, his suretyship for the deputy sheriff, and was not therefore made bona fide for the advancement of his children. And when we come to look at the particular marks or badges of fraud attending the transaction, *we find emphatically true, what was well said by the counsel for the appellee, that the conveyance could have been made for no honest purpose; and if so, we can conceive no other purpose than to delay, hinder or defraud the grantor's creditor; whether creditors existing at the time, or thereafter arising, I deem wholly immaterial. The facts speak for themselves a language which cannot be misunderstood. A father, in moderate circumstances, and with an increasing family, conveys at one dash to his infant children, four in number, jointly and without discrimination, and with no provision for himself, his wife, or future offspring, his whole property, real and personal, down to his unspecified and unscheduled farming utensils and household furniture, with the grain and the live stock which furnished his bread and his meat; thereby, if to be believed, "dispossessing himself of all his goods, and subjecting himself to his cradle:" continuing, however, in the possession and enjoyment of the whole subject, controlling and using it as his own, paying the taxes, though charged to the grantees, and discrediting the very title which he professed to confer, by offering to sell the realty, and actually

selling a portion thereof. If such shallow devices be suffered to cover up a man's property from the pursuit of his creditors, will it not be "not only to the let or hindrance of the due course and execution of justice, but also to the overthrow of all true and plain dealing, bargaining and chicanery between man and man, without the which no commonwealth or civil society can be maintained or continued?"

Upon the whole, I am well satisfied that the judgment of the circuit court is right, so far as relates to the tract of 500 acres: but in regard to the tract of 100 acres, I think it wrong; that portion of the land not having been sold or levied on under the commonwealth's execution, and though conveyed by the sheriff's deed to the purchaser, that conveyance can present

141 *no obstacle to a recovery by the lessors of the plaintiff claiming under their father's deed, they having acquired a title good between the parties, and unimpeachable by the commonwealth or any one claiming under her; she, since the sale of the 500 acres, no longer occupying the relation of creditor, her debt having been fully satisfied by the proceeds of that sale. A difficulty, however, occurs as to the mode of correcting this error. It might be thought, at first view, that the alternative general finding of the jury, for the plaintiff or the defendant as the law of the case might be, being entire, the judgment must conform to the verdict in that respect, or not at all; which would render it necessary to set aside the verdict, and award a venire facias de novo. Such a result is to be deprecated, inasmuch as it would put the parties at sea again before a jury: and some reflection will serve to shew that it would be improper. The courts have always disregarded mere informalities in verdicts, of which numerous examples may be found in 3 Bac. Abr. London ed. of 1832, title Ejectment, F. p. 29. In this case, there can be no doubt that it was the intent of the jury to submit to the court the law of the whole case upon the facts specially found. If the alternative finding of the jury in behalf of the plaintiff had been for the lands in the declaration mentioned, or so much thereof as he is entitled to recover, it is clear there could be no objection to rendering judgment for part only. The omission of such terms I regard as a mere informality, as the jury cannot be supposed to have intended, what would have been obviously improper, to fetter the power of the court in rendering judgment according to the law of the case. The verdict ought therefore to be considered as a finding for the plaintiff of so much of the lands demanded, as in the opinion of the court he was entitled to recover. And my opinion is, that the judgment ought to be re-

142 versed with costs, and judgment *rendered in favour of the plaintiff for the tract of 100 acres, one of the messuages demanded, and for the defendant as to the residue.

STANARD, J. The finding of the jury

ascertains that the deed from Hutchison to his children was not only voluntary and without valuable consideration, but was made mala fide and covinously. It is not merely constructively fraudulent as being voluntary: it is tainted with actual covin, and according to the letter and spirit of the statute, void as to all creditors. The property conveyed by it was therefore liable to the execution of the commonwealth; and the purchaser under that execution, to the extent of the levy thereof and sale under it, has title paramount to that derived under the fraudulent deed. I think it unnecessary, in this case, to enter at large into the review of the numerous cases which have been so elaborately collected and examined by my brother Baldwin. I content myself with saying, that on other occasions I have examined them with care, and my impression was and still is, that the principle extracted by chancellor Kent, in his elaborate judgment in the case of *Reade v. Livingston*, 3 Johns. Ch. R. 481,—to wit, that a voluntary conveyance without valuable consideration, though free from actual covin, cannot prevail against the claims for debts existing at the time of such conveyance,—is a sound one.

The claim of the purchaser under the execution is only commensurate with the levy and sale under it. As that levy was on one tract of 500 acres, the sheriff had no authority to sell and convey more, and his deed to the purchaser for the other tract of 100 acres conveyed no title, and the judgment in respect to the tract of 100 acres was erroneous.

The judges unanimously concurred in reversing the judgment of the circuit court, with costs, and entering judgment, as to the tract of 100 acres of land, that the plaintiff recover his term yet to come in the same, and his costs of suit; and as to the tract of 500 acres, that the defendant go thereof without day.

Hewes v. Doddridge & C.*

August, 1842, Lewisburg.

(Absent ALLEN, J.)

Powers of Attorney—Construction of Powers.—Under a power of attorney, authorizing the attorney to act in every species of business wherein the principal may be concerned or interested in the United States, HELD, notwithstanding the broad terms of the power, the attorney is not authorized to pledge the property of his principal, to secure the individual debt of the attorney.

*For monographic note on Master and Servant, see end of case.

Powers of Attorney—Notice to Third Person.—Where one deals with an agent under written power he must take notice of his powers, as an act not authorized is not binding on the principal. *Dyer v. Duffy*, 30 W. Va. 152, 19 S. E. Rep. 541, citing *Hewes v. Doddridge*, 1 Rob. 143. The principal case is also cited in *Stainback v. Read*, 11 Gratt. 281. See monographic note on "Master and Servant" at end of case.

On the 17th of September 1833, David T. Hewes of Harrison county made a power of attorney, whereby he appointed William Thomas of Prince William county his agent and attorney in fact, for him the said Hewes and on his behalf, and in his name, to do, transact and perform "all and every thing or things, act or acts, which he may deem proper to be done (always consulting his own judgment in the act or acts to be done and performed) in any and every species of business wherein I (the said Hewes) may be in any wise concerned or interested in the United States." Power was given the attorney to prosecute suits in the name of the principal, to make bargains, contracts or sales in his name, to accommodate, by compromise or otherwise, any question of or concerning property between the principal and persons in the United States, and to do such other and further acts as he might think right and just to do; the principal declaring that

144 he intended to vest his said agent with unlimited power in the execution or performance of all things or matters wherein he was in any wise interested or concerned in the United States. And the power concluded in these words: "I do hereby declare his every act in that capacity to be legal and valid against myself, my heirs, and every other person or persons whatsoever."

Soon after the execution of this power of attorney, the following bill of sale was made:

"In consideration of Jasper Y. Doddridge and William L. Jackson becoming liable for David T. Hewes as well as myself, I, as agent and attorney of David Hewes, and for myself, do hereby convey to said Doddridge and Jackson one grey mare lately owned by John Davis, and one grey horse lately owned by Jesse Jarvis, to have and to hold the same as their property. Witness my hand and seal, as agent and attorney aforesaid, and for myself, this 9th October 1833.

William Thomas, agent and
atty. for D. Hewes, [Seal.]
William Thomas [Seal.]"

An action of detinue being brought by Doddridge and Jackson against Hewes for the horse and mare, the plaintiffs gave in evidence the power of attorney and bill of sale, and proved that since the execution of the latter, and before the institution of this suit, the horse and mare were in possession of the defendant, who claimed the same as his own, and refused to deliver them to the plaintiffs. The defendant then read in evidence a single bill to Waldo P. Goff for 85 dollars, dated the 9th of October 1833, payable three months after date, which was executed by Thomas as principal and the plaintiff Jackson as his surety therein, and offered evidence tending to prove that the bill of sale executed by Thomas to the plaintiffs was intended to indemnify
145 Jackson as surety to said Goff. And thereupon the said defendant moved

the court to instruct the jury, that if, from the whole evidence before them, they were satisfied that the said bill of sale was made and intended to indemnify the surety for said Thomas in the bond to Goff, and that the debt due to Goff was the individual debt of said Thomas, then the plaintiffs could not recover, Thomas not being authorized by the power of attorney to pledge the horses to secure the payment of his individual debt. The court declined giving this instruction, and instructed the jury that the power of attorney invested Thomas with full power and authority to make sale or dispose of the property of Hewes, so long as the said power of attorney was unrevoked and in force; that under that authority it was competent to the attorney to execute the said bill of sale, and to vest thereby a legal estate in the said horse and mare in the plaintiffs; and that the legal rights of the plaintiffs to the said property are not affected by reason of the transfer by the attorney in fact being in consideration of one of the plaintiffs becoming surety for a private debt of the said attorney in fact. To these opinions of the court the defendant excepted.

Verdict and judgment being rendered for the plaintiffs, a supersedeas was awarded the defendant.

The cause was submitted without argument, by William A. Harrison for the plaintiff in error, and George H. Lee for the defendants in error.

STANARD, J. It is necessary to the validity of a title claimed under the act of an agent or attorney, that the act be within the scope of the agency or power. Where one deals with an attorney having his authority in writing, he is informed of the objects and limitations of the power, and good faith forbids his co-operation in any act which on its face applies the power 146 to purposes "in no wise connected with the interests of the principal, and perverts it to objects hostile to those interests; and the law justly denies validity to such acts. In particular agencies, this operates the annulment of the act, though the agent may have had the possession and ostensible ownership of the subject of the contract, and the party dealing with him may not have known that he was not the actual owner. Thus a factor has the possession of the property of his principal, with full power to sell for cash or on credit, and on a credit sale, to transfer or collect the debts. All such acts may be for the benefit of his principal; and the subsequent misuse of the funds that may thus come to his hands in no wise invalidates the sale, transfer or collection. But he cannot pledge the goods, or the note taken on the sale of them, for his own debt, so as to give the pledgee a title paramount to that of his principal. *Comyn on Contr.* 538, 9. And this, though the pledgee did not know that the party with whom he dealt was not in reality what he ostensibly was, the owner of the goods. *Martini v. Coles*, 1 *Mau. &*

Selw. 140. The power of the factor is assimilated to that of an attorney, for the purpose of imposing this limitation on his general and large authority, *Kinder v. Shaw*, 2 *Mass. Rep.* 398, and the party dealing with him is subject to the consequence of this limitation, though he knows not that in the particular transaction his title is that of a factor. When the act is done avowedly under a written authority, the party is with more reason bound to shew that it is done in conformity with the objects, and within the expressed or fairly inferred limits, of such authority. Broad as are the terms of the letter of attorney in question, the power given has relation to the business and concerns of the principal, and an act which is not only alien but ostensibly hostile to those interests is not within its scope. Such is the act in question; and if the facts be as the plaintiff 147 tiff in error offered evidence *to prove them, there is a misstatement of the consideration in the bill of sale, which evinces a consciousness in the parties of a want of authority for the real transaction, and an improper attempt to disguise it, by giving it the semblance of an act concerning the business of the principal. I think, therefore, that the court below erred in its opinion, and that the judgment ought to be reversed with costs, the verdict set aside, and a new trial of the issue had, on which the court, if desired, should give the instruction that the plaintiff in error asked for on the former trial, and withhold that which was given on that trial.

The other judges concurring, judgment entered accordingly.

MASTER AND SERVANT.

I. When Relation Exists.

II. Compensation of Servant.

III. Master's Liability to Third Persons.

1. For Acts of His Servant.
2. For Acts of Independent Contractor.

IV. The Nonassignable Duties of the Master.

1. Statement and Nature of Duties.
 - a. General Statement of Duties.
 - b. Personal Character of Duties.
2. Duty to Provide Safe Place.
3. Duty to Provide Safe Machinery and Appliances.
 - a. Statement of Rule.
 - b. Duty a Continuing One.
- c. Right of Servant to Rely on Performance of Duty.
- d. Degree of Care Required of Master.
- e. Necessity of Furnishing Absolutely Safe Appliances.
- f. Necessity of Furnishing Best Appliances Obtainable.
- g. Necessity of Furnishing Latest Inventions.
- h. Knowledge of Defects by Master or Servant.
- i. Defects Must Be Proximate Cause of Injury.
- j. Application of Rules to Particular Appliances.
4. Duty as to Inspection.
5. Duty to Provide Sufficient Force of Competent Servants.
6. Duty to Provide Rules for Conduct of Business.
7. Duty to Warn and Instruct Servant.

V. Assumption of Risks by Servant.

1. Risks Ordinarily Incident to Service.
2. Patent and Obvious Defects and Dangers.
 - a. General Rule.
 - b. In Place of Work.
 - c. In Machinery and Appliances.
 - d. In Methods of Work.
3. Latent Defects and Dangers.
4. Risks Arising from Master's Negligence.
5. Remaining in Service upon Promise to Repair.
- VI. Contributory Negligence of Servant.
 1. Servant Must Exercise Ordinary Care.
 2. Right to Rely on Assurances of Safety.
 3. Negligence Must Be Proximate Cause of Injury.
 4. Working with Knowledge of Defects and Dangers.
 5. Disregard of Rules.
 6. Disregard of Warnings or Signals.
 7. Voluntary Assumption of Dangerous Position.
 8. Acting in Obedience to Orders.
 9. Acting in Disobedience of Orders.
 10. Assuming Extraordinary Risks to Save Life.
 11. Acting in Emergencies.
 12. Working Outside Scope of Employment.
- VII. Damages Recoverable by Servant for Injuries.
- VIII. Evidence in Actions by Servant against Master.
- IX. Burden of Proof.
 1. Of Negligence of Master.
 2. Of Contributory Negligence of Servant.
- X. Discharge of Servant.

Cross References to Monographic Notes.

Agencies, appended to *Silliman v. Fredericksburg, etc.*, R. Co., 27 Gratt. 119.

Fellow Servants.

Officers and Agents of Private Corporations, appended to *Richmond Enquirer Co. v. Robinson*, 24 Gratt. 548.

I. WHEN RELATION EXISTS.

As it is essential in order to establish liability against a party for the act or neglect of another that the relation of master and servant should exist, the question as to when the relation exists becomes an important one. It may be stated to be the general rule that where one has voluntarily chosen another to serve him, upon knowledge or belief in his skill or care, and has power to give him orders which he is bound to receive and obey, and has the power to discharge him for misconduct, the relation of master and servant exists between the parties; and whether such servant was appointed by the master directly or intermediately through the intervention of an agent authorized by him to appoint servants for him can make no difference. *Muse v. Stern*, 82 Va. 33; *Emmerson v. Fay*, 94 Va. 60, 26 S. E. Rep. 386. On the other hand, where the person, whom it is sought to hold liable as a master, has not exercised this power of selection, and does not possess the power to discharge, the relation of master and servant does not exist between the parties. Thus, in a case where one member of a firm, who individually owned a horse and carriage, sent his servant with it to meet and convey the other partner to the store, and while returning, the driver recklessly drove against a third party, knocking him down and injuring him, it was held that the relation of master and servant did not exist between the person riding in the carriage and the driver, and the mere fact of his presence in the carriage at the time of the injury did not render him liable for

the driver's negligence. *Muse v. Stern*, 82 Va. 33. See also, *Fry v. Albemarle Co.*, 86 Va. 196, 9 S. E. Rep. 1004. See *post*, this note, "Master's Liability to Third Persons."

II. COMPENSATION OF SERVANT.

Services Rendered by Near Relations.—Contract for Wages Must Be Shown.—In all cases where compensation is claimed for services rendered near relatives, as a father, brother, grandfather, etc., the law will not imply a promise, and no recovery can be had unless an express contract or an equivalent thereto is shown. It is not enough to establish a moral obligation to pay for them, but an actual promise must be proved, or facts from which such promise can be reasonably inferred, established by evidence so clear, direct and explicit, as to leave no doubt as to the understanding and intention of the parties. Loose declarations to neighbors or friends, or even to the claimant himself, are not enough, particularly when such relative is deceased. It must be shown that the deceased intended to and did assume a legal obligation to the complainant for such services of such a character that it could be legally enforced against him. Expressions of commendation or gratitude, or of an intention to remember him in his will, cannot, unless brought home to the knowledge of the claimant, and shown to have been the consideration upon which the services were rendered, to the knowledge of the deceased, be made the basis of a contract obligation. An action cannot be predicated upon intention merely. *Jackson v. Jackson*, 96 Va. 166, 81 S. E. Rep. 78; *Williams v. Stonestreet*, 3 Rand. 559; *Stoneburner v. Motley*, 96 Va. 784, 30 S. E. Rep. 364.

Hence, where there is no contract, express or implied, a son-in-law is not entitled to payment for nursing his father-in-law during his last illness, as, considering the relation between parties, no compensation can be expected for the services. *Williams v. Stonestreet*, 3 Rand. 559.

As between Parent and Child.—As between parent and an adult child, whenever compensation is claimed in any case by either against the other for services rendered, or the like, it must be determined from the particular circumstances of that case whether the claim should be allowed or not. There can be no fixed rule governing all cases. In the absence of direct proof of any express contract, the question always is, can it be reasonably inferred that the pecuniary compensation was contemplated at the time the services were rendered; and that depends upon all the circumstances of the case; the relation of the parties being one. *Harshberger v. Alger*, 81 Gratt. 52; *King v. Malone*, 81 Gratt. 158; *Thompson v. Halstead*, 44 W. Va. 390, 29 S. E. Rep. 991; *Jackson v. Jackson*, 96 Va. 173, 81 S. E. Rep. 78; *Stansbury v. Stansbury*, 20 W. Va. 81; *Hurst v. Hite*, 20 W. Va. 205; *Riley v. Riley*, 38 W. Va. 290, 18 S. E. Rep. 569.

Seaman Contracting for a Voyage Not Entitled to Wages Unless Voyage Is Completed.—Seamen, who engage for a voyage, are never allowed wages unless the voyage is finished, or prevented by the act of the owners themselves, or the government. Hence a mariner, who quits the ship after capture, without the assent of the owners, or having been forced to do so by the captors, is not entitled to wages to the time of the capture. *Cavan v. Martin*, 3 Call 228.

Wages Conditional upon an Event within Master's Control.—Where an employee's compensation in ad-

dition to his regular salary is conditional on the event only that there are sold specific lands in excess of a certain amount, there is no implied agreement that his employer will put the bonds on the market. *Winter v. Southern Loan & Inv. Co.*, 3 Va. Dec. 456.

Interest Where Compensation is Measured in Profits.—Where the servant's compensation is measured by a share in the profits, he is entitled to interest on the compensation remaining in the hands of the master after it is due. *Goldsmith v. Latz*, 96 Va. 680, 32 S. E. Rep. 483.

Hire of Slaves—Liability of Wages Where Slave is Sick or Dies.—Where one hires a slave for a year, and the slave is sick, or runs away, the tenant must pay the hire; but if the slave die without any fault on the part of the tenant, the owner, and not the tenant, should lose the hire unless otherwise stipulated. By pursuing this rule, the act of God falls on the owner, on whom it must have fallen if the slave had not been hired. *George v. Elliott*, 2 H. & M. 5.

Condonation of Servant's Misconduct Entitle Servant to Wages.—Where the servant is guilty of such misconduct as furnishes sufficient ground for dismissal and the master still retains him in his service until the expiration of his term, he will be deemed to have waived or condoned the misconduct and will be compelled to pay the wages agreed upon. *Burdine v. Burdine*, 98 Va. 515, 36 S. E. Rep. 992.

Account Stated—Estoppel to Deny Correctness.—Where a servant received of the master a statement of the account between them for services, and accepted the same without objection, and continued in his employment for more than a year, the presumption arises that he agreed to the correctness of the account. *Goldsmith v. Latz*, 96 Va. 680, 32 S. E. Rep. 483.

Statutory Regulations.—In some jurisdictions statutes have been enacted with a view to protect certain classes of employees from the supposed opportunity of their employers to impose upon them and oppress them by paying their wages otherwise than in money, or by selling them supplies at a greater price than charged for like supplies when sold to other persons. But some courts regard such attempts by the legislature to regulate contracts between the employer and employees as infringements of their rights. Thus, in *State v. Goodwill*, 33 W. Va. 179, 10 S. E. Rep. 285, a statute, declaring that no person engaged in mining or manufacturing should issue for the payment of labor, any order or other paper, unless the same purported to be redeemable at its face value in legal money of the United States, bearing interest at the legal rate, made payable to the employee or bearer, and redeemable within thirty days by the maker thereof, was held unconstitutional and void.

And a statute declaring that it shall be unlawful for any person, firm, or corporation engaged in mining or manufacturing and interested in merchandising, to knowingly and willfully sell any merchandise to any employee at a greater per cent. of profit than when selling merchandise or supplies of like quality to other customers buying for cash, and not employed by them, was also held void, the court saying that such an enactment was class legislation and an unjust interference with the rights, privileges, and property of both the employer and the employee. *State v. Fire Creek Coal, etc., Co.*, 33 W. Va. 188, 10 S. E. Rep. 288.

But in *Peel Splint Coal Co. v. State*, 36 W. Va. 802, 15 S. E. Rep. 1000, 17 L. R. A. 885, an evenly divided

court affirmed the judgment of the trial court which held that a statute providing that employers should not pay the wages of their employees in other than lawful money of the United States, did not abridge the privileges and immunities of the citizen or deprive any person of life, liberty or property without due process of law.

III. MASTER'S LIABILITY TO THIRD PERSONS.

1. FOR ACTS OF HIS SERVANTS.

General Principles Governing Liability of Master for Servant's Acts.—The liability of a third person, to the person injured, for the negligence of another, proceeds upon the maxim, *qui facit per alium, facit per se*, and presupposes the existence of the relation of master and servant between such third person and the person actually guilty of the negligent act. It is founded upon the right which the employer has to select his servants and to discharge them if not competent or skillful, and to direct and control them while in his employ. A servant is regarded as an instrument set in motion by the master, and if any injury occurs to another through the negligence or unskillfulness of such servant, while in the course of his employment, it is deemed reasonable that he who has selected the servant should be answerable for such injury. Hence, in cases of this character when it has once been ascertained in whose employ the servant actually is, it is only necessary to ascertain further that the servant was engaged at the time the act of negligence was committed, in the performance of some duty enjoined upon him by his master, within the scope of employment, to fasten upon the master liability for any injury resulting from the negligent act of the servant. *Muse v. Stern*, 83 Va. 38; *Bibb v. Norfolk, etc., R. Co.*, 87 Va. 711, 14 S. E. Rep. 163.

Master is Liable for Acts Done within Course of His Employment.—That the master is liable for the acts of his servant done within the course of his employment is well settled. It is equally well settled that he is liable for the negligent omissions of the servant, if the omitted duty comes within the scope of the servant's employment. *Norfolk, etc., R. Co. v. Anderson*, 90 Va. 1, 17 S. E. Rep. 767; *Gregory v. Ohio River R. Co.*, 37 W. Va. 606, 16 S. E. Rep. 819; *Virginia, etc., R. Co. v. White*, 84 Va. 496, 5 S. E. Rep. 573; *Harris v. Nicholas*, 5 Munf. 483; *Bess v. Chesapeake, etc., R. Co.*, 35 W. Va. 492, 14 S. E. Rep. 224; *Bowen v. Flanagan*, 84 Va. 313, 4 S. E. Rep. 724; *Norfolk, etc., R. Co. v. Neely*, 91 Va. 539, 22 S. E. Rep. 367. Thus, where the conductor of a railroad train illegally requires a passenger to identify himself in an unreasonable manner, and in a way other than that required by the rules of the company and indorsed on the back of the ticket, and upon failure of the passenger to so identify himself ejects him from the train, the carrier is liable in damages. *Norfolk, etc., R. Co. v. Anderson*, 90 Va. 1, 17 S. E. Rep. 767; *Norfolk, etc., R. Co. v. Neely*, 91 Va. 539, 22 S. E. Rep. 367. And in a case in which the plaintiff, who was in the exercise of due care, was injured owing to a servant's negligence in leaving a mule unattended in a public street, it was held that the master was liable for the injury. *Bowen v. Flanagan*, 84 Va. 313, 4 S. E. Rep. 724.

Servant Does Not Have to Be Following Instructions.—The test of the liability of the principal or master for the torts of his agent or servant in all cases, is whether the latter was at the time acting within the scope of his authority in the business of the principal or master, and not whether the act

was done in accordance with his instructions. For if such act is done within the scope of his authority, and while engaged in his employer's business, the latter is bound for it. *Gregory v. Ohio River R. Co.*, 27 W. Va. 606, 16 S. E. Rep. 812. In this case, indeed, it was said by the court that perhaps the most numerous instances in which the master has been held liable for the acts of his servant were those in which the servant was departing from orders.

Willful and Malicious Acts of Servant.—A general rule of master and servant is that the master is liable for the acts of the servant, though willful and malicious, if done in the course of his employment and within the scope of his authority. *Bess v. Chesapeake, etc., R. Co.*, 35 W. Va. 493, 14 S. E. Rep. 234. But for willful and unauthorized trespasses of the servant not within the scope of his employment, the master is not liable. *Harris v. Nicholas, 5 Munf. 483.*

Master Liable for Servant's Negligent Acts.—Where a servant, acting within the course of his employment fails to exercise such care as a reasonably prudent man would exercise under like circumstances, in consequence of which injury results to a third party, the master is liable in damages. *Bowen v. Flanagan*, 84 Va. 313, 4 S. E. Rep. 724.

Not Liable for Acts beyond Course of Employment.—Where a person, to whom a railroad company owes no duty, is injured by one of its servants, the company is not liable to the party injured unless the servant was acting within the scope of his employment at the time the injury was inflicted. Thus, where a servant of the carrier willfully ejected a trespasser from a freight train while in motion, which resulted in injury to the party ejected, it was held that in order to hold the carrier liable it was necessary to show that the act was done in the course of the employee's business, and within the scope of his authority. *Bess v. Chesapeake, etc., R. Co.*, 35 W. Va. 493, 14 S. E. Rep. 234.

2. FOR ACTS OF INDEPENDENT CONTRACTOR.

Who Are Independent Contractors.—An independent contractor is one who, in the course of an independent occupation, prosecutes and directs the work himself, using his own method to accomplish it, and representing the will of his employer only as to the result of his work. *Norfolk, etc., R. Co. v. Stevens*, 97 Va. 631, 34 S. E. Rep. 536. The mere fact that the employer reserves the privilege of inspecting and supervising the work of the contractor, during the progress of its construction, does not destroy or impair his character as an independent contractor. *Bibb v. Norfolk, etc., R. Co.*, 87 Va. 711, 14 S. E. Rep. 163.

In *Emmerson v. Fay*, 94 Va. 60, 26 S. E. Rep. 386, the court, in discussing the question, said: "As a general rule, where a person is employed to perform a certain work, which requires the exercise of skill and judgment as a mechanic, and the execution of which is, because of his superior skill, left to his discretion, without restriction upon the means to be employed in doing the work, and he employs his own labor, which is subject alone to his control and direction, the work being executed according to his own ideas or in accordance with plans furnished him by the person for whom the work is done, such a person is not a servant under the control of the master, but is an independent contractor, and the fact that his compensation is to be measured by a *per diem* to himself and those employed by him does not affect the independent character of his employment, nor does the circumstance that his

employer is to furnish the materials to be used in doing the work alter his status as an independent contractor, and create the relation of master and servant."

What Constitutes an Independent Contractor is a Mixed Question of Law and Fact.—What constitutes an independent contractor is a question for the court, but whether or not a particular person is, under the evidence, an independent contractor is a question for the jury. *Emmerson v. Fay*, 94 Va. 60, 26 S. E. Rep. 386.

General Rule—Master Not Liable for Acts of Independent Contractor.—It may be stated as the general rule that no person other than the one immediately or actually guilty of the wrongful act is liable therefor, except upon the ground that the relation of principal and agent, or master and servant, existed between the person or corporation sought to be made liable and the person who did the act, or who was guilty of the negligence that caused the injury. In other words the principle of *respondet superior* does not extend to cases of independent contracts where the party for whom the work is to be done is not the immediate superior of those guilty of the wrongful act, and has no choice in the selection of the workmen, and no control over the manner of doing the work. *Wilson v. City of Wheeling*, 19 W. Va. 323, 42 Am. Rep. 780; *Emmerson v. Fay*, 94 Va. 60, 26 S. E. Rep. 386; *Bibb v. Norfolk, etc., R. Co.*, 87 Va. 711, 14 S. E. Rep. 163; *Norfolk, etc., R. Co. v. Stevens*, 97 Va. 631, 34 S. E. Rep. 536.

Master Liable in Some Cases.—While the general rule, as stated above, is that the employer is not liable to third parties for the acts of an independent contractor, still there are cases where, because of the dangers incident to the performance of the work, the law holds the employer liable for the acts of an independent contractor. In other words, there are some duties imposed upon the master by law which cannot be delegated to an independent contractor so as to escape liability for their non-performance or for the negligence of the independent contractor in performing them. *Wilson v. City of Wheeling*, 19 W. Va. 323, 42 Am. Rep. 780; *Bibb v. Norfolk, etc., R. Co.*, 87 Va. 711, 14 S. E. Rep. 163; *Stevenson v. Wallace*, 27 Gratt. 77; *City of Richmond v. Long*, 17 Gratt. 375; *Richmond, etc., R. Co. v. Moore*, 94 Va. 493, 27 S. E. Rep. 70; *Virginia, etc., R. Co. v. Sanger*, 15 Gratt. 230; *Carrico v. W. Va., etc., R. Co.*, 35 W. Va. 399, 14 S. E. Rep. 15; *Carrico v. W. Va., etc., R. Co.*, 39 W. Va. 94, 19 S. E. Rep. 573.

Where Work is Intrinsically Dangerous.—One of the cases where the general rule does not apply is where the contract directly requires the performance of a work intrinsically dangerous, however skillfully performed. In such case the party authorizing the work is justly regarded as the author of the mischief resulting from it, whether he does the work himself or lets it out by contract. Thus, where a city undertakes the improvement of a street, by grading or otherwise, the authorities are bound to take care that the manner of doing the work does not endanger the safety of the public. The city is in all cases responsible for such dangers as are incident to, and consequent upon, the nature of the work itself; while its liability for those dangers which result from the improper execution of the work, may be limited by the terms of the contract under which it is performed. *Wilson v. City of Wheeling*, 19 W. Va. 323, 42 Am. Rep. 780.

But where a passenger is injured by reason of the track or roadbed undergoing repairs, the fact that

the work is being done by an independent contractor, is not of itself sufficient to relieve the company from liability. But it is for the jury to inquire whether there was not danger in the work, arising from the mode and manner in which it was done; whether the company did not know, or by the exercise of proper diligence might not have ascertained, the existence of such danger; and whether they had used due care and foresight in guarding against it; and if they failed in this, the company is responsible to the passenger for the injury sustained. *Virginia, etc., R. Co. v. Sanger*, 15 Gratt. 230; *Carrico v. W. Va., etc., R. Co.*, 35 W. Va. 399, 14 S. E. Rep. 15; *Carrico v. W. Va., etc., R. Co.*, 39 W. Va. 94, 19 S. E. Rep. 573.

Where Employer Invites Persons on His Premises.—Another case to which the general rule is inapplicable is where a person goes upon the premises of another by invitation. In such case the latter owes him the duty to see that he is not injured while on the premises, either by himself, or through the act of an independent contractor. Thus, in a case in which a party attending a balloon ascension on the premises of another, was injured through the negligence of the balloon man, he being an independent contractor, the owner of the premises was held liable for the injury. *Richmond, etc., R. Co. v. Moore*, 94 Va. 493, 27 S. E. Rep. 70.

III. THE NONASSIGNABLE DUTIES OF THE MASTER.

1. STATEMENT AND NATURE OF DUTIES.

a. GENERAL STATEMENT OF DUTIES.—The duties owed by the master to the servant which are personal to him and cannot be assigned are: (1) The duty to use ordinary care to provide a reasonably safe place in which the servant is to work. (2) The duty to use ordinary care to provide reasonably safe machinery and appliances for the performance of the work required of the servant. (3) The duty to use ordinary care in inspecting the place and the machinery and appliances from time to time so as to keep them in a reasonably safe condition. (4) The duty to exercise ordinary care to provide a sufficient force of competent servants for the doing of the work. (5) The duty to adopt reasonable rules for the regulation and conduct of the work in which the servant is engaged, and to exercise ordinary care in bringing them to the knowledge of the servant and seeing that they are enforced. (6) The duty to exercise ordinary care in superintending the work, and in warning and instructing the servant of dangers which are unknown to him. *Core v. Ohio River R. Co.*, 38 W. Va. 456, 18 S. E. Rep. 596; *Riley v. Railway Co.*, 27 W. Va. 145; *Norfolk, etc., R. Co. v. Ampey*, 93 Va. 108, 25 S. E. Rep. 226; *Cooper v. Railroad Co.*, 24 W. Va. 37; *Jackson v. Norfolk, etc., R. Co.*, 43 W. Va. 380, 27 S. E. Rep. 278, 31 S. E. Rep. 258, 46 L. R. A. 337, and *note*. See the cases cited under the headings which follow.

b. PERSONAL CHARACTER OF DUTIES.—When it is said that these duties of the master are personal to him and are nonassignable, it is not meant that they are such as in the nature of things cannot be performed by an agent, but only that they are duties imposed upon the master by law for the due performance of which he is personally responsible. If he fails to exercise due care in the performance of these duties and the servant is injured in consequence thereof, he is liable; and if he delegates the performance of those duties to an agent, and the agent is guilty of negligence, the master still re-

mains liable, as the negligence of the agent is the negligence of the master. *Richmond Locomotive Works v. Ford*, 94 Va. 627, 27 S. E. Rep. 599; *Norfolk, etc., R. Co. v. Houchins*, 95 Va. 398, 28 S. E. Rep. 578.

In a recent and leading case upon this subject the court said: "The doing of these things is a duty of the master to the servant for the latter's safety. The master can either perform these duties personally, or he may delegate their performance to some one else, whom the books call 'vice principal,' because he stands, as to these duties, in the place of his master; but if either fails in the performance of duty in any of these respects, and damage results to a servant, the master must answer. If, however, the damaging negligent act is not one of the things which rest on the master as a duty to the servant, it is the act, purely, of a fellow servant, and the injured servant must look to him, not to the master. These duties falling on the master to perform are called in the law-books 'nonassignable duties,' because he owes them to the servant, and he cannot assign them to another to perform, and exempt himself from liability for their misperformance. These duties are sometimes spoken of as duties in construction, preparation, and preservation, as contrasted with mere work of operation. For instance, the construction of the railroad or other work, the preparation of machinery and implements to be used in the business, the preservation of the track or working place, or machinery and appliances, in proper, safe condition, and the selection of proper servants to work. The master having well done his duty in these things, their handling and use in the prosecution of the work designed is a work of mere operation, and this work the servants must perform well, in the interest of their master and fellow servants; and if one fails to do so, and injures a fellow servant, the master is not liable, since he cannot always stand by and watch the servant in his every act in the carrying on or operation of the business, and the law, of necessity, permits him to commit this work of mere operation to other hands." *Jackson v. Norfolk, etc., W. R. Co.*, 43 W. Va. 380, 27 S. E. Rep. 278, 31 S. E. Rep. 258, 46 L. R. A. 337, and *note*. For a full discussion, see the headings which follow; and see monographic *note* on "Fellow Servants."

2. DUTY TO PROVIDE SAFE PLACE.

Statement of Duty.—It is the duty of the master to exercise ordinary care and diligence to provide a reasonably safe place in which the servant is to work, considering the character of the work to be done. If the master is guilty of neglect in performing this duty, and, in consequence thereof, a servant, without default on his part, receives an injury, in the course of his employment, the master is liable in damages. *Norfolk, etc., R. Co. v. Cromer*, 90 Va. 763, 40 S. E. Rep. 54; *Richmond Locomotive Works v. Ford*, 94 Va. 627, 27 S. E. Rep. 599; *Richmond, etc., R. Co. v. Norment*, 84 Va. 167, 4 S. E. Rep. 211; *Richlands Iron Co. v. Elkins*, 90 Va. 249, 17 S. E. Rep. 890; *Daniel v. Chesapeake, etc., R. Co.*, 36 W. Va. 397, 15 S. E. Rep. 162, 32 Am. St. Rep. 870; *Berns v. Coal Co.*, 27 W. Va. 385; *Richmond, etc., R. Co. v. Williams*, 86 Va. 165, 9 S. E. Rep. 990; *Richmond Granite Co. v. Bailey*, 92 Va. 554, 24 S. E. Rep. 223; *Goodman v. Richmond, etc., R. Co.*, 81 Va. 576; *Norfolk, etc., R. Co. v. Stevens*, 97 Va. 631, 38 S. E. Rep. 525; *Graham v. Coal Co.*, 38 W. Va. 373, 18 S. E. Rep. 584; *Haffner v. Chesapeake, etc., R. Co.*, 96 Va. 523, 31 S. E. Rep. 899; *Chesapeake, etc., R. Co. v. Hafner*, 90 Va. 621, 19 S. E. Rep. 166; *Russell Creek Coal Co. v.*

Wells, 96 Va. 416, 31 S. E. Rep. 614; Bertha Zinc Co. v. Martin, 96 Va. 791, 22 S. E. Rep. 809; Norfolk, etc., R. Co. v. Ward, 90 Va. 687, 19 S. E. Rep. 849; Norfolk, etc., R. Co. v. Poole (Va.), 40 S. E. Rep. 627; Seldomridge v. Chesapeake, etc., R. Co., 46 W. Va. 569, 33 S. E. Rep. 293; Robinson v. Dininny, 90 Va. 41, 30 S. E. Rep. 442; Riley v. Railway Co., 27 W. Va. 146; Robinson v. West Virginia, etc., R. Co., 40 W. Va. 583, 21 S. E. Rep. 727; Cooper v. Railroad Co., 24 W. Va. 37; Norfolk, etc., R. Co. v. Nunnally, 88 Va. 546, 14 S. E. Rep. 307.

Duty a Continuing One.—Not only is it the duty of the master to provide a safe place in the first instance, but it is incumbent upon him to exercise ordinary care in keeping it in a reasonably safe condition. Hence, if the place provided by the master is reasonably safe in the first instance, and is afterwards rendered unsafe by the negligent manner in which the boss or foreman of a gang of hands directs the work to be done, in the doing of which an injury is inflicted, the master is liable for such injury. *Richmond Locomotive Works v. Ford*, 94 Va. 627, 27 S. E. Rep. 509; *Russell Creek Coal Co. v. Wells*, 96 Va. 416, 31 S. E. Rep. 614.

Degree of Care Required of Master.—The master is only held to the exercise of ordinary care in performing his duty to provide a safe place for his servants to work. And, as in such matters, even the skillful and experienced will frequently differ in their choice of instrumentalities and methods of doing the work, the master should not be adjudged negligent for not conforming to some other method believed by some to be less perilous than the one adopted by him. *Norfolk, etc., R. Co. v. Cromer*, 99 Va. 762, 40 S. E. Rep. 54; *Graham v. Coal Co.*, 38 W. Va. 273, 18 S. E. Rep. 584; *Chesapeake, etc., R. Co. v. Hafner*, 90 Va. 621, 19 S. E. Rep. 166; *Hafner v. Chesapeake, etc., R. Co.*, 96 Va. 528, 31 S. E. Rep. 809; *Russell Creek Coal Co. v. Wells*, 96 Va. 416, 31 S. E. Rep. 614; *Bertha Zinc Co. v. Martin*, 93 Va. 791, 22 S. E. Rep. 809; *Norfolk, etc., R. Co. v. Ward*, 90 Va. 687, 19 S. E. Rep. 849; *Goodman v. Richmond, etc., R. Co.*, 81 Va. 576; *Berns v. Coal Co.*, 27 W. Va. 285; *Richlands Iron Co. v. Elkins*, 90 Va. 249, 17 S. E. Rep. 890; *Richmond, etc., R. Co. v. Norment*, 84 Va. 167, 4 S. E. Rep. 311; *Richmond Locomotive Works v. Ford*, 94 Va. 627, 27 S. E. Rep. 509; *Norfolk, etc., R. Co. v. Stevens*, 97 Va. 631, 34 S. E. Rep. 525; *Norfolk, etc., R. Co. v. Poole (Va.)*, 40 S. E. Rep. 627; *Seldomridge v. Chesapeake, etc., R. Co.*, 46 W. Va. 569, 33 S. E. Rep. 293.

Thus, in one case it was said that, "The owner of a coal mine is not required to resort to the most expensive methods for keeping his mines freed from fire-damp in order to escape injury to his servants working in the mines caused by the explosion of the fire-damp. If he has reasonably safe methods in use for the proper ventilation of the mine, and uses reasonable care to keep the mine properly ventilated and the fire-damp expelled therefrom, he will not be responsible." *Berns v. Coal Co.*, 27 W. Va. 285; *Norfolk, etc., R. Co. v. Ormsby*, 27 Gratt. 355; *Richlands Iron Co. v. Elkins*, 90 Va. 249, 17 S. E. Rep. 890; *Bertha Zinc Co. v. Martin*, 93 Va. 791, 22 S. E. Rep. 809; *Norfolk, etc., R. Co. v. Stevens*, 97 Va. 633, 34 S. E. Rep. 525; *Norfolk, etc., R. Co. v. Houchins*, 95 Va. 308, 28 S. E. Rep. 578; *Riley v. Railway Co.*, 27 W. Va. 146; *Hoffman v. Dickinson*, 31 W. Va. 143, 6 S. E. Rep. 58; *Stewart v. Ohio River R. Co.*, 40 W. Va. 186, 20 S. E. Rep. 922; *Oliver v. Railroad Co.*, 42 W. Va. 708, 26 S. E. Rep. 444; *McDonald v. Norfolk, etc., R. Co.*, 96 Va. 98, 37 S. E. Rep. 321; *Berns v. Coal Co.*, 27

W. Va. 285; *Norfolk, etc., R. Co. v. Williams*, 80 Va. 165, 15 S. E. Rep. 522.

Servant May Rely on Master's Performance of Duty.

—In the absence of notice to the contrary, the servant is warranted in assuming that the master has performed his duty. *Richlands Iron Co. v. Elkins*, 90 Va. 249, 17 S. E. Rep. 890. And this rule applies where the master has delegated the performance of the duty to a superior servant. Hence, a servant has the right to presume that a foreman of the company, whose duty it is to ascertain the running of the trains on the track and to take precaution to prevent collision, has performed the duty required of him and is not guilty of negligence. Thus, where a servant voluntarily got upon a hand car in foggy weather, and no flag was sent out in advance, and no precaution taken to prevent a collision, this being the duty of the foreman as required by the rules of the company, it was held that as the servant had not been informed of the negligence of the foreman in performing his duty, the conduct of the servant was a voluntary assumption of risk of collision only with trains which the foreman could not have ascertained would have been on the track, had he used due diligence to obtain information, and that the company was liable to the servant for an injury received by a collision with an extra train which could have been discovered by the foreman if he had exercised due diligence. *Crisswell v. Pittsburgh, etc., R. Co.*, 30 W. Va. 708, 6 S. E. Rep. 31.

Master Not Liable for Negligence of Third Parties.

—While the master must use ordinary care in the construction and maintenance of a safe place in which the servant is to work, he is not liable for defects not arising from his own negligence, and which could not have been discovered by the exercise of ordinary care. Thus a railroad company is not liable for injuries sustained by an employee by the sliding out or giving way of the foundation on which an embankment rests, where it was made by a different company a long time before the accident, and there is no obvious defect in its construction. *Norfolk, etc., R. Co. v. Poole (Va.)*, 40 S. E. Rep. 627.

Effect of Servant's Assent to Work in Place Provided.—The assent by the servant to occupy the place prepared for him, and to incur the dangers to which he will be exposed thereby, he having sufficient intelligence and knowledge to enable him to comprehend them, discharges the master from the liability to make the place more safe, even if the same can be done with reasonable care and expense. Having consented to serve in the way and manner in which the business was being conducted, he has no proper grounds of complaint, even if reasonable precautions have not been taken. *Seldomridge v. Chesapeake, etc., R. Co.*, 46 W. Va. 569, 33 S. E. Rep. 293. See *post*, "Assumption of Risks by Servants."

Departure by Servant from Safe Place without Reason.

—If a servant who has been assigned a safe place to work, voluntarily leaves it, without any reasonable and proper cause for so doing, and in consequence thereof, is injured, he has no remedy against the master. But it has been held that it is not unreasonable for a servant, in cold weather, to go to a fire, where dynamite is being thawed, to warm his hands; and where he and other hands resorted to the fire for that purpose with the knowledge of and without objection from the master, and an injury resulted therefrom, this was held not to be such contributory negligence on the part of the servants as to preclude their recovery.

Bertha Zinc Co. v. Martin, 98 Va. 791, 23 S. E. Rep. 890.

Place Rendered Unsafe by Act of God.—Where the place in which the servant is engaged to work is rendered dangerous and unsafe by reason of the act of God, the master is not liable for injuries resulting to the servant therefrom. Thus in a case in which an engineman was injured owing to the roadbed having become washed away by violent rains, the company having used due diligence in inspecting the roadbed, it was held that the plaintiff could not recover. *Binns v. Richmond, etc., R. Co.*, 88 Va. 891, 14 S. E. Rep. 701.

Application of Rule to Mines.—It is the duty of the operator of every coal mine to provide ample means of ventilation, and to cause air to be circulated through the headings and working places, so as to dilute, render harmless, and carry off dangerous and noxious gases. It is also his duty to employ a competent fire boss to examine with safety lamps, immediately before each shift, working places and other places where gas is liable to exist. It is also his duty to employ a competent mining boss to keep careful watch over the ventilating apparatus and the air ways, traveling ways, pumps and drainage, and to see that proper break-throughs are made, as required by law, and that all loose coal, slate, or rock overhead in the working places and along the haulways be removed or carefully secured, so as to prevent danger to the persons employed in the mine, and to provide props and timbers for the mine, and perform other duties required of him by law. Omission of these duties is negligence in the operator, and renders him liable to his employee for injuries resulting. *Graham v. Newburg, etc., Coal Co.*, 38 W. Va. 273, 18 S. E. Rep. 584. See also, *Berns v. Coal Co.*, 37 W. Va. 285.

Working between Cars.—A railroad company is guilty of negligence, and liable to its employee injured thereby, when it puts him to work overhauling or repairing a car, where it is necessary for him to be between two cars, and it causes another car to be shifted on the same track and driven against that on which he is at work, without giving any previous warning. *Richmond, etc., R. Co. v. Norment*, 84 Va. 167, 4 S. E. Rep. 211.

Leaving Dangerous Machinery Uncovered.—Where an employer left a large rapidly revolving cogwheel unprotected, so that tongs carrying a large mass of iron were liable to be caught and taken into it and the piece thrown all about the room with such force as to kill any person with whom they came in contact, after having been warned by a skillful workman to encase it, he was held liable for an injury to an employee resulting from the tongs catching in the cogs. *Richlands Iron Co. v. Elkins*, 90 Va. 249, 17 S. E. Rep. 800.

Overhead Bridges.—It seems to be a settled principle of law that it is negligence for a railroad company to operate its railroad with an overhead bridge too low for its employees, whose duty require their presence on top of the cars, to pass under when standing on the cars in the discharge of their duties. *Norfolk, etc., R. Co. v. Marpole*, 97 Va. 594, 34 S. E. Rep. 462; *Chesapeake, etc., R. Co. v. Hafner*, 90 Va. 631, 19 S. E. Rep. 166; *Hafner v. Chesapeake, etc., R. Co.*, 96 Va. 528, 31 S. E. Rep. 899; *Clark v. Railroad Co.*, 78 Va. 709, 49 Am. Rep. 894; *Williamson v. Newport News, etc., Co.*, 34 W. Va. 657, 12 S. E. Rep. 824; *Nelson v. Chesapeake, etc., R. Co.*, 88 Va. 971, 14 S. E. Rep. 888.

Railroad Tracks Must Be Free from Obstructions.—Where a railroad company fails to keep its track free from obstructions, or allows structures to remain dangerously near the same, it is liable to the servant for an injury received in consequence of such neglect. Accordingly the company was held liable where a brakeman, unfamiliar with the fact that a stump was dangerously near the track, was ordered to see if the wheels were sliding, and, who, while looking with his head outside the train, was struck by the stump, the existence of which was known to, the employee of the company who gave the order unaccompanied by any special warning. *Riley v. West Virginia, etc., R. Co.*, 27 W. Va. 145. See also, *Daniel v. Chesapeake, etc., R. Co.*, 36 W. Va. 397, 15 S. E. Rep. 162, 32 Am. St. Rep. 870.

Delegation of Duty to Independent Contractor.—Since the master, in performing his nonassignable duties, is only held to the exercise of reasonable care, he may, it is held, delegate the performance of one of these duties to an independent contractor, where the delegation of it is consistent with his exercise of reasonable care. Thus, in *Norfolk, etc., R. Co. v. Stevens*, 97 Va. 631, 34 S. E. Rep. 525, a railroad company, who had exercised reasonable care in providing a safe place for its servants to work by delegating the performance of the duty to a competent independent contractor, was held not responsible for an injury received by one of its servants through the negligence of the contractor. See criticisms of this case in 5 Va. Law Reg. 633; 6 Va. Law Reg. 637.

Declaration Need Not Aver Servant's Ignorance of Danger.—In an action by the servant for injuries received by working in a dangerous place, the declaration need not aver the servant's ignorance of the danger to which he was exposed. *Richmond Granite Co. v. Bailey*, 92 Va. 554, 24 S. E. Rep. 232.

3. DUTY TO PROVIDE SAFE MACHINERY AND APPLIANCES.

a. STATEMENT OF RULE.—The master is bound to exercise ordinary care for the safety of those in his service in providing them with machinery and appliances reasonably safe and suitable for their use; and where the servant is injured through a defect existing in the machinery or appliances, which was known to the master, or ought to have been known to him, and which was unknown to the servant, the master is liable for the injury. *Richmond, etc., R. Co. v. Norment*, 84 Va. 167, 4 S. E. Rep. 211; *Richmond, etc., R. Co. v. Burnett*, 88 Va. 538, 14 S. E. Rep. 372; *Goodman v. Richmond, etc., R. Co.*, 81 Va. 576; *Richmond, etc., R. Co. v. Williams*, 86 Va. 165, 9 S. E. Rep. 990; *Richlands Iron Co. v. Elkins*, 90 Va. 249, 17 S. E. Rep. 800; *Richmond, etc., R. Co. v. George*, 88 Va. 223, 13 S. E. Rep. 429; *Norfolk, etc., R. Co. v. Gilman*, 88 Va. 239, 13 S. E. Rep. 475; *Baltimore, etc., R. Co. v. McKenzie*, 81 Va. 71; *Beard v. Chesapeake, etc., R. Co.*, 90 Va. 361, 18 S. E. Rep. 559; *Humphreys v. Newport News, etc., Co.*, 33 W. Va. 135, 10 S. E. Rep. 39; *Darracott v. Chesapeake, etc., R. Co.*, 83 Va. 288, 2 S. E. Rep. 511; *Core v. Ohio River R. Co.*, 38 W. Va. 456, 18 S. E. Rep. 596; *Norfolk, etc., R. Co. v. Ampey*, 93 Va. 108, 25 S. E. Rep. 226; *Norfolk, etc., R. Co. v. Brown*, 91 Va. 668, 22 S. E. Rep. 496; *Richmond, etc., R. Co. v. Moore*, 78 Va. 93; *Norfolk, etc., R. Co. v. Nunnally*, 88 Va. 546, 14 S. E. Rep. 397; *Moon v. Richmond, etc., R. Co.*, 78 Va. 745; *Cooper v. Railroad Co.*, 24 W. Va. 37; *Berns v. Gaston Gas Coal Co.*, 27 W. Va. 285; *Richmond Granite Co. v. Bailey*, 92 Va. 554, 24 S. E. Rep. 232; *White v. Newport News,*

etc., Co. v. 95 Va. 355, 28 S. E. Rep. 577; *Riley v. West Virginia, etc.*, R. Co., 27 W. Va. 145; *Norfolk, etc., R. Co. v. Jackson*, 1 Va. Dec. 680; *Chesapeake, etc., R. Co. v. Lash*, 3 Va. Dec. 342; *Harris v. Chesapeake, etc., R. Co.*, 2 Va. Dec. 248; *Southern R. Co. v. Mauzy*, 98 Va. 602, 37 S. E. Rep. 285; *Richmond, etc., R. Co. v. Tribble*, 97 Va. 495, 34 S. E. Rep. 278; *New York, etc., R. Co. v. Cromwell*, 98 Va. 227, 35 S. E. Rep. 444; *Virginia, etc., Wheel Co. v. Chalkley*, 98 Va. 62, 34 S. E. Rep. 976; *Graham v. Newburg, etc., Coal Co.*, 38 W. Va. 273, 18 S. E. Rep. 584; *Norfolk, etc., R. Co. v. Cromer*, 99 Va. 763, 40 S. E. Rep. 54; *South West Va. Imp. Co. v. Smith*, 85 Va. 306, 7 S. E. Rep. 365; *Norfolk, etc., R. Co. v. Ward*, 90 Va. 687, 19 S. E. Rep. 849; *Meyers v. Falk*, 99 Va. 385, 38 S. E. Rep. 178; *Bertha Zinc Co. v. Martin*, 93 Va. 791, 23 S. E. Rep. 869; *Riverside Cotton Mills v. Green*, 98 Va. 58, 34 S. E. Rep. 698; *Richmond, etc., R. Co. v. Risdon*, 87 Va. 335, 13 S. E. Rep. 786; *Norfolk, etc., R. Co. v. Nuckolls*, 91 Va. 207, 21 S. E. Rep. 342; *Robinson v. West Virginia, etc., R. Co.*, 40 W. Va. 568, 21 S. E. Rep. 727; *Ayers v. Richmond, etc., R. Co.*, 84 Va. 679, 5 S. E. Rep. 582; *Norfolk, etc., R. Co. v. McDonald*, 88 Va. 352, 13 S. E. Rep. 706; *Seldomridge v. Chesapeake, etc., R. Co.*, 46 W. Va. 569, 33 S. E. Rep. 308; *McKelvey v. Chesapeake, etc., R. Co.*, 35 W. Va. 500, 14 S. E. Rep. 261; *Richmond Locomotive Works v. Ford*, 94 Va. 627, 27 S. E. Rep. 509; *Norfolk, etc., R. Co. v. Houchins*, 95 Va. 398, 28 S. E. Rep. 578; *Johnson v. Chesapeake, etc., R. Co.*, 36 W. Va. 73, 14 S. E. Rep. 432; *Hoffman v. Dickinson*, 81 W. Va. 142, 6 S. E. Rep. 53; *Norfolk, etc., R. Co. v. Stevens*, 97 Va. 631, 34 S. E. Rep. 525; *McDonald v. Norfolk, etc., R. Co.*, 95 Va. 98, 27 S. E. Rep. 821.

b. **DUTY A CONTINUING ONE.**—The master's duty in regard to machinery and appliances is not discharged simply by purchasing or providing reasonably safe instrumentalities at the time of the commencement of the servant's term, but his duty in this respect is a continuing one. That is, it is his duty to use reasonable care in providing safe machinery and appliances in the first instance, and, in addition to this, to see that they are maintained in a reasonably safe condition. *Cooper v. Railroad Co.*, 34 W. Va. 37; *Norfolk, etc., R. Co. v. Nunnally*, 88 Va. 546, 14 S. E. Rep. 367.

c. **RIGHT OF SERVANT TO RELY ON PERFORMANCE OF DUTY.**—The duty of furnishing safe and suitable machinery and appliances being one imposed upon the master by law, the servant is entitled to presume that the master has performed the duty as required by law, and that he has used due care in seeing that the instrumentalities are in a reasonably safe and proper condition. *Norfolk, etc., R. Co. v. Nunnally*, 88 Va. 546, 14 S. E. Rep. 367; *Ayers v. Richmond, etc., R. Co.*, 84 Va. 679, 5 S. E. Rep. 582; *Chesapeake, etc., R. Co. v. Lee*, 84 Va. 642, 5 S. E. Rep. 579; *Richmond, etc., R. Co. v. Williams*, 86 Va. 165, 9 S. E. Rep. 990; *Richmond, etc., R. Co. v. Burnett*, 88 Va. 588, 14 S. E. Rep. 373; *Beard v. Chesapeake, etc., R. Co.*, 90 Va. 351, 18 S. E. Rep. 559.

d. DEGREE OF CARE REQUIRED OF MASTER.

Ordinary Care.—In the performance of his duty to furnish adequately safe and suitable machinery and appliances, the law does not hold the master to the exercise of extraordinary care, but it is well settled that he is only required to use "ordinary care." *Darracott v. Chesapeake, etc., R. Co.*, 83 Va. 288, 2 S. E. Rep. 511; *Norfolk, etc., R. Co. v. Stevens*, 97 Va. 631, 34 S. E. Rep. 525; *Norfolk, etc., R. Co. v. Jackson*, 85 Va.

489, 8 S. E. Rep. 370; *Bertha Zinc Co. v. Martin*, 93 Va. 791, 23 S. E. Rep. 869; *Berns v. Coal Co.*, 27 W. Va. 235; *Johnson v. Chesapeake, etc., R. Co.*, 36 W. Va. 73, 14 S. E. Rep. 432; *South West Imp. Co. v. Smith*, 85 Va. 306, 7 S. E. Rep. 365; *Riverside Cotton Mills v. Green*, 98 Va. 58, 34 S. E. Rep. 693; *Richmond, etc., R. Co. v. Risdon*, 87 Va. 335, 13 S. E. Rep. 786; *Richlands Iron Co. v. Elkins*, 90 Va. 249, 17 S. E. Rep. 890; *Norfolk, etc., R. Co. v. Ampey*, 93 Va. 108, 25 S. E. Rep. 226; *Norfolk, etc., R. Co. v. Jackson*, 1 Va. Dec. 680; *Riley v. West Virginia, etc., R. Co.*, 27 W. Va. 145; *Richmond, etc., R. Co. v. Norment*, 84 Va. 167, 4 S. E. Rep. 211; *Norfolk, etc., R. Co. v. Gilman*, 88 Va. 239, 13 S. E. Rep. 475; *Goodman v. Richmond, etc., R. Co.*, 81 Va. 580; *Richmond, etc., R. Co. v. Burnett*, 88 Va. 588, 14 S. E. Rep. 372; *Virginia, etc., Wheel Co. v. Chalkley*, 98 Va. 62, 34 S. E. Rep. 976; *Southern R. Co. v. Mauzy*, 98 Va. 602, 37 S. E. Rep. 285; *Norfolk, etc., R. Co. v. Cromer*, 99 Va. 763, 40 S. E. Rep. 54; *Chesapeake, etc., R. Co. v. Lash*, 2 Va. Dec. 343; *Richmond, etc., R. Co. v. George*, 88 Va. 228, 18 S. E. Rep. 429; *Harris v. Chesapeake, etc., R. Co.*, 2 Va. Dec. 248.

Thus, in *Norfolk, etc., R. Co. v. Jackson*, 85 Va. 489, 8 S. E. Rep. 370, it was held that a count averring that defendant was bound to furnish a "push pole, constructed in the best and safest manner, and of the best material," was faulty, it being defendant's duty only to use "ordinary care" in providing suitable appliances.

Extraordinary Care Not Required.—It has been held in numerous cases that the master is not bound to use more than ordinary care, no matter how hazardous the business in which the servant is employed may be. *Richmond, etc., R. Co. v. Risdon*, 87 Va. 335, 13 S. E. Rep. 786; *Norfolk, etc., R. Co. v. Cromer*, 99 Va. 763, 40 S. E. Rep. 54; *Bertha Zinc Co. v. Martin*, 93 Va. 791, 23 S. E. Rep. 869; *Berns v. Coal Co.*, 27 W. Va. 235; *Darracott v. Chesapeake, etc., R. Co.*, 83 Va. 288, 2 S. E. Rep. 511; *Virginia, etc., Wheel Co. v. Chalkley*, 98 Va. 62, 34 S. E. Rep. 976. For example, it has been held that the measure of care imposed upon the master for the safety of his servant in providing means for thawing dynamite, is that ordinary care which reasonable and prudent men would and do exercise under like circumstances. *Bertha Zinc Co. v. Martin*, 93 Va. 791, 23 S. E. Rep. 869; *Schwartz v. Shull*, 45 W. Va. 405, 31 S. E. Rep. 914.

What is Ordinary Care.—Whether or not the master has exercised ordinary care in a particular case must be determined with reference to the facts of that case. "Ordinary care" is such care as a reasonable and prudent man would exercise under like circumstances. *South West Imp. Co. v. Smith*, 85 Va. 306, 7 S. E. Rep. 365; *Darracott v. Chesapeake, etc., R. Co.*, 83 Va. 288, 2 S. E. Rep. 511; *Richmond, etc., R. Co. v. Risdon*, 87 Va. 335, 13 S. E. Rep. 786; *Richlands Iron Co. v. Elkins*, 90 Va. 249, 17 S. E. Rep. 890; *Norfolk, etc., R. Co. v. Cromer*, 99 Va. 763, 40 S. E. Rep. 54.

Sufficiency of Allegations of Want of Care.—A declaration which distinctly alleges negligence, and that the company did not provide safe appliances, though it does not allege that it did not use "due, reasonable, and ordinary care to provide proper appliances" is not demurrable. *Norfolk, etc., R. Co. v. Jackson*, 1 Va. Dec. 680.

And a declaration alleging that it is the duty of a railroad company to keep its brakes and other appliances "in sufficient repair," is not demurrable as charging a higher duty than the law imposes. *Goodman v. Richmond, etc., R. Co.*, 81 Va. 580; *Rich-*

mond, etc., R. Co. v. Burnett, 88 Va. 538, 14 S. E. Rep. 372.

e. NECESSITY OF FURNISHING ABSOLUTELY SAFE APPLIANCES.—It is not the duty of the master to provide machinery and appliances which are absolutely safe. His duty is performed by providing machinery and appliances which are reasonably suited for the performance of the work in hand. Southern Ry. Co. v. Mauzy, 98 Va. 602, 37 S. E. Rep. 285; Seldomridge v. Chesapeake, etc., R. Co., 46 W. Va. 569, 33 S. E. Rep. 293; Richmond, etc., R. Co. v. Risdon, 87 Va. 335, 12 S. E. Rep. 786; Norfolk, etc., R. Co. v. Cromer, 99 Va. 763, 40 S. E. Rep. 54; Bertha Zinc Co. v. Martin, 98 Va. 791, 22 S. E. Rep. 869; Berns v. Coal Co., 27 W. Va. 285; Darracott v. Chesapeake, etc., R. Co., 83 Va. 288, 2 S. E. Rep. 511; Riverside Cotton Mills v. Green, 98 Va. 58, 34 S. E. Rep. 963.

f. NECESSITY OF FURNISHING BEST APPLIANCES OBTAINABLE.—Neither is it the duty of the master to furnish the best machinery and appliances which may be obtainable; for his duty is only to furnish such instrumentalities as a reasonable and prudent man would furnish under like circumstances, and it is well known that reasonable and prudent men do not in all cases provide the best instrumentalities which can be obtained. Therefore if the machinery and appliances which the master has are such as are commonly used, and can be used by the servant without danger, provided he exercises reasonable care, this is all that can be required. Berns v. Gaston Gas Coal Co., 27 W. Va. 285; Riverside Cotton Mills v. Green, 98 Va. 58, 34 S. E. Rep. 963; Seldomridge v. Chesapeake, etc., R. Co., 46 W. Va. 569, 33 S. E. Rep. 293; Richmond, etc., R. Co. v. Risdon, 87 Va. 335, 12 S. E. Rep. 786; Norfolk, etc., R. Co. v. Cromer, 99 Va. 763, 40 S. E. Rep. 54; Bertha Zinc Co. v. Martin, 98 Va. 791, 22 S. E. Rep. 869; Darracott v. Chesapeake, etc., R. Co., 83 Va. 288, 2 S. E. Rep. 511. The master performs his duty when he furnishes appliances of ordinary character and reasonable safety, for in regard to the style of the implements or nature of the mode of performance of any work, "reasonably safe," means safe according to the usage, habits, and ordinary risks of the business. The master is not liable for the consequences of danger but his liability rests upon negligence; and the test of negligence in methods, machinery and appliances is the ordinary usage of the business. Bertha Zinc Co. v. Martin, 98 Va. 791, 22 S. E. Rep. 869; Riverside Cotton Mills v. Green, 98 Va. 58, 34 S. E. Rep. 963.

g. NECESSITY OF FURNISHING LATEST INVENTIONS.—That the master is not bound to provide the latest inventions or the most newly-discovered appliances in order to exempt himself from liability for injury to the servant is held in numerous cases. And he may have machinery and appliances in operation which are shown to be less safe than others in use, without being liable to his servants for failure to adopt the improvement, provided that the servant is not deceived as to the degree of danger which he incurs. Norfolk, etc., R. Co. v. Cromer, 99 Va. 763, 40 S. E. Rep. 54; Richmond, etc., R. Co. v. Risdon, 87 Va. 335, 12 S. E. Rep. 786; Bertha Zinc Co. v. Martin, 98 Va. 791, 22 S. E. Rep. 869; Berns v. Gaston Gas Coal Co., 27 W. Va. 285; Darracott v. Chesapeake, etc., R. Co., 83 Va. 288, 2 S. E. Rep. 511.

Thus, where the plaintiff's intestate and a fellow servant, employees of defendant railroad company, in obeying an order, adjusted a "push pole" from the corner of a tender to the corner of a car on a parallel track, for the purpose of pushing the car,

but as the engine started one end of the pole slipped, throwing intestate under the wheels, whereby he was killed, it was held that the plaintiff could not recover on the ground that the defendant was negligent in not supplying the corner of the tender and car with "sockets" in which to place the pole, when the plaintiff's evidence showed that such "sockets" were a new invention, not in general use. Norfolk, etc., R. Co. v. Jackson, 85 Va. 489, 8 S. E. Rep. 370.

h. KNOWLEDGE OF DEFECTS BY MASTER OR SERVANT.—The servant cannot recover for an injury suffered in the course of his employment, from a defect in the machinery or appliances used, unless the master knew, or could have known by the exercise of ordinary care, of the existence of the defect, and the servant was ignorant and had not equal means of knowledge. Ignorance or want of equal means of knowledge by the servant is essential, for if the servant knows of the unsafe condition of the appliances and proceeds with the work, especially in the absence of any opportunity on the part of the master to know of such unsafe condition, he thereby assumes the risk of such defects. Hoffman v. Dickinson, 31 W. Va. 142, 6 S. E. Rep. 53; White v. Newport News, etc., Co., 95 Va. 355, 23 S. E. Rep. 577; Humphreys v. Newport News, etc., Co., 33 W. Va. 135, 10 S. E. Rep. 39; Richlands Iron Co. v. Elkins, 90 Va. 249, 17 S. E. Rep. 890; Riley v. Railway Co., 27 W. Va. 146; Norfolk, etc., R. Co. v. Ampey, 98 Va. 108, 25 S. E. Rep. 236; Johnson v. Chesapeake, etc., R. Co., 36 W. Va. 73, 14 S. E. Rep. 432; Virginia, etc., Wheel Co. v. Chalkley, 98 Va. 62, 34 S. E. Rep. 976; Richmond, etc., R. Co. v. Burnett, 88 Va. 538, 14 S. E. Rep. 372; Skidmore v. W. Va., etc., R. Co., 41 W. Va. 293, 23 S. E. Rep. 713. But see § 162, art. 12, Va. Const. 1902.

Sufficiency of an Instruction Omitting Elements of Servant's Knowledge.—Applying this rule it has been held that an instruction, that if the locomotive engine of the defendant was in a defective condition, and the defendant knew it, and by conduct, actions, or words, lulled its engineer into a feeling of security, whereby he was killed, the company was liable, was erroneous, because it omitted altogether the element of the engineer's ignorance of the defective and dangerous condition of the locomotive. McKelvey v. Chesapeake, etc., R. Co., 35 W. Va. 500, 14 S. E. Rep. 261.

Sufficiency of Declaration Omitting to Charge Knowledge of Master and Ignorance of Servant.—But a declaration, in an action by a servant against the master for an injury, which properly charges the master with negligence, although it does not allege knowledge by the master of the defect in the machinery, which caused the injury, or that he ought to have known of such defect, and does not allege ignorance of such defect in the plaintiff, is sufficient. Hoffman v. Dickinson, 31 W. Va. 142, 6 S. E. Rep. 53.

Servant with Knowledge of Defects Lulled into Security by Master.—Where the servant knows of defects in the machinery, appliances, or his working place, and is lulled into a sense of security by words, acts or conduct of his employer, and continues in the service, and is injured by reason of such defects, he is not precluded thereby from recovery of damages from his employer, provided the danger is not so plain and obvious that a prudent, careful man, anxious for his own safety, would not risk it. Graham v. Newburg, etc., Coal Co., 38 W. Va. 273, 18 S. E. Rep. 584.

1. DEFECTS MUST BE PROXIMATE CAUSE OF INJURY.—Where the master has failed to use due care in providing and maintaining safe and suit-

able machinery and appliances, and a servant is injured and brings a suit for damages, basing his claim upon this neglect of the master, it is essential to his recovery to show that the master's failure to provide the proper instrumentalities was the proximate cause of the injury. Thus, where the proximate cause of the servant's injury is the negligence of a fellow servant, and defects existing in the machinery and appliances are only the remote and secondary cause of the accident, there can be no recovery. *Richmond, etc., R. Co. v. Tribble*, 97 Va. 495, 24 S. E. Rep. 378; *Norfolk, etc., R. Co. v. Brown*, 91 Va. 608, 22 S. E. Rep. 496. See monographic note on "Fellow Servants."

J. APPLICATION OF RULES TO PARTICULAR APPLIANCES.

Ladders on Railroad Cars for the Passage of Servants.

—It is the duty of the railroad company to provide a safe mode for its servants to pass backwards and forwards on the train while performing their duties. Thus, where a conductor, whose duty it was to pass up and down the train, was injured by the breaking of a ladder, which was out of repair and over which it was necessary for him to pass in the discharge of his duties, the company was held liable. *Goodman v. Richmond, etc., Co.*, 81 Va. 576.

Bumpers, Deadblocks, etc., on Railroad Cars.—So it is the duty of a railroad company to use reasonable care to see that the couplings, deadblocks, and bumpers on its cars are in good condition, and where it neglects this duty it is responsible for an injury received by a servant, in the course of his employment, while in the exercise of due care. Thus in *Richmond, etc., R. Co. v. George*, 88 Va. 223, 18 S. E. Rep. 429, a brakeman, in attempting, on a dark night, to climb down the ladder on the front of a freight car next to the engine, was crushed by the engine's suddenly coming back up on him while feeling with his foot for the bottom rung of the ladder, which was missing—a fact of which he was ignorant. The bumper on the car was broken, which made it possible for the engine and car to come together and cause the injury. It was held that it was the company's duty to furnish proper cars and to keep them in good order; and that no negligence could be imputed to the plaintiff in this case, because the train having been made up in the night, under the supervision of the regular inspector, the plaintiff had no opportunity to discover the defect; and that therefore the railroad company was liable. *Richmond, etc., R. Co. v. George*, 88 Va. 223, 18 S. E. Rep. 429.

Cars of Unequal Heights—Mismatched Couplings—Not Per Se Negligence.—The use of cars of unequal heights and mismatched couplings in the same train is not negligence *per se*, and not, as a matter of law, a violation of the company's duty to furnish safe machinery. *Norfolk, etc., R. Co. v. Brown*, 91 Va. 608, 22 S. E. Rep. 496.

Defective Cars Belonging to Other Companies.—Where an injury results to the servant of a carrier from the defective condition of cars in its use, but owned by another company, the carrier cannot escape liability for the injury on the ground that the cars do not belong to them, as, in such case, the owner of the cars will be deemed to be the agent of the carrier, and it will be held to be the same liability as if it had owned the cars. *New York, etc., R. Co. v. Cromwell*, 98 Va. 227, 35 S. E. Rep. 444.

Defective Chain.—Where the plaintiff, a brakeman, was injured by the breaking of a defective chain, which caused the train to run over the end of a

wharf, it was held that the defendant company was liable. *Norfolk, etc., R. Co. v. Gilman*, 88 Va. 230, 13 S. E. Rep. 475. See also, *Hoffman v. Dickinson*, 81 W. Va. 142, 6 S. E. Rep. 53.

4. DUTY AS TO INSPECTION.

Rule Stated.—The duty of inspecting the place of work and the appliances and machinery to see that they are maintained in good condition and repair, is also one of the nonassignable duties. They must be continuously inspected by persons competent to perform that duty; and the negligence of the person engaged in performing this duty is the negligence of the master. *Cooper v. Railroad Co.*, 24 W. Va. 37; *Riley v. West Virginia, etc., R. Co.*, 27 W. Va. 145; *Norfolk, etc., R. Co. v. Houchins*, 95 Va. 308, 28 S. E. Rep. 573; *Madden v. Chesapeake, etc., R. Co.*, 28 W. Va. 610, 57 Am. Rep. 606; *Norfolk, etc., R. Co. v. Nuckols*, 91 Va. 207, 27 S. E. Rep. 342; *Norfolk, etc., R. Co. v. Nunnally*, 88 Va. 546, 14 S. E. Rep. 367. Thus, it has been held that it is the duty of a railroad company not only to furnish a reasonably well constructed railway and tracks for the use of its employees, but it must also exercise continued supervision over the same and keep them in good and safe repair and condition. *Riley v. West Virginia, etc., R. Co.*, 27 W. Va. 145. So where a brakeman was injured by the breaking loose of a hand hold attached to a car which it was necessary for him to take hold of in the performance of his duty, and the defect was one that could have been discovered by careful inspection of the car, the company was held liable for the injury, though the proximate cause of the injury was the negligence of the inspector charged with the duty of inspecting the appliances. *Cooper v. Railroad Co.*, 24 W. Va. 37.

Facts Charging Master with Duty to Inspect.—Where facts exist which are sufficient to cause a man of ordinary prudence and caution to believe that the instrumentalities are in such condition that their continued use will cause them to break or give away, and endanger the life of the servants, the master is liable if he does not forthwith use reasonable diligence and care to discover and repair the defect. Thus where the plaintiff, a fireman, was injured in an accident due to the failure of the company to suitably inspect the coupling pin after it had been subjected to a strain which was likely to have injured it, and which ought to have suggested to the company the propriety of an inspection, the company was held liable for the injury. *Norfolk, etc., R. Co. v. Nunnally*, 88 Va. 546, 14 S. E. Rep. 367.

In a somewhat similar case a servant had his leg broken by reason of a chain which was worked with a ratchet breaking. The evidence showed that while the plaintiff was working the ratchet, the noise made by the chain was heard. The work was stopped, and again the same noise was heard, and the ratchet again stopped. The plaintiff was afraid that the chain would break and injure him, but the defendant being present assured him that there was no danger and ordered him to continue work. The court held that when the defendant saw that the men were fearing the chain would break, it was his duty, before ordering them to proceed, to examine it, to see that it was safe, and as he did not examine it his liability depended upon whether or not an examination by him would have disclosed defects which ought to have been known to him, and which he could have avoided by proper care and caution. *Hoffman v. Dickinson*, 81 W. Va. 142, 6 S. E. Rep. 53.

5. DUTY TO PROVIDE SUFFICIENT FORCE OF COMPETENT SERVANTS.

Statement of Rule.—It is the duty of the master to exercise reasonable care, prudence and discretion in employing and retaining a sufficient force of careful, responsible and trustworthy servants. He must, on engaging a servant, make reasonable investigation into his character, habits of life, and fitness for the discharge of the duties to be assigned to him. If the master is negligent in performing this duty he will be held liable for injuries to his servants occasioned by the negligence, incapacity, or intemperance of their fellow servants. *Norfolk, etc., R. Co. v. Donnelly*, 88 Va. 853, 14 S. E. Rep. 692; *Norfolk, etc., R. Co. v. Thomas*, 90 Va. 205, 19 S. E. Rep. 884, 44 Am. St. Rep. 908; *Dingee v. Unrue*, 98 Va. 247, 35 S. E. Rep. 794; *Madden v. Chesapeake, etc., R. Co.*, 28 W. Va. 610, 57 Am. Rep. 695; *Norfolk, etc., R. Co. v. Ampey*, 98 Va. 108, 25 S. E. Rep. 226; *Norfolk, etc., R. Co. v. Nuckolls*, 91 Va. 207, 27 S. E. Rep. 843; *Jones v. Old Dominion Cotton Mills*, 82 Va. 140; *South West Imp. Co. v. Smith*, 85 Va. 306, 7 S. E. Rep. 355; *Norfolk, etc., R. Co. v. Houchins*, 95 Va. 398, 28 S. E. Rep. 578; *Core v. Ohio River R. Co.*, 38 W. Va. 456, 18 S. E. Rep. 596; *Williams v. Thacker Coal Co.*, 44 W. Va. 599, 30 S. E. Rep. 107; *Norfolk, etc., R. Co. v. Graham*, 96 Va. 480, 31 S. E. Rep. 604.

Duty to Provide a Sufficient Force of Servants.—The general rule, which exempts the master from liability to his servants for injuries received by them in the course of the employment, does not apply where he undertakes to run dangerous machinery with insufficient help, in consequence of which the servant is injured; for such conduct on the part of the master is negligence, and constitutes a recognized exception to the general rule. *South West Imp. Co. v. Smith*, 85 Va. 306, 7 S. E. Rep. 355. For example, the plaintiff, a boy thirteen years of age, was in the service of the defendant corporation, being engaged in the weaving department of its cotton mills, "to sweep the floor, carry water, and fill the buckets with quills." The dangerous machinery of the weaving department was at the time being operated with insufficient help, and an employee of the defendant, acting as its agent, called on the plaintiff for help, and ordered him into a position of danger, the result of which was irreparable injury to him. The defendant corporation was held liable in damages for the injury thus sustained by the plaintiff. *Jones v. Old Dominion Cotton Mills*, 82 Va. 140.

Application of Rule to Railroads.—It is the duty of a railroad company to see that the persons in charge of their engines and trains are competent to fill their respective positions. Accordingly it is held that where an engineer, without authority so to do, places an inexperienced and incompetent fireman in charge of an engine, the company is liable for unavoidable injuries that result to other employees by such fireman's unskillful management of the engine, for the reason that it is a breach of the duty the company owes to its employees to exercise ordinary care in providing and retaining competent servants. *Core v. Ohio River R. Co.*, 38 W. Va. 456, 18 S. E. Rep. 596.

Same—Proof of Engineer's Incompetency.—But, when an action is founded on the incompetency of a fireman temporarily in charge of an engine, the plaintiff must prove that the fireman was so inexperienced in the management of the engine that it was not an exercise of ordinary care to place him in charge thereof, he not being reasonably safe and

fit for the employment; that he was guilty of mismanagement of the engine by reason of his experience and unskillfulness; and that such mismanagement was the proximate cause of the plaintiff's injury. *Core v. Ohio River R. Co.*, 38 W. Va. 456, 18 S. E. Rep. 596.

Operators of Mines Must Employ Competent "Boss"—**West Virginia Statutory Provision.**—Under the W. Va. Code of 1891, sec. 11, p. 995, it is the duty of an operator or agent of a coal mine to employ a competent mine boss, and, having employed him according to the provision of this section, his duty to his employees in relation to those duties which the statute prescribes may be performed by the mine boss is performed, and the operator or agent is not liable for injuries arising from the negligence of the mine boss, as he is a fellow servant of the other employees. *William v. Thacker Coal, etc., Co.*, 44 W. Va. 599, 30 S. E. Rep. 107.

Jury May Be Instructed as to This Duty.—Where there is any evidence tending to show that the master has failed to exercise due care in the selection of servants and foreman it is proper to instruct the jury with regard to the master's duty in this respect. *Dingee v. Unrue*, 98 Va. 247, 35 S. E. Rep. 794.

6. DUTY TO PROVIDE RULES FOR CONDUCT OF BUSINESS.

Duty to Adopt Rules.—It is the duty of a master who is engaged in a complex and dangerous business which requires definite rules for the protection and safety of his servants, to adopt rules for that purpose, and a failure to do so is personal negligence, which renders him responsible for all injuries to his servants resulting therefrom. *Moore Lime Co. v. Richardson*, 95 Va. 326, 28 S. E. Rep. 334; *Norfolk, etc., R. Co. v. Donnelly*, 88 Va. 853, 14 S. E. Rep. 692; *Richmond Granite Co. v. Bailey*, 93 Va. 554, 24 S. E. Rep. 233; *Madden v. Chesapeake, etc., R. Co.*, 28 W. Va. 610, 57 Am. Rep. 695; *Norfolk, etc., R. Co. v. Houchins*, 95 Va. 398, 28 S. E. Rep. 578; *Richlands Iron Co. v. Elkins*, 90 Va. 249, 17 S. E. Rep. 890.

But the mere failure of the master to enact rules for the performance of simple duties, the danger attending the discharge of which is obvious, does not constitute negligence, unless, from the nature of the work in which the servants are employed, the master, in the exercise of reasonable care, should have foreseen and anticipated the necessity for such rules. *Norfolk, etc., R. Co. v. Graham*, 96 Va. 480, 31 S. E. Rep. 604; *Moore Lime Co. v. Richardson*, 95 Va. 326, 28 S. E. Rep. 334. Thus, it has been held that the occasional moving of cars by hand on a railroad siding is not a work of such nature as to require a promulgation of rules for the government of servants engaged therein. *Moore Lime Co. v. Richardson*, 95 Va. 326, 28 S. E. Rep. 334.

Duty to Exercise Reasonable Care in Bringing Rules to the Knowledge of Servants.—Not only is it the duty of a master, who is engaged in a complex and dangerous business, to adopt rules for the protection and safety of his servants engaged therein, but he must also exercise reasonable care and diligence in bringing them to the knowledge of the servants, and in seeing that they are enforced. But in bringing the rules to the notice of the servants, and in enforcing them, he is only bound to exercise reasonable care, and his duty in this respect is performed by the selection of competent servants to receive and transmit the orders, and negligence by them in performing this duty is a risk of the employment taken by the co-employee when he enters the service. *Oliver v. Ohio River R. Co.*, 43 W. Va. 708, 36 S. E. Rep. 444;

Gregory v. Ohio River R. Co., 37 W. Va. 606, 16 S. E. Rep. 819.

Rules Do Not Bind Servant Unless He Has Knowledge of Them.—Rules of master do not bind the servant like public law binds every man, but they must be brought to the servant's knowledge in order to bind him. Gregory v. Ohio River R. Co., 37 W. Va. 606, 16 S. E. Rep. 819; Criswell v. Railroad Co., 30 W. Va. 798, 6 S. E. Rep. 31.

Rules for Guidance of Superior Servants.—Where the master prescribes rules for the guidance of his superior servants and the rules are disregarded by the superior servants, the master is liable for injuries to servants of an inferior grade occasioned thereby. Thus where a railroad company prescribed rules for the guidance of its foreman, so as to reduce the danger of collisions on its road, and a collision occurred by reason of the failure of the foreman to observe such rules, the company was held liable to a servant for injuries resulting from such neglect. Criswell v. Pittsburg, etc., R. Co., 30 W. Va. 798, 6 S. E. Rep. 31. See monographic note on "Fellow Servants."

Breach of Rules by Servant Amounts to Contributory Negligence.—Where a servant is injured while acting in direct contravention of a reasonable rule made by the master for the safety of his servants, of which rule he has notice, and which he has promised to obey, this is such contributory negligence as bars his recovery for the injury. Overby v. Chesapeake, etc., R. Co., 37 W. Va. 584, 16 S. E. Rep. 813. For a full discussion, see post, "Contributory Negligence of Servant—Disregard of Rules."

1. DUTY TO WARN AND INSTRUCT SERVANT.

General Rule.—The master must use reasonable care and diligence to warn his servants against such accidents and casualties as may be reasonably foreseen. It is also his duty to instruct young or inexperienced servants as to the dangers incident to the employment so that the servant may avoid being injured by the exercise of ordinary care. The master, however, owes no duty to the servant to warn and instruct him of dangers which are so open and obvious as to be apparent to any reasonable man, for the servant assumes the risk of them at the time of entering into the employment. Richmond Granite Co. v. Bailey, 92 Va. 554, 24 S. E. Rep. 232; Daniel v. Chesapeake, etc., R. Co., 36 W. Va. 397, 15 S. E. Rep. 162, 33 Am. St. Rep. 870; Moore Lime Co. v. Richardson, 95 Va. 326, 28 S. E. Rep. 334; Stewart v. Ohio River R. Co., 40 W. Va. 188, 20 S. E. Rep. 922; Michael v. Roanoke Machine Works, 90 Va. 492, 19 S. E. Rep. 261, 44 Am. St. Rep. 927; Richmond Locomotive Works v. Ford, 94 Va. 627, 27 S. E. Rep. 509.

As to Known Dangers.—A servant who has been engaged for a number of years in the work of the master, and who has full knowledge of its danger, is not entitled, while engaged in his usual employment, to warning of dangers reasonably to be apprehended, nor is it the duty of the master to warn the servant against dangers which are open and obvious. Hence the mere failure of the foreman and fellow servant of a gang of hands engaged in moving cars on a siding to give warning of the approach from behind of a car by which a member of the gang is injured, is not negligence for which the master is liable, although it has been customary for the foreman to give such warning under like circumstances. Moore Lime Co. v. Richardson, 95 Va. 326, 28 S. E. Rep. 334; Stewart v. Ohio River R. Co., 40 W. Va. 188, 20 S. E. Rep. 922.

Duty to Inexperienced Servants.—It is the duty of the master to inform an inexperienced servant of dangers ordinarily incident to the service, and if he fails to do so, and the servant has no opportunity to learn of them, he will not be held to assume risks not obvious to one of his age, experience and judgment. But this rule only applies where the danger is known, or ought to be known, to the master, and of which the servant, on account of his youth or inexperience, is ignorant, and which he cannot reasonably be expected to discover by the exercise of ordinary care. Richmond Locomotive Works v. Ford, 94 Va. 627, 27 S. E. Rep. 509; Michael v. Roanoke Machine Works, 90 Va. 492, 19 S. E. Rep. 261, 44 Am. St. Rep. 927; Dingee v. Unrue, 98 Va. 247, 35 S. E. Rep. 794. Thus where a servant is ordered to temporarily work in another department of the master's general business where the work is of such a different character that it cannot be said to be within the scope of his employment, he does not, by obeying such orders, necessarily assume the risk incident to the work. Michael v. Roanoke Machine Works, 90 Va. 492, 19 S. E. Rep. 261, 44 Am. St. Rep. 927.

Duty to Warn Servant Engaged in Engrossing Duties.—A servant has a right to assume, when placed in a situation of danger where engrossing duties are required of him, that the master will not, without proper warning, submit him to other perils unknown to him, and from which the work exacted necessarily distracts his attention. The failure of the master to so warn the servant is negligence for which he is liable in case injury results to the servant while thus engaged. Michael v. Roanoke Machine Works, 90 Va. 492, 19 S. E. Rep. 261, 44 Am. St. Rep. 927.

Warning of Danger Must Be Given in the Usual Manner.—Where it is the duty of the master to warn the servant, the servant has the right to expect that the warning shall come from the usual source and in the usual manner, and a warning given in an unusual manner and coming from an unusual and unexpected source will not charge him unless it is actually heard by him. Thus, where a servant, in the exercise of due care, received an injury by being struck by a rope, one end of which was attached to a car and the other to an engine, and which suddenly became taut by the application of steam, it appeared that a foreman, who was not a fellow servant with the injured servant, instead of waiting for the servant to receive the usual notification of the starting of the engine, himself called to the servant that the engine was about to start, and ordered the engineer to start the engine at once. It also appeared that owing to the confusion of starting and to the fact that the notice came from an unusual and unexpected source, it was unheard by the servant. It was held that the failure to give the servant the usual notice was negligence for which the company was liable. Richmond Granite Co. v. Bailey, 92 Va. 554, 24 S. E. Rep. 232.

Duty to Instruct.—The master must not only give the servant warning of danger, but he must also give him such instruction as will enable him to avoid injury, unless both the danger and means of avoiding it, while he is performing the service required, are apparent. But he is not bound to anticipate extraordinary, unusual or improbable occurrences which involve inattention on the part of the servant. Stewart v. Ohio River R. Co., 40 W. Va. 188, 20 S. E. Rep. 922; Daniel v. Chesapeake, etc.,

R. Co., 36 W. Va. 397, 15 S. E. Rep. 162, 33 Am. St. Rep. 870.

V. ASSUMPTION OF RISKS BY SERVANT.

1. RISKS ORDINARILY INCIDENT TO SERVICE.

General Rule.—A servant entering into the employment of a master assumes such risks as are ordinarily incident to the employment from causes open and obvious, the dangerous character of which he has had opportunity to observe, and he must exercise reasonable care and caution for his own safety while engaged in the master's service. McDonald v. Norfolk, etc., R. Co., 95 Va. 98, 27 S. E. Rep. 821; Bertha Zinc Co. v. Martin, 93 Va. 791, 22 S. E. Rep. 869; Turner v. Norfolk, etc., R. Co., 40 W. Va. 675, 23 S. E. Rep. 83; Michael v. Roanoke Machine Works, 90 Va. 492, 19 S. E. Rep. 261, 44 Am. St. Rep. 927; Norfolk, etc., R. Co. v. Gilman, 98 Va. 239, 13 S. E. Rep. 475; Berns v. Gaston Gas Coal Co., 27 W. Va. 285; Norfolk, etc., R. Co. v. Cottrell, 83 Va. 512, 3 S. E. Rep. 123; Chesapeake, etc., R. Co. v. Lee, 84 Va. 642, 5 S. E. Rep. 579; Moon v. Richmond, etc., R. Co., 78 Va. 745; Southwest Imp. Co. v. Andrew, 86 Va. 270, 9 S. E. Rep. 1015; Stewart v. Ohio River R. Co., 40 W. Va. 183, 20 S. E. Rep. 922; Robinson v. Dinlinny, 96 Va. 41, 30 S. E. Rep. 442; Hoffman v. Dickinson, 31 W. Va. 142, 6 S. E. Rep. 53; Daniel v. Chesapeake, etc., R. Co., 36 W. Va. 397, 15 S. E. Rep. 162, 33 Am. St. Rep. 870; Robinson v. West Virginia, etc., R. Co., 40 W. Va. 563, 31 S. E. Rep. 727; Clark v. Richmond, etc., R. Co., 78 Va. 709; Richmond, etc., R. Co. v. Risdon, 87 Va. 335, 12 S. E. Rep. 786; McVey v. St. Clair Co., 49 W. Va. 412, 38 S. E. Rep. 648; Seldomridge v. Chesapeake, etc., R. Co., 46 W. Va. 569, 33 S. E. Rep. 293; Oliver v. Ohio River R. Co., 43 W. Va. 703, 26 S. E. Rep. 444; Moore Lime Co. v. Richardson, 95 Va. 326, 28 S. E. Rep. 334; Baltimore, etc., R. Co. v. McKenzie, 81 Va. 71; Norfolk, etc., R. Co. v. Nuckols, 91 Va. 207, 21 S. E. Rep. 343; Knight v. Cooper, 36 W. Va. 232, 14 S. E. Rep. 999; Davis v. Nuttallsburg Coal, etc., Co., 34 W. Va. 500, 12 S. E. Rep. 539; Richlands Iron Co. v. Elkins, 90 Va. 249, 17 S. E. Rep. 890; Skidmore v. West Virginia, etc., R. Co., 41 W. Va. 293, 23 S. E. Rep. 713; Riley v. Railway Co., 27 W. Va. 146; Norfolk, etc., R. Co. v. Jackson, 85 Va. 489, 8 S. E. Rep. 370; Russell Creek Coal Co. v. Wells, 96 Va. 416, 31 S. E. Rep. 614; Wooddell v. Improvement Co., 38 W. Va. 23, 17 S. E. Rep. 386; Norfolk, etc., R. Co. v. Brown, 91 Va. 668, 23 S. E. Rep. 496; Richmond, etc., R. Co. v. Tribble, 97 Va. 495, 24 S. E. Rep. 373.

In a recent case the court drew a distinction between the risks incident to the service and the risks ordinarily incident to it, saying that the servant assumes the latter but not the former. Moore Lime Co. v. Richardson, 95 Va. 326, 28 S. E. Rep. 334.

Risk of Negligence of Fellow Servants.—One of the risks assumed by the servant when entering into the service is the risk of danger arising from the negligence of his fellow servants. In other words, the master is exempt from liability to his servants for injuries arising from the negligence or default of their fellow servants. Baltimore, etc., R. Co. v. McKenzie, 81 Va. 71; Daniel v. Chesapeake, etc., R. Co., 36 W. Va. 397, 15 S. E. Rep. 162, 33 Am. St. Rep. 870; Southwest Imp. Co. v. Smith, 85 Va. 306, 7 S. E. Rep. 365; McVey v. St. Clair Co., 49 W. Va. 412, 38 S. E. Rep. 648. See monographic note on "Fellow Servants."

Risks Outside Scope of Employment Not Assumed.—The servant assumes only such risks as are within or naturally incident to the service, and, if he is

ordered to temporary work in another department of the master's business where the work is of such a different character that it cannot be said to be within the scope of the employment, he does not, by obeying such orders, necessarily assume the risk incident to the work. Michael v. Roanoke Machine Work, 90 Va. 492, 19 S. E. Rep. 261, 44 Am. St. Rep. 927; Shugart v. Norfolk, etc., R. Co., 2 Va. Dec. 146; Harris v. C. & O. Ry. Co., 2 Va. Dec. 248. See post, this note, "Contributory Negligence of Servant."

Application of Rule to Infant Servants.—The fact that the servant is an infant is immaterial if he has sufficient understanding to fully appreciate the nature and extent of the risk, and the master has not neglected to take due precaution to inform him of the dangers. The question as to the capacity of the servant to understand the nature of the risks taken, and the question whether the master neglected to take due precaution to inform him of the dangers, are questions of fact for the jury, as to which there need be no averment in the declaration. Southwest Imp. Co. v. Smith, 85 Va. 306, 7 S. E. Rep. 365; Norfolk, etc., R. Co. v. Cottrell, 83 Va. 512, 3 S. E. Rep. 123.

2. PATENT AND OBVIOUS DEFECTS AND DANGERS.

a. GENERAL RULE.—As the law presumes notice of those perils which are open and obvious, and which the employee has the opportunity to ascertain, a servant, when he enters the service of the master, besides assuming all the risks ordinarily incident to the service, is also held to assume, as a general rule, all risks from causes which are known to him, or should be readily discernible by a person of his age and capacity in the exercise of ordinary care. Southern Ry. Co. v. Mauzy, 98 Va. 692, 37 S. E. Rep. 235; Norfolk, etc., R. Co. v. Jackson, 85 Va. 489, 8 S. E. Rep. 370; Stewart v. Ohio River R. Co., 40 W. Va. 183, 20 S. E. Rep. 923; Reese v. Wheeling, etc., R. Co., 43 W. Va. 333, 26 S. E. Rep. 304; Sexton v. Turner, 99 Va. 341, 15 S. E. Rep. 862.

b. IN PLACE OF WORK.

General Rule.—A servant who knows the unsafe condition of the place in which he is working is not compelled to continue the work, but if he does continue it, without exercising ordinary prudence and care for his safety, he must be held to assume not only the risks ordinarily incident to the service when he entered upon it, but such as became known to him during the progress of the work, or which were readily discernible to a person of his age and capacity in the exercise of ordinary care. The servant is under as great obligation to provide for his own safety from such dangers as are known to him or are discernible by ordinary men on his part, as the master is to provide for him, and the negligence of the master does not excuse the servant for the failure to exercise such care, if such failure was the cause of the injury. Russell Creek Coal Co. v. Wells, 96 Va. 416, 31 S. E. Rep. 614; Berns v. Coal Co., 27 W. Va. 285; Robinson v. Dinlinny, 96 Va. 41, 30 S. E. Rep. 442.

Overhead Bridges and Tunnels.—A servant accepting service on a railway with knowledge of the character and position of structures from which he is liable to receive injury, cannot call upon his employer to make alterations to secure his greater safety, nor to respond in damages for injuries received from his want of care while passing under or through such structures. Thus where a bridge or tunnel through which a brakeman must pass is too

low to permit his passage in safety while standing upright on the car, and he is warned of this fact at the time of or before entering into the service of the company, he cannot recover damages because of injuries inflicted upon him by such bridge or tunnel by his coming in contact with it while standing upright on the car. *Williamson v. Newport News, etc., Co.*, 34 W. Va. 657, 12 S. E. Rep. 824. See also, *Clark v. Richmond, etc., R. Co.*, 78 Va. 709; *Nelson v. Chesapeake, etc., R. Co.*, 88 Va. 971, 14 S. E. Rep. 838; *Haffner v. Chesapeake, etc., R. Co.*, 96 Va. 528, 31 S. E. Rep. 899; *Chesapeake, etc., R. Co. v. Hafner*, 90 Va. 621, 19 S. E. Rep. 166; *Sheeler v. Chesapeake, etc., R. Co.*, 81 Va. 188; *Norfolk, etc., R. Co. v. Marpole*, 97 Va. 594, 24 S. E. Rep. 462. See *ante*, this note, "Contributory Negligence of Servant."

Dangers in Mining.—Where the plaintiff, a minor, was injured in performing work which he had sought because of the greater ease and profit incident to it, though knowing at the time that its performance was attended with extraordinary dangers, it was held that he had assumed these extraordinary risks at the time of accepting the work and the master was not liable for the injury. *Knight v. Cooper*, 36 W. Va. 232, 14 S. E. Rep. 999.

c. IN MACHINERY AND APPLIANCES.

The Rule Stated.—A servant cannot recover of the master damages for an injury resulting from defective machinery and appliances where the defect is open and obvious and known to the servant, and he with such knowledge continues to use such machinery and appliances for a long period of time without notice to the master or objections of any kind. *Riverside Cotton Mills v. Green*, 98 Va. 58, 34 S. E. Rep. 963; *McDonald v. Norfolk, etc., R. Co.*, 95 Va. 98, 27 S. E. Rep. 821; *Norfolk, etc., R. Co. v. McDonald*, 98 Va. 352, 13 S. E. Rep. 706; *Darracott v. Chesapeake, etc., R. Co.*, 83 Va. 288, 2 S. E. Rep. 511; *Hoffman v. Dickinson*, 31 W. Va. 142, 6 S. E. Rep. 58; *Seldomridge v. Chesapeake, etc., R. Co.*, 46 W. Va. 569, 23 S. E. Rep. 293; *Norfolk, etc., R. Co. v. Jackson*, 85 Va. 499, 8 S. E. Rep. 370.

But the servant does not assume the extraordinary risk arising from defective machinery unless he has knowledge thereof and then chooses to remain in the employment. *Richlands Iron Co. v. Elkins*, 90 Va. 249, 17 S. E. Rep. 890.

Dangers Must Be Such as Would Convince an Ordinary Man That an Accident Would Probably Ensnare.—While the general rule of law is that an employee, knowing of defects in machinery, appliances, or in his working place, and still continuing in service, assumes the risk, and cannot recover from his employer damages for injury arising from such defects, yet the rule is not without exception. Mere continuance in service with such knowledge is not sufficient to charge the servant with having assumed the risk. He need not stop in every instance of knowledge of a defect, but may run some risk by continuing service, provided the defects be not plainly dangerous, or be not such as ought to induce a prudent, careful man to believe that accident would likely ensue, and that, looking to his safety, he should not continue the work. *Graham v. Newburg, etc., Coal Co.*, 38 W. Va. 273, 18 S. E. Rep. 564.

Brakeman Assumes Risk of Dangerous Couplings.—A brakeman, entering the service of a railroad company, assumes the risk of accident arising from the use of dangerous appliances which he knew to be in use by the company at the time when he accepted service. Thus where a brakeman, who had

an opportunity to know the character of couplings used by the company by whom he was employed, was injured in coupling cars with the "three link couplings,"—a coupling the making of which is attended with more than ordinary danger,—it was held that the company was not liable. *Darracott v. Chesapeake, etc., R. Co.*, 83 Va. 288, 2 S. E. Rep. 511. See also, *Norfolk, etc., R. Co. v. Cottrell*, 88 Va. 512, 3 S. E. Rep. 123.

In an action against a railroad company to recover for the death of a brakeman, killed while attempting to couple cars with mismatched couplers, it appeared that on entering into the service of the company, the deceased had been informed that mismatched couplers were used by the company, and had been told of the danger in making couplings with them, and had been instructed how to make them safely; that he continued to use such couplers in the service of the company for nearly a year, making no remonstrance or complaint. It was held that he must be taken to have assumed the risk and the company was not responsible. *McDonald v. Norfolk, etc., R. Co.*, 95 Va. 98, 27 S. E. Rep. 821, 8 Am. & Eng. R. Cas., N. S., 562; *Norfolk, etc., R. Co. v. McDonald*, 98 Va. 352, 13 S. E. Rep. 706.

d. IN METHODS OF WORK.—The servant assumes the risk or hazard of the business as the master conducts it, and if he knows the method of the service, and still remains in the service, he cannot recover, although there may be a safer way or method of doing the same business. *Norfolk, etc., R. Co. v. Briggs*, 1 Va. Dec. 757; *Improvement Co. v. Andrew*, 86 Va. 270, 9 S. E. Rep. 1015; *Richmond, etc., R. Co. v. Norment*, 84 Va. 167, 4 S. E. Rep. 311. Thus in a case in which the method of doing the work was inhuman, and there was a safer and better way to do it, and it was folly in the servant to engage in it, yet as the danger was open and obvious, there could, it was held, be no recovery against the master for injuries to the servant. *Robinson v. Dininny*, 96 Va. 41, 30 S. E. Rep. 442; *Skidmore v. West Virginia, etc., R. Co.*, 41 W. Va. 293, 23 S. E. Rep. 713; *Oliver v. Ohio River R. Co.*, 42 W. Va. 708, 26 S. E. Rep. 444; *Woodell v. West Virginia Imp. Co.*, 38 W. Va. 23, 17 S. E. Rep. 386.

3. LATENT DEFECTS AND DANGERS.

Unknown to Master.—Where the danger consists in a latent defect not apparent by the use of ordinary diligence on the part of the master, and the servant has the same chance of ascertaining the defect as the master, no liability attaches to the master for an injury to the servant resulting therefrom. *Skidmore v. West Virginia, etc., R. Co.*, 41 W. Va. 293, 23 S. E. Rep. 713.

Known to Master.—But where there are latent defects and hazards incident to the occupation, of which the master knows or ought to know, it is his duty to warn the servants of them, and, failing to do so, he is liable to him for any injury that he may sustain in consequence of such neglect; and this rule applies even where the danger or hazard is patent, if, through youth, inexperience, or other cause, a servant is incompetent to fully understand and appreciate the nature of the hazard. *Turner v. Norfolk, etc., R. Co.*, 40 W. Va. 675, 22 S. E. Rep. 83.

4. RISKS ARISING FROM MASTER'S NEGLIGENCE.—When the servant shows that his injury was in consequence of an increased risk, and one not ordinarily incident to his employment, but growing out of the master's negligence, the burden of proof is upon the master that the servant knew of

and understood the increased danger. *Norfolk, etc., R. Co. v. Ward*, 90 Va. 687, 19 S. E. Rep. 849.

5. REMAINING IN SERVICE UPON PROMISE TO REPAIR.

Express Promise to Repair.—Where the servant makes complaint of the defective appliance, and the master, in response thereto, promises to remedy the defect, the servant may continue in the employment for such time as is reasonably sufficient for the purpose of repairing, without thereby assuming the risk of injury, or waiving his right of action in case he is injured, except where the danger is so palpable, immediate, and constant that no one but a reckless person would expose himself to it, even after receiving such promise or assurance. *Virginia, etc., Wheel Co. v. Chalkley*, 98 Va. 62, 34 S. E. Rep. 976, 5 Va. Law Reg. 763, and *note*; *McKelvey v. Chesapeake, etc., R. Co.*, 35 W. Va. 500, 14 S. E. Rep. 261.

Where Servant Has Reasonable Grounds to Believe That Repairs Will Be Made.—And, if the servant, even though he knew of the existence of the defects at the time of entering into the employment, has reasonable grounds to believe that the master has cured or will immediately cure the same, he is not guilty of negligence in remaining in the service and may recover for the injury caused by such negligence of the master. *Berns v. Gaston Gas Coal Co.*, 27 W. Va. 265.

VI. CONTRIBUTORY NEGLIGENCE OF SERVANT.

1. **SERVANT MUST EXERCISE ORDINARY CARE.**—That a person who, by his own default, has brought upon himself a loss or injury, can claim no compensation for it from another, is a principle of universal application. In the law of master and servant it is well settled that if the servant is injured, and his own negligence is the proximate cause of his injury, he cannot recover of the master, no matter how negligent the master may have been. The servant is bound to exercise reasonable or ordinary care to protect himself from dangers which are known or discernible to him, and negligence on the part of the master does not excuse the servant from failure to exercise such care. *Russell Creek Coal Co. v. Wells*, 96 Va. 416, 31 S. E. Rep. 614; *McDonald v. Railroad Co.*, 96 Va. 106, 27 S. E. Rep. 821; *Bertha Zinc Co. v. Martin*, 93 Va. 791, 22 S. E. Rep. 869; *Robinson v. Dinlenny*, 96 Va. 41, 30 S. E. Rep. 442; *Johnson v. Chesapeake, etc., R. Co.*, 38 W. Va. 206, 18 S. E. Rep. 573; *Seldomridge v. Chesapeake, etc., R. Co.*, 46 W. Va. 569, 33 S. E. Rep. 293; *Knight v. Cooper*, 36 W. Va. 232, 14 S. E. Rep. 999; *Norfolk, etc., R. Co. v. Cromer*, 99 Va. 763, 40 S. E. Rep. 54; *Robinson v. West Virginia, etc., R. Co.*, 40 W. Va. 563, 21 S. E. Rep. 737; *Darracott v. Chesapeake, etc., R. Co.*, 38 Va. 288, 2 S. E. Rep. 511.

So where the injury is caused by the mutual fault of both parties, but it would not have happened except for the culpable negligence of the injured party, concurring with that of the other party, there can be no recovery of damages by the party injured, unless the injury could have been avoided after the defendant had notice of the negligence of the plaintiff, or was wanton or malicious. *Eastburn v. Norfolk, etc., R. Co.*, 34 W. Va. 681, 12 S. E. Rep. 819; *McCreery v. Ohio River R. Co.*, 49 W. Va. 301, 38 S. E. Rep. 534.

The servant, however, is only bound to exercise ordinary care: that is, he is only required to do that which a man of ordinary prudence would have done under like circumstances. *Norfolk, etc., R. Co. v. Ampey*, 93 Va. 108, 25 S. E. Rep. 226.

Application of Rule to Infants.—Where an infant servant, who is properly chargeable with contributory negligence, by reason of his maturity and experience, is guilty of negligence which contributes to the injury received by him, the master is not responsible. *McDaniel v. Lynchburg Cotton Mills Co.*, 99 Va. 146, 37 S. E. Rep. 781. An infant employee, however, has a right to rely upon the superior skill and knowledge of the foreman having authority over him, and if, in obedience to such foreman's direction, he runs into unknown dangers, against which it is the duty of the foreman to warn him, but which duty the foreman negligently fails to perform, he cannot be held to be guilty of contributory negligence or to have assumed the risk of such dangers. *Turner v. Norfolk, etc., R. Co.*, 40 W. Va. 675, 23 S. E. Rep. 83.

2. **RIGHT TO RELY ON ASSURANCES OF SAFETY.**—Where a servant is told by the master that the machinery and appliances are in a safe and proper condition, the servant has the right to rely upon this assurance. Thus, in a case in which the servants, believing that the machinery was out of order and about to break, stopped work, and were assured by the master that there was no danger, and told to go ahead with the work, it was held that the master was liable. *Hoffman v. Dickinson*, 31 W. Va. 142, 6 S. E. Rep. 53. See also, *Graham v. Newburg, etc., Coal Co.*, 38 W. Va. 273, 18 S. E. Rep. 584.

3. NEGLIGENCE MUST BE PROXIMATE CAUSE OF INJURY.

Plaintiff's Negligence Must Be Last Negligent Act.—If an injury has resulted from a certain wrongful act or omission, but only through or by means of some intervening cause, from which last cause the injury follows as a direct and immediate consequence, the law will refer the damages to the last or proximate cause, and refuse to trace it to that which is remote. Therefore in order for the negligence of the plaintiff to bar his recovery it must be shown that his was the last negligent act contributing to the injury. *Schwartz v. Shull*, 45 W. Va. 405, 31 S. E. Rep. 914; *Norfolk, etc., R. Co. v. Brown*, 91 Va. 668, 22 S. E. Rep. 496; *Cawley v. Winifrede R. Co.*, 31 W. Va. 116, 5 S. E. Rep. 318; *Darracott v. Chesapeake, etc., R. Co.*, 38 Va. 288, 2 S. E. Rep. 511; *Sexton v. Turner*, 89 Va. 341, 15 S. E. Rep. 863; *McCreery v. Ohio River R. Co.*, 49 W. Va. 301, 38 S. E. Rep. 534; *Richmond, etc., R. Co. v. Tribble*, 97 Va. 495, 24 S. E. Rep. 278.

Hence though an employee of a railway corporation is not, at the time of the collision and of his injury thereby, at his post of duty, or at the place where the rules of the company require him to be, and his conduct contributes to the accident, yet if such conduct was not the direct, immediate, and proximate cause of the accident, and it could have been avoided by the exercise of ordinary care and diligence, which the company and its vice principal failed to exert, then it is answerable to the injured servant. *Daniel v. Chesapeake, etc., R. Co.*, 36 W. Va. 397, 15 S. E. Rep. 162, 33 Am. St. Rep. 870.

Negligence Must Contribute to but Need Not Be Sole Cause of Injury.—The negligence of the plaintiff, in order to bar his recovery, must contribute directly to the injury; but it is not essential to the defence of contributory negligence that the plaintiff's fault should have been, in any degree, the cause of the event by which he was injured. It is enough to defeat him, if the injury might have been avoided by his exercise of ordinary care. The question to be

determined in every case is not whether the negligence caused but whether it contributed to the injury of which he complains. This it may do by exposing him to the risk of injury, quite as effectually as if he committed the very act which injured him. Neither is it necessary that the plaintiff's negligence should have contributed to the injury in any greater degree than the negligence of the defendant. *Norfolk, etc., R. Co. v. Cromer*, 99 Va. 768, 40 S. E. Rep. 54.

Previous Negligence of Plaintiff Does Not Bar Recovery.—When at the time an injury is inflicted it might have been avoided by reasonable care on the part of the defendant, the plaintiff can recover damages notwithstanding his previous negligence. *Virginia, etc., R. Co. v. White*, 84 Va. 498, 10 Am. St. Rep. 874, 5 S. E. Rep. 573.

4. WORKING WITH KNOWLEDGE OF DEFECTS AND DANGERS.

The Rule.—Where the servant engages in a service with knowledge of defects existing in the instrumentalities of work, or where he willfully encounters other dangers which are known to him, or are notorious, the master is not responsible for any injury occasioned thereby. *Hoffman v. Dickinson*, 31 W. Va. 143, 6 S. E. Rep. 53; *Turner v. Norfolk, etc., R. Co.*, 40 W. Va. 675, 22 S. E. Rep. 83; *Stewart v. Ohio River R. Co.*, 40 W. Va. 188, 20 S. E. Rep. 922; *Humphreys v. Newport News, etc., Co.*, 33 W. Va. 135, 10 S. E. Rep. 39; *Seldomridge v. Chesapeake, etc., R. Co.*, 46 W. Va. 569, 33 S. E. Rep. 293; *Reese v. Wheeling, etc., R. Co.*, 43 W. Va. 383, 26 S. E. Rep. 304; *Davis v. Nuttallsburg Coal, etc., Co.*, 34 W. Va. 500, 12 S. E. Rep. 539; *Knight v. Cooper*, 36 W. Va. 232, 14 S. E. Rep. 999; *Richmond Granite Co. v. Bailey*, 92 Va. 554, 24 S. E. Rep. 232; *Piedmont, etc., Ill. Co. v. Patteson*, 84 Va. 747, 6 S. E. Rep. 4; *Southern, etc., Co. v. Clements*, 96 Va. 1, 34 S. E. Rep. 951; *Chesapeake, etc., R. Co. v. Lash*, 2 Va. Dec. 342; *Norfolk, etc., R. Co. v. Emmert*, 83 Va. 640, 3 S. E. Rep. 145; *Norfolk, etc., R. Co. v. McDonald*, 88 Va. 352, 13 S. E. Rep. 706; *Massie v. Peel Splint Coal Co.*, 41 W. Va. 620, 24 S. E. Rep. 644.

Application of Rule.

Low Bridges.—While, as seen above, it is negligence for a railroad company to operate its road with bridges so low as not to permit their employees to pass under them while standing upon the top of the cars, yet it is well settled that employees who have notice of the dangerous character of these bridges, must exercise reasonable care on their part to avoid injury, and a failure on their part to exercise ordinary care, resulting in an injury to them, is contributory negligence which bars a recovery. Thus where a brakeman, who had been warned of the dangerous character of low bridges on the road, and who had passed under them on several occasions during the daytime, was injured while standing on top of a freight car which passed under the bridge at night, it was held that there could be no recovery, as the plaintiff's negligence had contributed to his injury. *Clark v. Richmond, etc., R. Co.*, 78 Va. 709, 40 Am. Rep. 394. See also, *Williamson v. Newport News, etc., Co.*, 34 W. Va. 657, 12 S. E. Rep. 824; *Nelson v. Chesapeake, etc., R. Co.*, 88 Va. 971, 14 S. E. Rep. 538; *Haffner v. Chesapeake, etc., R. Co.*, 96 Va. 523, 31 S. E. Rep. 899; *Chesapeake, etc., R. Co. v. Haffner*, 90 Va. 631, 19 S. E. Rep. 166.

In *Sheeler v. Chesapeake, etc., R. Co.*, 81 Va. 188, 59 Am. Rep. 654, a fireman, without orders and in violation of the rules of the company, opened an ashpan, whereby fire was communicated to waste in a

journal box. Then without orders or necessity he stood outside of the engine on the steps of the engine and tender, and endeavored to extinguish the fire with a hose, and while so employed was struck by the side of a bridge, the dangerous character of which was well known to him, and killed. It was held that the company was not liable.

The fact that the employee does not know of his exact locality or the proximity of the bridge, by reason of darkness, fog, or other natural or artificial causes incident to his employment, is immaterial. *Norfolk, etc., R. Co. v. Marpole*, 97 Va. 594, 34 S. E. Rep. 462.

Using Improper Appliances without Warning Master.

—A servant who knows that unsuitable appliances are being used to do the master's work, or that the appliances have not been properly adjusted, and also knows that his foreman or master is ignorant of the fact, is guilty of inexcusable negligence where he proceeds with the work without informing them thereof. Thus, where the plaintiff, an intelligent and experienced employee, who knowingly assisted in making an improper adjustment of appliances, when suitable appliances for the safe and proper adjustment had been furnished by the master and were in easy reach, and it was shown that he was further negligent in not warning the foreman of the dangerous character of the appliances, it was held that the company was not liable, for an injury received by the plaintiff while making the adjustment of the appliances by order of the foreman, who was ignorant of their defective condition. *White v. Newport News, etc., R. Co.*, 95 Va. 355, 28 S. E. Rep. 577.

Defective Condition of Bumpers on Railroad Cars.

—Where a servant, engaged in coupling cars, was injured by reason of the alleged defective condition of the bumper or drawhead, which he had recently used, and whose condition it was part of his duty to observe, it was held that he was negligent and could not recover. *Norfolk, etc., R. Co. v. Emmert*, 83 Va. 640, 3 S. E. Rep. 145.

Coupling Cars of Unequal Heights.—Where a brakeman, knowing that cars were of unequal height and that crooked links were used to couple them, went in between a car that was approaching by his own signal, and a stationary car, and used a straight link to make the coupling, thereby allowing the bumper of the former to pass under the bumper of the latter, by which means he was caught between them and injured, it was held that the employer was not liable. *Norfolk, etc., R. Co. v. Emmert*, 83 Va. 640, 3 S. E. Rep. 145.

Going between Cars to Couple Them Where Couplings Are Mismatched.—In *Norfolk, etc., R. Co. v. McDonald*, 88 Va. 352, 13 S. E. Rep. 706, a brakeman knowing that the couplings were mismatched, placed a pin in a moving car, and remained between the two cars to shake the pin in position, when he might safely have made the coupling by placing the pin in the standing car, and letting it be shaken into position by the concussion. It was held that he was guilty of such negligence as barred a recovery against the company.

Using Rope Known to Be in Unsafe Condition.—In *Chesapeake, etc., R. Co. v. Sparrow*, 98 Va. 630, 37 S. E. Rep. 302, the court, while conceding that the servant in this case lost his life by the use of a defective rope at a ferry, of which defect the master had notice, and which it was his duty to replace, held that as the servant had better knowledge of the condition of the rope than the master, and the

defect being open and obvious, the contributory negligence on his part in continuing to use it barred his recovery.

Climbing a Telegraph Pole Known to Be Dangerous.—The plaintiff, an employee of a telephone company, was directed by the latter's foreman to climb a pole, which had been previously condemned and marked, as were all poles needing repairs. The plaintiff knew of the mark on the pole, but it appeared safe until he had cut the last wire, when it fell, causing the injury complained of. It was held that the question whether or not the plaintiff was guilty of contributory negligence was for the jury. *Southern Bell Tel. & Tel. Co. v. Clements*, 98 Va. 1, 34 S. E. Rep. 961.

Electric Wires Improperly Insulated.—In an action against an electric light company for killing a servant, it was proved that he was sent to look for a break in the circuit while the current was on, and took with him a defective shunt-cord. He found the break, and in trying to turn on the current, grasped the cord at the defective end, and, at the same time, put his other hand on the naked end of the live wire, whereby the current passed through and killed him. Had he grasped the wire above the exposed end he would not have been injured, notwithstanding the fact that the shunt-cord was defective in not being insulated throughout its entire length. It was held that the evidence failing to show negligence on the defendant's part unmixed with the servant's contributory negligence was not sufficient to sustain a verdict for the plaintiff. *Piedmont, etc., Co. v. Patteson*, 84 Va. 747, 6 S. E. Rep. 4.

Marks on Cars Insufficient to Charge Servant with Notice of Defects.—Chalk marks, meaning "out of order," placed on cars to inform the road from which they were received that the cars were out of order when received, and that the defendant company was, therefore, not liable for their repair, are not, as a matter of law, notice to a brakeman that the bumpers are defective, so as to prevent a recovery for his death caused by coupling the cars. *Chesapeake, etc., R. Co. v. Lash*, 2 Va. Dec. 342.

5. DISREGARD OF RULES.

General Rule.—Where the master has adopted reasonable rules for the conduct of his business, and has exercised due care in bringing them to the knowledge of the servant and seeing that they are properly enforced, he is not liable to a servant for an injury received in consequence of his disobedience of the rules, as disobedience under such circumstances amounts to contributory negligence on the part of the servant, and bars his recovery. But, in order for the servant's disobedience of the rules to amount to such contributory negligence as to bar his recovery, it is well settled that the breach of the rules must have been the proximate cause of the injury. *Darracott v. Chesapeake, etc., R. Co.*, 83 Va. 288, 2 S. E. Rep. 511, 5 Am. St. Rep. 266; *Richmond, etc., R. Co. v. Pannill*, 89 Va. 552, 16 S. E. Rep. 748; *Norfolk, etc., R. Co. v. Briggs*, 1 Va. Dec. 757; *Richmond, etc., R. Co. v. Dudley*, 90 Va. 304, 18 S. E. Rep. 274; *Shenandoah, etc., R. Co. v. Lucado*, 86 Va. 390, 10 S. E. Rep. 422; *Norfolk, etc., R. Co. v. Lindamood*, 1 Va. Dec. 748; *Norfolk, etc., R. Co. v. Donnelly*, 88 Va. 853, 14 S. E. Rep. 692; *Eastburn v. Norfolk, etc., R. Co.*, 34 W. Va. 681, 12 S. E. Rep. 819; *Overby v. Chesapeake, etc., R. Co.*, 37 W. Va. 524, 16 S. E. Rep. 813; *Davis v. Nuttallsburg Coal, etc., Co.*, 34 W. Va. 500, 12 S. E. Rep. 539; *Robinson v. West Virginia, etc., R. Co.*, 40 W. Va. 588, 21 S. E. Rep. 737; *Norfolk, etc., R.*

Co. v. Houchins, 96 Va. 308, 28 S. E. Rep. 578; *Beall v. Pittsburgh, etc., R. Co.*, 38 W. Va. 525, 18 S. E. Rep. 729; *Johnson v. Chesapeake, etc., R. Co.*, 38 W. Va. 306, 18 S. E. Rep. 573; *Norfolk, etc., R. Co. v. Marpole*, 97 Va. 594, 34 S. E. Rep. 463; *Sheeler v. Chesapeake, etc., R. Co.*, 81 Va. 188, 59 Am. Rep. 654; *Richmond, etc., R. Co. v. Tribble*, 97 Va. 495, 24 S. E. Rep. 278.

Rule Where Compliance with Rules Impracticable.—But the general rule does not apply where the master is guilty of negligence, and the servant is ordered to perform work in regard to which rules have been promulgated by the master, and it is impracticable to comply with the rules, as in such case, the master is liable for an injury sustained by the servant while performing the service. Accordingly it has been held that a brakeman, injured through the negligence of the company while coupling cars under orders, has a right of action against the company, though the coupling is made by hand, contrary to the rules of the company, it being impracticable to use a stick as required by the rules. *Richmond, etc., R. Co. v. Rudd*, 88 Va. 648, 14 S. E. Rep. 361.

Specific Instances of Violation of Rules.

Getting on and off Train While in Motion.—Where a rule of the railroad company forbade their servants from getting on and off trains when in motion, a servant who was injured while getting off a moving engine by tripping over wires which were exposed, failed in an action against the company. *Overby v. Chesapeake, etc., R. Co.*, 37 W. Va. 524, 16 S. E. Rep. 813.

And so where a section hand was killed in attempting to mount a passing engine, contrary to the rules of the company of which he had notice, it was held that the company was not liable; and it was immaterial whether or not his getting on the engine was objected to by those in charge of it. *Shenandoah Valley R. Co. v. Lucado*, 86 Va. 390, 10 S. E. Rep. 422.

Coupling Cars by Hand.—Where the rules of the company require couplings to be made with a stick when practicable, the company is not liable for injuries received by brakeman while making the coupling without a stick, if the stick can be used to advantage. *Richmond, etc., R. Co. v. Pannill*, 89 Va. 552, 16 S. E. Rep. 748; *Darracott v. Chesapeake, etc., R. Co.*, 83 Va. 288, 2 S. E. Rep. 511; *Norfolk, etc., R. Co. v. Briggs*, 1 Va. Dec. 757.

Coupling Cars While in Motion.—And where a brakeman is injured while violating a rule of the company which forbids the coupling of cars while in motion, he cannot recover. *Johnson v. Chesapeake, etc., R. Co.*, 38 W. Va. 306, 18 S. E. Rep. 573; *Darracott v. Chesapeake, etc., R. Co.*, 88 Va. 288, 2 S. E. Rep. 511.

Running Cars down Grade without an Engine.—Where, contrary to the rules of the company, a conductor allowed cars to be shifted and run down grade without an engine to control them, and while he was between the cars a brakeman, without objection from the conductor, caused another car to run down the same way, which, by reason of defective brakes, became unmanageable and ran into the first-named cars with such violence as to cause injury to the conductor, it was held that the conductor could not recover. *Richmond, etc., R. Co. v. Dudley*, 90 Va. 304, 18 S. E. Rep. 274.

Failure to Report Defects in Appliances—Using Defective Appliances.—Where a rule of the company required brakemen to know for themselves that the brakes and appliances were in proper condition, and, in case they needed repairs, either to make the repairs themselves or report the defect to the proper

parties, and a brakeman was injured while attempting to apply the brakes, knowing that a defect existed in them which he had not attempted to repair or report to the proper parties, it was held that the company was not liable for the injury, as the brakeman's negligence in disobeying the rules of the company contributed to his injury. *Beall v. Pittsburgh, etc., R. Co.*, 38 W. Va. 526, 18 S. E. Rep. 739.

Failure to Apply Brakes Where Train Separates.—Where the rules of a company provided that upon a train parting, the flagman should immediately apply the brakes and stop the cars, and the engineer should keep the front part of the train in motion until the detached portion was stopped, it appeared that after a train parted a distance of at least four or five miles was covered before the rear portion of the train, moving with its own momentum, overtook and collided with the front portion. It was held, in an action by a brakeman for injuries received in the collision, that the train being equipped with sufficient brakes to stop it, the proximate cause of the collision was the negligent failure of the plaintiff and his fellow servants to apply the brakes, and that therefore the company was not liable. *Richmond, etc., R. Co. v. Tribble*, 97 Va. 496, 24 S. E. Rep. 278.

Failure to Inspect Cars Picked up in Transit.—Conductors who are required by the rules of the company to inspect all cars picked up in transit, cannot recover for injuries received by them by reason of failure to inspect such cars. *Richmond, etc., R. Co. v. Dudley*, 90 Va. 304, 18 S. E. Rep. 274. See *ante*, this note, "Duty to Provide Rules for Conduct of Business."

6 DISREGARD OF WARNINGS OR SIGNALS.—Where a servant disregards warnings or signals, given by the master to prevent injury to the servant, the master is not responsible. Thus, in *Norfolk, etc., R. Co. v. Williams*, 80 Va. 166, 15 S. E. Rep. 322, the plaintiff, an engineman, started his train from a station and ran about seven hundred yards, attaining the speed of about twenty or twenty-five miles an hour, when he saw freight cars about forty yards ahead, which had been stored on the siding and had gotten loose and moved down on the main track. The freight cars had displaced the switch so as to expose the danger signal which the plaintiff might have seen, as well as the cars, in ample time, if he had exercised reasonable care. Besides, he was approaching a bridge in the course of construction at a forbidden rate of speed. It was held that he was not entitled to recover for injuries received by jumping from his engine.

7. VOLUNTARY ASSUMPTION OF DANGEROUS POSITION.

General Rule.—Where the servant suffers an injury which is due to his voluntary assumption of a position of danger, which is not necessary to the performance of the work in hand, this is such contributory negligence on his part as to bar his recovery. And a servant who is injured in consequence of attempting to do a harmless act at an obviously dangerous place, when he could have readily waited until he reached a place of safety, cannot recover therefor of the master. *Norfolk, etc., R. Co. v. Mann*, 99 Va. 180, 27 S. E. Rep. 849; *Richmond, etc., R. Co. v. DeButts*, 90 Va. 406, 18 S. E. Rep. 337; *Norfolk, etc., R. Co. v. Cottrell*, 88 Va. 512, 3 S. E. Rep. 123; *Chesapeake, etc., R. Co. v. Lee*, 84 Va. 62, 5 S. E. Rep. 579; *Norfolk, etc., R. Co. v. Graham*, 94 Va. 430, 31 S. E. Rep. 604; *Harris v. Chesapeake, etc., R. Co.*, 2 Va. Dec. 248; *Reese v. Wheeling, etc., R. Co.*, 43 W. Va. 333, 26 S. E. Rep. 204; *Young v. West*

Virginia, etc., R. Co., 43 W. Va. 112, 24 S. E. Rep. 615; *Bertha Zinc Co. v. Martin*, 93 Va. 791, 22 S. E. Rep. 869.

Applications of Rule.

Going under Car to Fix Brake.—Where a railroad employee went under a car to replace a brake, knowing that no one on the attached engine or elsewhere had been charged with any particular duty to look out and warn him of approaching danger, it was held that his failure to notify the engineer of going under the car was such negligence as to prevent his recovery for injuries received by the starting of the train, which was preceded by ringing the bell several times. *Norfolk, etc., R. Co. v. Graham*, 96 Va. 430, 31 S. E. Rep. 604.

Riding on Truck.—In *Reese v. Wheeling, etc., R. Co.*, 43 W. Va. 333, 26 S. E. Rep. 204, an employee of a railroad company who was being carried on a construction train from his work to his home, without any agreement or compensation therefor, voluntarily took a position standing on a small truck, which was being pushed forward by the engine, contrary to repeated warning of those in charge of the train as to the danger of so doing. It was held, in an action brought for an injury received while so riding, that, if riding in that position was the proximate cause of the injury, the railroad company was not responsible.

Assumption of Negligent Position in Making Coupling.—Where a brakeman, in attempting to withdraw the coupling pin and uncouple a car from the engine and tender, stood with one foot on the bumper of each car, and, with a lantern in his left hand, leaned forward, and reached with his right to withdraw the coupling pin, which had already been withdrawn by a fellow brakeman, and the cars separating caused him to fall between them, and to be run over and injured, it was held that he must be regarded as negligent, and his negligence must be considered the proximate cause of the injury. *Young v. West Virginia, etc., R. Co.*, 43 W. Va. 112, 24 S. E. Rep. 615.

Going between Moving Cars to Make Coupling.—In *Norfolk, etc., R. Co. v. Cottrell*, 88 Va. 512, 3 S. E. Rep. 123, the plaintiff, a brakeman, seeing that cars were coming too fast for safe coupling signaled them to stop. He saw that they did not obey the signal, but when they were near him he stepped in to make the coupling, and was injured. It was held that when he saw that none of his signals had been obeyed that it was negligence in him to attempt to make a coupling, and the injury being an immediate result of his own act there could be no recovery.

Dangerous Position in Adjusting Brakes.—The plaintiff, a brakeman, while engaged in side tracking a flat car, the train having backed into the siding, cut the car loose and signaled the train to leave it. The car not clearing the main track he signaled the train to return and push it further, and after signaling, put one foot between the iron rails loaded on the car and the end of the car, and the other outside so as to set the brake. The train returning very fast struck the car and pushed the rails forward so as to crush his foot. It was held that the plaintiff's negligent acts were the proximate cause of the injury, and barred his recovery. *Richmond, etc., R. Co. v. DeButts*, 90 Va. 406, 18 S. E. Rep. 337.

8. ACTING IN OBEDIENCE TO ORDERS.

Does Not Amount to Negligence Unless Prudent Man Would Not Obey the Order.—Where the master orders a servant into a situation of danger, and he obeys, and is thereby injured, the law will not deny him a remedy against the master on the ground of con-

tributory negligence, unless the danger was so glaring that no prudent man would have entered into it, even when, like the servant, he was not entirely free to choose. The same rule applies where the person injured is ordered into a service of peculiar danger, such as he did not undertake to perform, by another servant standing towards him in the relation of superior or vice principal and if he obeys such order and is injured he may recover damages; the law will not declare his act of obedience negligence *per se*, but will leave it to the jury to say whether he ought to obey or not. For instance, a laborer, who does not know of an unusual and increased danger known to his employer, but who goes into a ditch and digs it to twice its usual depth under peremptory orders from his master or vice principal, does not assume the risk of injuries received from a caving in of the sides of the ditch, and may recover from his negligent employer. *Norfolk, etc., R. Co. v. Ward*, 90 Va. 687, 19 S. E. Rep. 849.

Using Defective Appliances under Orders.—As a general rule if the employee, without specific command as to time and manner, uses an obviously defective implement, the defect alike open to the observation and within the comprehension of both employer and employee, both stand upon common ground, and no recovery can be had for the resulting injury to either; but when the servant acts under the order of his master, and is injured, the rule is different, for then it cannot be said, with any degree of reason, that the master and servant stand on equal footing, even though they may have equal knowledge of the danger. The servant occupies a position of subordination and may rely upon the skill and knowledge of his master, and is not free to act on his own suspicions. *Norfolk, etc., R. Co. v. Ward*, 90 Va. 687, 19 S. E. Rep. 849.

Using Dangerous Machinery under Orders upon Agreement by Master to Use Extraordinary Care.—Where a servant, in obedience to the requirement of the master, incurs the risks of machinery which is dangerous, but it is reasonably probable that danger may be avoided if extraordinary care and skill be used, and the servant uses such care and skill as the exigencies of the situation seem reasonable to demand and yet injury results, the master is liable. Thus in *Norfolk, etc., R. Co. v. Ampey*, 93 Va. 108, 25 S. E. Rep. 226, the plaintiff, a brakeman, after making several attempts to couple cars with a stick, as required by rules of the company, informed the conductor that owing to the defective condition of the couplers he was unable to make the coupling with a stick. He was then ordered by the conductor to couple the cars with his hand. The plaintiff replied that the coupling could be made by hand without danger if the train was moved back slowly and with great care. The plaintiff returned to make the coupling with his hand, and was injured by reason of the train coming back with its usual speed, in response to the ordinary signal by the conductor, instead of coming back slowly and gently as the brakeman had stipulated should be done. The company was held liable. *Norfolk, etc., R. Co. v. Ampey*, 93 Va. 108, 25 S. E. Rep. 226.

9. ACTING IN DISOBEDIENCE OF ORDERS.

Bars Right of Action for Injuries.—A servant cannot recover if his injury was received as the direct result of his own disobedience of orders. *Knight v. Cooper*, 86 W. Va. 232, 14 S. E. Rep. 999; *Richmond, etc., R. Co. v. Risdon*, 87 Va. 335, 12 S. E. Rep. 786;

Robinson v. West Virginia, etc., R. Co., 40 W. Va. 563, 21 S. E. Rep. 727. See also, *Norfolk, etc., R. Co. v. Williams*, 89 Va. 165, 15 S. E. Rep. 523.

Engineer Running Train on Curve at Forbidden Rate of Speed.—So where an engineer running his train on a curve at a rate of speed prohibited by the company, was killed by the engine leaving the track, it was held that the company was not liable for the injury; and the question whether or not the company had used due care in constructing the curve—due care in such case requiring the outer track to be higher than the inner—was immaterial. *Robinson v. West Virginia, etc., R. Co.*, 40 W. Va. 563, 21 S. E. Rep. 727.

Disobedience of Orders in Coupling Cars.—In an action by a brakeman to recover for personal injuries it was proven that on the night of the accident, the yardmaster ordered him to uncouple cars, which were standing still, and then ride them back on a switch, but, instead of obeying orders, he signaled the engineer to back, and stepping between the moving cars to couple them, he got his foot caught in the frog and was run over and killed. The proximate cause of the injury, it was held, was the servant's disobedience of the orders, which was contributory negligence precluding a recovery. *Richmond, etc., R. Co. v. Risdon*, 87 Va. 335, 12 S. E. Rep. 786.

10. ASSUMING EXTRAORDINARY RISKS TO SAVE LIFE.—When one risks his life or places himself in a position of danger in an effort to save the life of another, or to protect another who is exposed to a sudden peril, or in danger of great bodily harm, such risk for such a purpose is not negligence; but the question whether the person is in such a position of danger as to bring the case within this principle is for the jury. *Johnson v. Richmond, etc., R. Co.*, 86 Va. 975, 11 S. E. Rep. 829.

11. ACTING IN EMERGENCIES.

General Rule.—In judging of the care exercised by the plaintiff, reasonable allowance is always made for the circumstances of the case; and if the plaintiff is suddenly put into peril, without having sufficient time to consider all the circumstances, he is excusable for omitting some precautions, or making an unwise choice, under this disturbing influence, although, if his mind had been clear, he ought to have done otherwise, especially if his peril is caused by the defendant's fault. If one is placed by the negligence of another in such a position that he is compelled to choose instantly, in the face of a grave and apparent peril, between two hazards, and he makes such a choice as a person of ordinary prudence, placed in such a position, might make, the fact that, if he had chosen the other hazard, he would have escaped injury, is of no importance. *Haney v. Pittsburg, etc., R. Co.*, 88 W. Va. 570, 18 S. E. Rep. 748; *S. W. Imp. Co. v. Smith*, 85 Va. 306, 7 S. E. Rep. 365; *Dingee v. Unrue*, 98 Va. 247, 35 S. E. Rep. 794; *Richmond, etc., R. Co. v. Brown*, 89 Va. 749, 17 S. E. Rep. 132.

Loss of Presence of Mind through Negligence of Master.—Where the servant loses his presence of mind because placed in sudden imminent peril by the negligence of the master, the master is liable though the servant fails to avail himself of any means of escape. But this rule is not applicable of course in a case where the servant is ordered to leave the place in which he is working before he is confronted with the peril and disobeys the order, when by obeying the same by reasonable promptitude he might have escaped the injury. *Dingee v. Unrue*, 98 Va.

267, 35 S. E. Rep. 794; *Richmond, etc., R. Co. v. Brown*, 20 Va. 746, 17 S. E. Rep. 132.

Signal to Apply Brakes Not Sufficient to Render Brakeman Irresponsible.—The mere signal to put on brakes when approaching an over-head bridge which is very low does not constitute such an emergency as to render a brakeman irresponsible for his acts. *Haffner v. Chesapeake, etc., R. Co.*, 96 Va. 523, 31 S. E. Rep. 899.

12. ACTING OUTSIDE SCOPE OF EMPLOYMENT.—Where a servant receives an injury while performing work which is not within the regular scope of his employment, though it is in the supposed furtherance of his master's business, the master is not liable in damages. Thus where a fireman was killed while attempting to couple cars, it was held that in order to recover, it was necessary for the plaintiff to show that his intestate, in acting thus out of the scope of his employment, was doing so by the command of a superior; and that a failure to show this affirmatively was sufficient to defeat a recovery. *Shugart v. Norfolk, etc., R. Co.*, 2 Va. Dec. 146. See also, *Harris v. Chesapeake, etc., R. Co.*, 2 Va. Dec. 248; *Michael v. Roanoke Machine Works*, 90 Va. 492, 19 S. E. Rep. 261. See *ante*, this note, "Assumption of Risks by Servant."

VII. DAMAGES RECOVERABLE BY SERVANT FOR INJURIES.

Elements of Damages.—The expenses of the plaintiff's cure, the value of his time lost during his cure, and a fair compensation for his physical and mental suffering caused by the injury, are elements of damage for which compensation must be made as well as for any permanent reduction of his power to earn money. *Riley v. Railway Co.*, 27 W. Va. 146. That, in an action to recover damages for personal injuries, the jury may take into consideration the mental anguish, as well as the physical pain, resulting from such injuries is well settled. *Norfolk, etc., R. Co. v. Marpole*, 97 Va. 594, 34 S. E. Rep. 462, and *Southern Bell Tel. & Tel. Co. v. Clements*, 98 Va. 1, 34 S. E. Rep. 51.

Punitive Damages against Corporations.—The rule laid down by the federal courts is that a corporation is not liable in punitive damages for injuries committed by its servants, merely because the servant's illegal conduct was wanton and oppressive; but in order to recover punitive damages in such cases it is necessary to show that the company had knowledge that the servant was incompetent, or that the company participated in, approved, or ratified his act. *Lake Shore, etc., R. Co. v. Prentice*, 147 U. S. 101. The state courts, on the other hand, maintain the doctrine that a corporation, like a natural person, is liable in punitive damages for the malicious and wanton wrongs of its servants done in the course of their employment. *Spellman v. Richmond, etc., R. Co.*, 28 Am. St. Rep. 868, and *note*.

Though the question has not been squarely presented in Virginia the leaning of the court seems to favor the rule of the federal courts. Thus in *Norfolk, etc., R. Co. v. Neely*, 91 Va. 539, 22 S. E. Rep. 367, the court said that an instruction that punitive damages might be recovered if the servant's act was wanton and oppressive, and if the company, after knowledge thereof, participated in or ratified it, expressly or by implication, correctly propounded an abstract principle of law, but that there was no evidence upon which to base such an instruction—the wrong complained of being the result of an innocent mistake. And in *Norfolk, etc., R. Co. v. Anderson*, 90

Va. 1, 17 S. E. Rep. 757, a railroad company was held liable in punitive damages to a passenger, wrongfully ejected by the conductor, but on the ground that the company subsequently ratified the conductor's act. See also, *dictum* in *Norfolk, etc., R. Co. v. Lipscomb*, 90 Va. 137, 17 S. E. Rep. 809, adopting the federal court rule.

In a West Virginia case it was said that, "The better and more reasonable doctrine seems to be, that a railway company is not to be held liable in exemplary damages for injuries caused by the negligence of its servants, unless it be shown that the servant's act was willful, and was either authorized or ratified by the company; but such authorization or ratification can be evidenced either by an express order to do the act, or an express approval of its commission, or by an antecedent retention of a servant of known incompetency, or by a subsequent retention or promotion of the negligent servant." *Downey v. Chesapeake, etc., R. Co.*, 28 W. Va. 733; *Ricketts v. Chesapeake, etc., R. Co.*, 33 W. Va. 433, 10 S. E. Rep. 801, 25 Am. St. Rep. 901.

VIII. EVIDENCE IN ACTIONS BY SERVANT AGAINST MASTER.

Evidence of Subsequent Repairs to Appliances.—In an action by a servant for personal injuries arising from the master's negligence in the maintenance of suitable machinery, evidence that subsequently to the injury the master made repairs upon the alleged defective appliance is not admissible to prove its defective condition. *Virginia, etc., Wheel Co. v. Chalkley*, 98 Va. 62, 34 S. E. Rep. 976, 5 Va. Law Reg. 763, and *note*.

Evidence of Incompetency of Servants.—Where a declaration avers that one of the acts of negligence of an employer resulting in injury to the servant was the employment and retention in service of an incompetent foreman, evidence of such incompetency is admissible. *Dingee v. Unrue*, 98 Va. 247, 35 S. E. Rep. 794.

A master's knowledge of the incompetency of a servant may be established by showing either actual knowledge, or such frequent acts of incompetency on the part of the servant that the law will presume knowledge. *Meyers v. Falk*, 99 Va. 835, 38 S. E. Rep. 178.

Servants as Witnesses.—A servant is a competent witness to prove that the master exercised a degree of care required of him by law, but the jury, in considering the weight to be given to the evidence of such witnesses may consider the question as to whether they were or were not influenced by the relation which exists between them and the master. *Norfolk, etc., R. Co. v. Poole (Va.)*, 40 S. E. Rep. 627.

In an action by a servant for personal injuries, it is error to allow other employees to testify what they did after the time of the injury and their reasons therefor. *Richmond Locomotive Works v. Ford*, 94 Va. 627, 27 S. E. Rep. 509.

Evidence to Show That Defendant Used as Much Care as Other Employers.—In an action by a servant against a railroad company for injuries received through the negligence of the company, evidence tending to show that the defendant conducted its road as well as other railroads are conducted is inadmissible. *Riley v. Railway Co.*, 27 W. Va. 146.

IX. BURDEN OF PROOF.

1. OF NEGLIGENCE OF MASTER.—The burden of proving negligence, in an action by the servant for damages for personal injuries, is upon the servant; and, in addition to negligence, it is encum-

bent upon him to show that the negligence complained of was the proximate cause of the injury. The mere fact of injury received raises no presumption of negligence on the part of the master. *Massie v. Peel Splint Coal Co.*, 41 W. Va. 620, 24 S. E. Rep. 644; *Stewart v. Ohio River R. Co.*, 40 W. Va. 188, 20 S. E. Rep. 922; *Norfolk, etc., R. Co. v. Brown*, 91 Va. 668, 22 S. E. Rep. 496; *Ketterman v. Dry Fork R. Co.*, 48 W. Va. 606, 37 S. E. Rep. 688; *Dingee v. Unrue*, 98 Va. 247, 35 S. E. Rep. 794; *Knight v. Cooper*, 36 W. Va. 232, 14 S. E. Rep. 999; *Norfolk, etc., R. Co. v. Cromer*, 99 Va. 763, 40 S. E. Rep. 54.

From the mere fact that an injury results to a servant from a latent defect in the machinery or appliances of the business, no presumption of negligence on the master's part arises. But there must be evidence of negligence connecting him with the injury. The servant takes upon himself the burden of showing that the master had notice of the defect complained of, or that in the exercise of that ordinary care which he is bound to observe, he would have known it, and that the servant was ignorant of such defect, and had not equal means of knowledge. *Johnson v. Chesapeake, etc., R. Co.*, 36 W. Va. 73, 14 S. E. Rep. 432; *Hoffman v. Dickinson*, 31 W. Va. 142, 6 S. E. Rep. 53; *Humphreys v. Newport News, etc., Co.*, 33 W. Va. 135, 10 S. E. Rep. 39; *Norfolk, etc., R. Co. v. Poole (Va.)*, 40 S. E. Rep. 627.

2. OF CONTRIBUTORY NEGLIGENCE OF SERVANT.—In an action for damages occasioned by the negligence or misconduct of the defendant, it is not necessary for the plaintiff to allege and prove the exercise of due care on his part to entitle him to recover. If the defendant relies upon contributory negligence of the plaintiff to defeat the action, he must prove it, unless, indeed, the fact is discovered by the evidence of the plaintiff, or may be fairly inferred from all the circumstances. *Southwest Imp. Co. v. Andrew*, 86 Va. 270, 9 S. E. Rep. 1015; *Comer v. Consol. Coal, etc., Co.*, 34 W. Va. 533, 12 S. E. Rep. 476; *Flannegan v. Chesapeake, etc., R. Co.*, 40 W. Va. 436, 21 S. E. Rep. 1028; *Riley v. Railroad Company*, 27 W. Va. 146; *Baltimore, etc., R. Co. v. McKenzie*, 81 Va. 78.

X. DISCHARGE OF SERVANT.

Master May Discharge Servant If He Does Not Possess Reasonable Skill.—A master may discharge the servant if he does not do the work he was employed to do in a reasonably skillful manner. But reasonable skill is all that is required, unless the servant professes a higher degree of skill, and contracts to perform the work in the best manner. *Crescent Horse-Shoe Co. v. Eynon*, 95 Va. 151, 27 S. E. Rep. 935.

Master May Discharge Where Servant Cannot Perform Work Engaged to Do.—In every case of a contract of employment where the parties know each other, and the purpose of each other, at the time of entering into it, and the terms of the contract are not to the contrary, the servant only engages to perform such service as he can perform. If a person engages to do service which he cannot perform his incompetence is cause for discharge. *Rhoades v. Chesapeake, etc., R. Co.*, 49 W. Va. 494, 39 S. E. Rep. 209.

Breach of Contract by Servant Is Good Ground of Discharge.—So where the servant breaks his contract with the master this is sufficient ground for his discharge. The law only requires that there should be an actual breach of the express or implied conditions of the contract in order to justify the discharge, and, if such cause in fact exist, the

master may avail himself of such breach in an action brought against him for damages resulting from the alleged wrongful dismissal. *Crescent Horse-Shoe Co. v. Eynon*, 95 Va. 151, 27 S. E. Rep. 935.

Discharge Justified If Sufficient Grounds Exist.—Where a sufficient cause exists for the discharge of the servant, thought not the inducing motive for the discharge, nor even known to the master, it will justify the discharge, and the master may avail himself of it in defense of an action for damages for an alleged wrongful dismissal, but an instruction to that effect should not be given when all existing causes were known to the master at the time of the discharge, as the instruction is then without evidence to support it. *Crescent Horse-Shoe Co. v. Eynon*, 95 Va. 151, 27 S. E. Rep. 935.

Insufficient Grounds of Discharge.—On the other hand, a servant may recover if he is discharged without sufficient cause regardless of the motive which induced the master to discharge him. *Crescent Horse-Shoe Co. v. Eynon*, 95 Va. 151, 27 S. E. Rep. 935.

Question Whether Servant Was Discharged or Voluntarily Gave up Employment Is for the Jury.—The question whether a servant was discharged by the master or voluntarily abandoned the service without sufficient cause, is for the jury. And if there is evidence tending to establish either of these, and an instruction is asked which correctly propounds the law on such view, it is error to refuse it. *Goldsmith v. Latz*, 96 Va. 680, 32 S. E. Rep. 483.

Damages for Wrongful Discharge.—Where the servant sues for damages for breach of the contract of service, the jury cannot take into consideration other elements of damages than those which were caused by the dismissal. *Crescent Horse-Shoe Co. v. Eynon*, 95 Va. 151, 27 S. E. Rep. 935; *Willoughby v. Thomas*, 24 Gratt. 531.

Where, in an action of trespass on the case by the servant against the master for a wrongful discharge, the declaration makes no averment of malice or of special damage beyond loss of employment and wages, evidence of special damage to the character of the servant by reason of the discharge, is irrelevant and inadmissible. *Lee v. Hill*, 84 Va. 919, 6 S. E. Rep. 473.

Same—Where the Servant Releases Claims against Master in Consideration of the Employment.—Where the servant releases his claim for damages for injuries in consideration of agreement by the master to furnish employment in the future, and the servant is discharged without cause, he may treat the contract as absolutely broken by the master, and in an action thereon recover the full value of the contract to him at the time of the breach, including all that he would have received in the future as well as in the past, if the contract had been kept, less any sum he may have earned already, or might thereafter earn in other service, as well as the amount of any loss the defendant sustained by the loss of his service without the master's fault. *Rhoades v. Chesapeake, etc., R. Co.*, 49 W. Va. 494, 39 S. E. Rep. 209.

Burden of Proving Grounds of Discharge.—Where the master agrees to employ the servant in consideration of his releasing a claim for personal injuries, and the servant is discharged by the master, in an action by the servant to recover damages for the breach of his contract the burden of proof is upon the master to show that there was good ground for the discharge. *Rhoades v. Chesapeake, etc., R. Co.*, 40 W. Va. 494, 39 S. E. Rep. 209.

148 *Breckenridge v. Auld and Others.

August 1842, Lewisburg.

(Absent ALLEN and BALDWIN, J.)*

Mortgages—Deed Absolute on Face Deemed a Mortgage.—Where a deed for land is absolute on its face, and, at the time it is made, a written agreement is entered into by the parties, shewing that the object of the deed is to secure to the grantee money, and indemnify him against liabilities, such deed is only a mortgage, and the right of redemption by the mortgagor is incident to it.

Same—Same—Vendee of Land—Rescission.—The grantee in a deed for land, which is absolute on its face, but in truth a mortgage, having conveyed the land to a purchaser from him for valuable consideration, without notice of the equity; and the purchaser, upon obtaining knowledge of it, having filed a bill against his vendor for a rescission of the contract, in which suit the mortgagor is a party, and unites in the prayer for rescission; **Held**, such rescission will be decreed, unless there be some other party who has a right to object.

Same—Same—Assignee of Purchase Money;—Onus Probandi.—The grantee in a deed for land, which is

*The former had been consulted by the appellee Strider. The latter was counsel for the appellee Auld.

Deed of Trust Considered a Mortgage.—In *Spencer v. Lee*, 19 W. Va. 192, it is said: "The death of the *cestui que trust* and the qualification of the trustee as his executor rendered it improper for him to sell. He could no longer act with that impartial disinterestedness required of a trustee. He had become a party himself. He had ceased to be a trustee and had become a mortgagee with the right of redemption in the mortgagor or his heir. In *Chowning v. Cox*, 1 Rand. 306, it was held, 'where a conveyance of real estate is made to a creditor in trust to satisfy his own debt, such conveyance is not to be considered as a deed of trust but as a mortgage, to which the right of redemption is incident.' *Vide also Taylor's Adm'r v. Chowning*, 3 Leigh 554; *Breckenridge v. Auld*, 1 Rob. 154; *Floyd v. Harrison*, 2 Rob. 178, 183, 185, 188; 2 Min. Inst. 290."

The principal case is cited in this connection in *Floyd v. Harrison*, 2 Rob. 183, 190.

See monographic note on "Mortgages" appended *Forkner v. Stuart*, 6 Gratt. 197; and monographic note on "Deeds" appended to *Flott v. Com.*, 12 Gratt. 564.

Deeds of Trust—Outstanding Title—Duty of Trustee.—It was held in *Rossett v. Fisher*, 11 Gratt. 492, that where real estate is conveyed in trust to secure debts, and the grantor in the deed has at the time but an equitable title, but is entitled to have the legal title, it is an abuse of his power by the trustee to sell the property before getting the legal title. The court said, at page 502: "Whatever might have been the rights of a *bona fide* purchaser without notice at such a sale, as to which I express no opinion, I think that the creditor being the purchaser under the circumstances before stated, the debtor has lost none of his rights by the sale, but is entitled to have it set aside and the property resold, if necessary, for the purposes of the trust. See *Gibson v. Jones*, 5 Leigh 370; *Breckenridge v. Auld*, 1 Rob. 148; *Dabney v. Green*, 4 H. & M. 101; *Lord Cranmouth v. Johnston*, 3 Ves. Jr. R. 170."

Assignments—Consideration.—In *Hopkins v. Richardson*, 9 Gratt. 492, the court said: "It is doubtless

absolute on its face, but in truth a mortgage, having sold the land, and taken from the purchaser bonds for the purchase money, and a deed of trust to secure the same, and having then transferred the bonds to one who claims to be the assignee thereof for valuable consideration, but appears to have taken the assignment under circumstances calculated to throw strong suspicion on the transaction; **Held**, it is incumbent on the assignee to prove that the assignment was for value.

Costs;—Appellate Court—Compellees—Apportionment.—The court of appeals reversing a decree, and there being three appellees, one of whom gets by the decision here what was sought by his bill and denied by the court below, and another of whom prevails here to the same extent that he prevailed in the court below, decreed that the third appellee pay to the appellant his costs.

On the 17th of August 1826, James W. Breckenridge and Eliza his wife, of the county of Prince George in the state of Maryland, made a deed to Colin Auld of the county of Alexandria in the district of 149 Columbia, *which stated on the face thereof, that Breckenridge and wife, for the consideration of 20,000 dollars, conveyed to Auld three pieces of land in the county of Mason in the state of Virginia, forming part of a tract called Graham's station.

On the same day, a memorandum was signed by Breckenridge and Auld, stating, that although that conveyance was made, it was understood that Auld was to account to Breckenridge for whatever the land might ultimately produce, after deducting any claims which Auld might have against Breckenridge, or against the estate of Bailey E. Clarke deceased, of which Breckenridge and his wife were executors, or whatever loss or damage might arise to Auld in consequence of his undertaking for Breckenridge and obligation to Abraham Clarke.

The conveyance was admitted to record in the county court of Mason (without the memorandum) on the 18th of September 1826, upon the certificates of two justices of the peace, of the acknowledgment of Breckenridge, and the acknowledgment and privy examination of his wife.

About three years after the conveyance, Auld advertised the land for sale. His advertisement appeared in some of the papers of the district of Columbia. And Breckenridge was at the time in the district, and knew of the advertisement.

On the 1st of September 1831, Auld made a correct, as argued by the counsel for the defendant in error, that the assignment of a chose in action not assignable at common law, does not make the assignor liable without a valuable consideration for the assignment; and that the assignment being in writing does not necessarily import that it was for a valuable consideration. *Hall v. Smith*, 3 Munf. 550; *Wood v. Duval*, 9 Leigh 6; *Breckenridge v. Auld*, 1 Rob. R. 148."

See monographic note on "Assignments" appended to *Ragsdale v. Hagy*, 9 Gratt. 409.

Costs.—See monographic note on "Costs" appended to *Jones v. Tatum*, 19 Gratt. 720.

deed to Henry Strider, of the county of Jefferson in Virginia, whereby he conveyed to Strider two parcels of the Graham's station tract (being all that remained unsold by Auld) for the consideration of 10,000 dollars. On the same day, Strider made a deed of trust to Richard H. Claggett, reciting his purchase from Auld; stating that he had executed to Auld the following bonds, to wit, five bonds for 1000 dollars each, payable on the first day of April 1832, 1833, 1834, 1835 and 1836
150 respectively, *two bonds for 2000 dollars each, payable on the first day of April 1837, and 1838 respectively, and one bond for 1000 dollars, payable on the first day of April 1839; and conveying to Claggett in trust, to secure the payment of the said bonds, the same property which had been conveyed by Auld to Strider. Both of these deeds were admitted to record; the deed to Strider on the 20th of September 1831, and his deed of trust on the 15th of November 1831.

Previously to the conveyance from Auld to Strider, Auld had been discharged from the liabilities against which the deed from Breckenridge and wife was intended to indemnify him, and Breckenridge had demanded a reconveyance of the land, on the allegation that there was no indebtedness from him to Auld. But Strider had not, at the date of his purchase, any knowledge of the secret equity of Breckenridge, or of any adversary claim whatever. Auld had held the land for years, and was in the actual possession thereof, claiming to be the owner, and exercising acts of ownership. And Strider contracted with Auld in the belief that he was the true and sole owner. Strider broke up his establishment in Jefferson county, removed to his new purchase, took possession of the land, and held it for nearly three years, before he heard of the claims of Breckenridge. During this time, he put upon the land valuable and permanent improvements. But he had paid no part of his purchase money, when he first received notice of Breckenridge's claims.

Before this notice was received by Strider, the matters in controversy between Auld and Breckenridge had, in March 1833, been submitted to arbitration. The adjustment was found to be one of great difficulty, requiring long and laborious investigation. The arbitrators had various meetings, and did not make up their award until the 29th of January 1834; when they adjudged that Auld should convey the land to Breckenridge.
151 and *that the latter should, on receiving the conveyance, pay to the former the sum of 3347 dollars 31 cents, which they found due to him.

About the time of this award, an assignment was made by Auld to John Ramsay, of the bonds executed by Strider to Auld. Strider was informed of the assignment by a letter from Auld bearing date the 30th of January 1834, and by a letter from Ramsay bearing date the 3d of February 1834.

In July 1834, Strider filed a bill in the circuit court of Mason, setting forth the nature of Breckenridge's title; stating, that he (Strider) considered his contract with Auld a bene-

ficial one, but that he regarded the title of Breckenridge as superior to that which he had acquired; and concluding with a prayer for a rescission of the contract between himself and Auld. To this bill, Breckenridge, Auld and Ramsay were made defendants: and they all answered.

The rescission of the contract between Strider and Auld promoted the object of Breckenridge, who by a cross bill, as well as by his answer to the original bill, sought a decree compelling the other parties to convey the land to him. Such rescission was, however, objected to by Ramsay, who claimed to be the assignee for valuable consideration, of the bonds executed by Strider to Auld.

It was expressly charged in the bill, that the assignment was made without consideration; and though the charge was denied by both Auld and Ramsay, neither of them exhibited any satisfactory proof of the consideration. All that was shewn was, that Auld had given bond in the office of the register of wills for Alexandria county, as guardian of John Ramsay and four other orphan children of John Ramsay deceased, in the penalty of 80,000 dollars. Whether any settlement of Auld's accounts as guardian had ever taken place, or what was the amount of his indebtedness, or whether he was
152 *indebted at all, nowhere appeared.

Yet Ramsay stated, that the motive which induced him to take the assignment, was his desire to get from Auld's hands the debt due from Auld on account of his father's estate.

Both Auld and Ramsay alleged that the assignment was made on the first of January 1834. But there was no proof to support this allegation. Neither of them alleged that any step was taken to inform Strider of the assignment until after the award. It appeared by the depositions of the arbitrators, that although Strider was no party to the submission, yet the sale to him was a subject investigated by them. They were satisfied that the land was worth much more than it was sold for to Strider; that it was worth 13,000 dollars. And this induced them to provide in the award, that in case Auld should not restore the land to Breckenridge at the time prescribed by them, then he should pay to Breckenridge, in lieu thereof, the sum of 13,000 dollars, subject to a deduction of the before mentioned sum of 3347 dollars 31 cents.

Pending the cause, a judgment was obtained by Ramsay on one of Strider's bonds, and an injunction was awarded to restrain Ramsay from proceeding on that judgment, and on the other bonds.

The circuit court of Mason, by two decrees of the 23d of January and 19th of April 1839, decreed, 1st.

That Strider be quieted in his title and possession of the land, subject to the deed of trust executed by him to secure the payment of the purchase money. 2. That the injunction be dissolved as to the judgment, and as to so much of the bonds first becoming due, as, with the judgment, would amount to 3347 dollars 31 cents with interest thereon from the 1st of January 1834, deducting there-

from the costs incurred by Breckenridge in the prosecution of his cross bill, which Auld was decreed to pay. 3. That Ramsay should file with the clerk the residue of the 153 bonds, and that Strider pay the *same to Breckenridge, without any damages by reason of the injunction.

On the petition of Breckenridge, an appeal was allowed him.

The cause was argued in August 1841, by the attorney general for the appellant, by Peyton for Ramsay, and by Cook for Strider. The argument not being concluded before the term ended, written notes of argument were delivered to the judges in vacation, by Baldwin for the appellee Auld, and Johnson for the appellant. It is unnecessary to report the argument in detail.

The question of law mainly discussed was, whether, notwithstanding the sale made by Auld of the land conveyed to him by the deed of the 17th August 1826, Breckenridge retained, as between Auld and himself, a right of redemption? The counsel for the appellees endeavored to distinguish the case from that of *Chowning v. Cox &c.*, 1 Rand. 306. But supposing the cases not to be distinguishable in principle, they said that *Chowning v. Cox &c.* had been decided without reference to the late decisions in England, or to those in New York, and was clearly inconsistent with them. Those decisions, they contended, have established the proposition that a power of sale given to a mortgagee, in default of payment, by way of substitute for the decree of foreclosure, may be exercised by the mortgagee so as to bar the equity of redemption. They referred to 2 Rob. Pract. 61. 2 Story's Eq. 295, § 1027. and note. 4 Kent's Comm. 146. 1 Sugden on Vendors 157, 8.—where the doctrine and cases are stated.

CABELL, P. The deed from Breckenridge to Auld for Graham's station, executed on the 17th of August 1826, although absolute on its face, was in fact nothing more than a mortgage; for the written agreement entered into by the parties on the same day, 154 gives the *true character of the deed, by shewing that its sole object was to secure to Auld any moneys which Breckenridge then owed him, or might thereafter owe him, and to indemnify him against certain liabilities to which he was exposed on his account.

The deed being only a mortgage, the right of redemption by Breckenridge was incident to it; and Auld could not, by the mere authority derived from the deed, and without resort to a court of equity, sell the land so as to bar the rights of Breckenridge. *Chowning v. Cox &c.*, 1 Rand. 306. The sale of the land by Auld to Strider, by the deed of the first of September 1831, was therefore, as between Auld and Breckenridge, a mere nullity; especially when we consider that Breckenridge had previously discharged him from the liabilities against which the deed was mainly intended as an indemnity, and had demanded a reconveyance of the land, on the allegation that there was no indebtedness from him to Auld. A sale of the land under such

circumstances, and without disclosing to Strider, the vendee, the pretensions of Breckenridge, was doubly fraudulent. If, therefore, there were no other parties to this controversy but Auld and Breckenridge, it is manifest that Breckenridge would be entitled to his land, on his paying to Auld the money which he owed him.

But there is a third party to the controversy. Strider has obtained the legal title to the land; and although that title was fraudulently conveyed to him by Auld, yet Strider did not participate in the fraud. He saw Auld in the actual possession of the land, which he had held for many years, claiming to be the owner thereof, and exercising all the acts of ownership, under an absolute deed in fee simple from Breckenridge, spread upon the records of the courts of the county where the land lay. Auld had even advertised the land for sale in the public newspapers published at no great distance from the residence of the parties, without remonstrance 155 *or opposition on the part of Breckenridge. It is not pretended that Strider,

at the date of his purchase, had any knowledge of the secret equity of Breckenridge, or of any adversary claim whatever. On the contrary, he had good reason to regard Auld as the true and sole owner; and he contracted with him in the belief that he was so; he received his conveyance, gave his bonds for the purchase money, broke up his old establishment, removed to his new purchase, took possession of the land, and held it for nearly three years, before he heard of the claims of Breckenridge; during which time, he put upon the land valuable and permanent improvements. It is true that he had paid no part of his purchase money, before the time when he received notice of Breckenridge's claims; and it was strongly contended in the argument, that this circumstance is sufficient to deprive him of the right to insist on the benefit of his purchase. I do not think it necessary to decide this point in this case; for if, in consequence of this notice, Strider had no right to insist on his purchase, then there would be nothing to prevent the court from deciding the cause as to Breckenridge and Auld, upon the principles of equity applicable to them. And if, on the contrary, he had a right, notwithstanding this notice, to insist on his purchase, it is very clear that he had the right to waive or abandon the purchase, provided his doing so would not impair or injure the rights of others. He might pursue this course, even if his right to insist on his purchase were clear and undoubted; much more might he do so, if it were attended with doubt and uncertainty. He has filed his bill, stating what he considers the superior title of Breckenridge, and praying the rescission of the contract, although he thinks that contract was a beneficial one. Who is to object to this course? Not Breckenridge; for it is that which he desires, and to which he claims to be entitled. Not Auld; for his interest is 156 *not affected by it; and if it were, the fraud of which he has been guilty must close his mouth against any such objections. If, therefore, Breckenridge, Auld and Strider

were the only parties to this controversy, the claims of Breckenridge must prevail.

But there is yet a fourth party, Ramsay, whose pretensions remain to be examined. He claims to be the assignee, for valuable consideration, of the bonds executed by Strider to Auld for the purchase money of the land in controversy. To make this claim available, he must not only allege, but he must prove, that he was an assignee for value; for, as the bonds were invalid and worthless in the hands of Auld, they will be equally so in the hands of his assignee without value. And it may also be added, that even if full value were paid for them, they will be unavailable in the hands of Ramsay, if he had notice of the claims of Breckenridge.

It is certain that these bonds were assigned to Ramsay under circumstances calculated to throw strong suspicion on the transaction.

The matters in controversy between Auld and Breckenridge had been submitted to arbitration, as far back as March 1833. The adjustment was found to be one of great difficulty, requiring long and laborious investigation. The arbitrators had various meetings from time to time, and did not make up their award until the 29th of January 1834, when they adjudged that Auld should convey the land to Breckenridge, and that the latter should, on receiving the conveyance, pay to the former the sum of 3347 dollars 31 cents, which they found due to him. Both Auld and Ramsay say that the assignment of the bonds was made on the first of January 1834. But there is no proof to support the allegation. They do not pretend that any step was taken to inform Strider of the transfer of his bonds, until after the award; Auld's letter, which

gives the information, bearing date on the 30th of January, and Ramsay's *on the 3d of February. If the assignment was in fact made on the 1st of January, this delay in making so important a communication would manifest a degree of negligence and imprudence which we are unprepared, by any thing in the record, to attribute to Mr. Auld; whilst the almost simultaneous communication by both Auld and Ramsay, so immediately after the award, excites a strong suspicion that the assignment itself followed the award, and was induced by a knowledge of its contents; and consequently, that Ramsay had notice of the claims of Breckenridge. This suspicion becomes still stronger, by the notoriety which the record shews was given to the subjects investigated by the arbitrators; one of which was the sale of the land to Strider, although he was no party to the submission. Besides, it seems almost inconceivable that any man should take an assignment of bonds for such an amount, and payable at such remote periods, without an enquiry into the consideration for which they were originally given; especially where the parties to the transaction occupied towards each other the intimate relations existing between Auld and Ramsay. But be this as it may, the conduct of Auld in assigning these bonds, at any time, while his right to them was involved in the questions then pending before the arbitrators, was grossly fraudu-

lent; and as it is expressly charged in the bill that the assignment was made without consideration, it was incumbent on Ramsay to adduce satisfactory proof of the consideration, if any. No such proof is exhibited. We have nothing but his own assertion and that of Auld, added to the fact that Auld had qualified as the guardian of Ramsay and his four sisters, and had given a bond as guardian of them all, in the penalty of 80,000 dollars. But whether any settlement of his accounts had ever taken place, or what was the amount of his indebtedness, or whether he was indebted at all, nowhere appears.

158 *Nothing is more improbable than the story told by Ramsay, as to the motive which induced him to take the assignment of these bonds. He says it was his desire to get from Auld's hands the debt due from him on account of his father's estate. Then why not get it directly from Auld himself, who lived in his immediate neighborhood, and who is not alleged to be insolvent, or even in embarrassed circumstances? Why take bonds on a stranger, living hundreds of miles from him? And above all, why take, in discharge of a present debt which he wished to collect, bonds, some of which had to run four years before they came to maturity? Upon the whole, I am of opinion that he has shewn no title to the bonds as against Strider or Breckenridge, and that his pretensions to enforce the collection thereof are without any just foundation.

The other judges concurred with the president in the following decree:

The court is of opinion that the sale by Auld to Strider of the land in controversy be rescinded, and that Strider do surrender to Breckenridge the full possession of the said land, with all its appurtenances, on or before the first day of January next; and that in the mean time he do permit him, his servants &c. to have free ingress and egress into and from the said land, for the purpose of seeding the usual fall crops. That an account be taken of the rents and profits of the said land while in the possession of the said Strider, and also of the permanent improvements put thereon by him, until the present time; distinguishing those permanent improvements made before, and those made since, the institution of the suit by Strider. That Strider do pay to Breckenridge the amount of the said rents and profits, subject, however, to a credit for so much of the value of all the said improvements, as may not exceed the amount of all the rents and profits; but

159 that Breckenridge *shall not be liable for any excess of the value of the improvements above the amount of all the rents and profits, unless the value of the improvements put upon the land before the institution of the suit, shall exceed the amount of all the rents and profits during the whole time that Strider has held the said land; in which case he shall be chargeable with such excess, as a lien on the said land. That the injunction restraining Ramsay from enforcing his judgment at law, and from enforcing the collection of the bonds executed by Strider to

Auld, and by him assigned to Ramsay, be perpetuated; and that Ramsay surrender the said bonds to Strider, to be cancelled.

But although Ramsay has shewn no cause, as between him and Breckenridge and Strider, to enforce the collection of the bonds assigned to him by Auld, yet as Auld admits that the said bonds were assigned by him for valuable and full consideration, the court is of opinion that that admission gives to Ramsay a just claim against Auld, and intitles Ramsay to receive from Breckenridge the sum of 3347 dollars 31 cents, found due from Breckenridge to Auld by the award of the arbitrators in the proceedings mentioned, with interest thereon from the first day of January in the year of 1835; and that the said sum, with interest as aforesaid, is chargeable as a lien on the said lands herein before directed to be surrendered to the said Breckenridge: that Breckenridge be directed to pay to Ramsay the said sum of 3347 dollars 31 cents with interest as aforesaid, on or before the expiration of sixty days from and after the time when he shall receive possession of the land as aforesaid; and that in default of said payment, the said land shall be sold, in whole or in part, as may be deemed most expedient, to pay such portion or part of the said sum of money and interest as aforesaid, as may remain unpaid, and the costs of the sale,—on a credit of nine months for one third part thereof, of twelve months for another third part, and of eighteen months for the residue.

It is therefore adjudged, ordered and decreed, that the decrees be reversed, with costs to the appellant Breckenridge, to be paid by the executor of Auld out of assets of his testator in his hands to be administered, if so much thereof he hath; the other appellees not being subjected to costs in this court, because the appellee Strider gets by the decree of this court a rescission of the contract of purchase, which he sought in the court below, and which was denied by the decree of that court; and because the appellee Ramsay prevails in this court, to the extent that he prevailed in the court below. And the cause is remanded to the circuit court, to be further proceeded in according to the principles before declared.

161 *Page and Others v. Booth and Others.

August, 1842, Lewisburg.

(Absent BROOKE, J.)

Laches—Case at Bar.—Upon a bill in equity to charge property which has passed into the hands of third persons without notice of the complainant's claim, the court being called upon to investigate transactions which occurred thirty years before the institution of the suit, and, from the lapse of time and the obscurity of the transactions, it being impossible to arrive at the truth of the case, **Held**, the bill ought to be dismissed.

Vendor and Vendee—Lien for Purchase Money.—A per-

*See monographic note on "Laches" appended to Peers v. Barnett, 12 Gratt. 410.

son entitled to have an assignment of a title bond and the possession of property upon paying a certain sum, transfers his right, and his assignee pays that sum, and assigns his right to another, who obtains title to the property according to the bond; after which the person first mentioned files a bill, alleging that his transfer was in consideration of money which has never been paid him, and claiming that the lien of a vendor for purchase money exists in his favour, upon the property in the hands of the subsequent holders, who purchased, as he alleges, with notice. **Held**, no such lien exists.

This case was stated by Allen, J., at the time of delivering his opinion, to be as follows:

In the year 1792, Stephen Jett, the owner of the equitable title to certain lots in the town of Christiansburg, Montgomery county, (the legal title to which was to pass through the trustees of the town, and was then outstanding in the original patentee or his representatives,) executed to William and Gilbert Christian his title bond, by which he bound himself to make or cause to be made to them a conveyance for three fourths of two lots, as soon as the trustees could make a title to the original purchasers, and also bound himself to deliver possession to the Christians, within a few weeks. Though Gilbert Christian was mentioned as a joint purchaser with William, it seems to have been determined in a subsequent controversy,

that William was entitled to the whole benefit of the contract. William Christian appears to have obtained possession of the property, and leased it to one Bratton. On the first of November 1794, whilst the property was held by the tenant of Christian, articles of agreement were entered into between Christian and Booth, by which Christian sold the property to Booth for £250. to be paid in property at a future day, and bound himself to give security, upon the payment of the purchase money, for the making of a conveyance as soon as a title could be procured from the trustees. The agreement further provided that Booth should get possession as soon as Bratton's lease expired, and be entitled to any rent which might be due from Bratton at the end of his term. This contract was not complied with. Booth did not deliver the property to be paid, by the day agreed on, and Christian did not give security for the title. Some payments were made, and on the 9th of April 1795, another arrangement was entered into between the parties. By this it was agreed, that upon full payment of the balance of the purchase money, or immediately afterwards, Christian should assign to Booth the title bond of Jett; but Booth was not to have possession until a lease to one Miller (probably a purchaser from Bratton) had terminated. And upon Christian's compliance with his agreement, he was to be exonerated from all further responsibility.

At this stage of the transaction, Booth

was not entitled to possession of the lost, or to a conveyance for them, or even to the equitable right held under Jett. The possession was held by the tenant of Christian, and until Booth paid Christian the balance of the purchase money, he had no right to call for an assignment of the title bond. His interest consisted of an executory contract, which authorized him, upon the payment of the purchase money, to demand a transfer of a title bond. He never did pay the balance of the purchase money; the bond was not assigned to 163 him, nor did he acquire "possession of the lots. The extent of his interest was never enlarged.

Whilst his claim remained in this condition, on the 25th of March 1797, he sold it to Isaac Rentfro, and bound himself to give up to Rentfro all the bonds and receipts relative thereto, and to make him all the right he had received or should receive by virtue of his purchase from Christian, for a sum to be adjudged by certain persons named. On the same day, Rentfro, by a distinct article (which recites that he had purchased of Booth the lots which Booth bought of Christian, the price of which was to be ascertained by valuers) bound himself to pay the sum to be ascertained as aforesaid, after deducting what might be due to Christian, in good land in Tennessee, by the 29th of December next ensuing the date of the contract. Rentfro never got possession of the property: it was still held by Bratton or Miller, under the lease. On the 17th day of April 1797, Rentfro sold his interest in the subject to John and Roswell Johnston, and bound himself to give them possession as soon as it could be obtained from Bratton, and to make them such right as the holders of the legal title should make to other purchasers, or give them Jett's title bond for such right. The Johnstons paid the purchase money agreed to be paid by them to Rentfro, obtained possession of the lots, and, on the 17th of July 1802, procured from Jett an order on the trustees for a deed. After continuing in possession several years, they sold to Page, the present owner, who afterwards obtained a deed from the trustees; having previously been in possession, and paid to the Johnstons the whole of the purchase money. He has held possession ever since.

The lots seem never to have been valued under the contract between Booth and Rentfro; at least there is no evidence of such valuation in this record. Booth, however, went to Tennessee to get the land which Rentfro was to pay; from 164 which it may be inferred that "some valuation was made, or that the parties had agreed on a price; since it would have been useless to go for the land, until the price of the lots had been ascertained. Why the land was not paid, does not distinctly appear, nor is it material to enquire. It is certain, from the admissions of all parties, that no land was paid. Rentfro, in his answer to a bill filed by one Glenn,

asserting a claim under Gilbert Christian to a moiety of the property, says that the contract was changed; that instead of the Tennessee lands, he conveyed to Christian 100 acres of land in Montgomery county, in discharge of some claim which Christian held on Booth; and there still being a balance due from him to Booth, the latter directed him to pay it over to Christian, which he did. This answer, filed in another case, is no evidence of the facts set out in it; but it serves to explain the testimony of William Christian, who says he received from Rentfro 100 acres of land and 40 dollars in money, for Booth. Another witness, John Gardner (one of the trustees) says, that Rentfro insisted he had paid for the lots, and Booth that he had not. And one of the subscribing witnesses states, he has every reason to believe that Rentfro did pay, as he was not to get possession until he paid; that possession was transferred to the Johnstons, his vendees, at his request, and the witness never heard any thing else than that he had paid. Rentfro seems to have been a man in good circumstances, and in 1798 he sold his property, or a portion of it, and removed to Kentucky, where he died in good circumstances in 1817. Booth was a poor man, and he absconded from his creditors and removed to Kanawha county, where he died in 1801, leaving a widow (who died about four months after him) and several children, the eldest about 12 years, the youngest 13 months old. In 1827, administration on Booth's estate was granted by the county court of Montgomery; and in the 165 month of August 1827, "the administrator filed this bill, alleging that the purchase money was never paid by Rentfro; that the subsequent holders were purchasers with notice; and that the property in their hands was subject to the vendor's lien for the purchase money.

The cause came on to be heard before the circuit court of Montgomery, the 26th day of May 1836, on the bill, the answers of Page and of John and Roswell Johnston, an order of publication against Rentfro's heirs, which appeared to have been duly executed, the depositions of witnesses, and the exhibits. Whereupon the court was of opinion, that Page was not a purchaser without notice, and therefore that the lots in his possession were liable for the purchase money and interest, due from Rentfro to Booth's administrator; and the price of the said lots at the time of the sale by Booth to Rentfro, not having been fixed and ascertained by the persons to whom it was referred, and they having since died or removed, the court decreed that a commissioner take an account, ascertaining and stating the value of the said lots at the time of the sale thereof by Booth to Rentfro, and how much of the purchase money, if any, had been paid, and the balance due, with interest thereon from the 25th of December 1797.

From this decree an appeal was allowed, on the petition of Page and John and Roswell Johnston.

The cause was argued by Preston and C. Johnston for the appellants, and by M'Comas and the attorney general for the appellees.

ALLEN, J. The first objection which presents itself is the staleness of the demand, and the impossibility of doing justice at this distance of time. The court is called upon to investigate, by the dim lights furnished by this record, transactions which occurred thirty years 166 *before the institution of this suit.

The cases on this subject are fully reviewed and commented on in Carr's acm'r &c. v. Chapman's legatees, 5 Leigh 164, and Hayes & al. v. Goode & al., 7 Leigh 452. The presumption of satisfaction is not the only consideration which operates on the court in refusing to entertain such a bill. In Hercy v. Dinwoody, 2 Ves. jun. 87, it was contended that the case was not open to the presumption of satisfaction, because, the matter being in suit, the defendants could not discharge themselves by a payment or settlement in pais. The master of the rolls admitted this, but said—"For the reasons given in Deloraine v. Brown, 3 Bro. C. C. 633, independent of the question of satisfaction, but on account of the very neglect, and the mischief and disturbance that may arise to families," (and I may add, to subsequent purchasers,) "though the presumption of satisfaction is not so strong, yet the laches and neglect may make it a matter of public policy that the party guilty of it shall abide the consequence." Here the property has passed into the hands of third persons, who have paid their purchase money; and whatever may have been the fact, there is certainly no proof that they had actual notice of this claim when the deed was procured from the trustees. The aid of a court of equity is now invoked against them, at a time when the truth is no longer attainable. Was there ever a valuation? From Booth's trip to Tennessee to receive the land, the inference is strong that there had been: but we have no evidence of it. Was the contract changed, as Rentfro alleges? The evidence of Christian, that he received from Rentfro 100 acres of land and 40 dollars, for Booth, would seem to shew that it had been. But what that contract was, and whether it had been complied with (as Rentfro, according to the testimony of Gardner, asserted, though Booth denied it,) we know not, and, from the proofs in the record, cannot ascertain.

The first step must be taken in the 167 dark, and no advance *can be made without the hazard of injustice. It may be the misfortune of those asserting this claim, that such obscurity involves the transaction. But even if they were exempt from the imputation of laches, it would not be the province of a court of equity to relieve them at the risque of doing injustice to fair purchasers. Booth however, if his claim was a valid one, had ample opportunities to assert it during his lifetime. He failed to do so; permitted

his vendee to remove from the country full-handed, though his own embarrassments should have urged him to enforce his claim, if in truth it had not been adjusted; and he himself subsequently absconded from his creditors, without giving them (so far as we see) any intimation of his claim as a means of satisfying their demands. Under these circumstances, he could not be exempted from the imputation of culpable neglect. I think that on this ground alone,—the impossibility, from the lapse of time and the obscurity of the transactions, of arriving at the truth of the case, the court should have dismissed the bill.

I am equally satisfied that if the claim had been asserted in proper time, the vendor's lien did not attach. What did Booth dispose of? Not the property: to that he had no claim. Under his contract of the 9th of April 1795, he might have become entitled to an assignment on Jett's title bond, and to the possession of the property, upon the payment of the balance of the purchase money to Christian. But he never paid that balance; it was not paid until the contract was made with Rentfro; and upon its being paid by Rentfro, Christian assigned to his vendees, the Johnstons. Suppose, upon the payment of this balance by Rentfro, Christian had refused to surrender or as in Jett's title bond; what would have been the remedy? Rentfro could have sued at law for the breach of contract in failing to assign the title bond: he had his election to adopt that course, and it would have been out of Booth's 168 power to control him. What *then becomes of the supposed lien for purchase money? It will not be pretended that it would attach on the personal subject. The contract transferred a right of action, and nothing more.

It has been contended in argument, that there was an express contract for the lien, and that this is proved by the statement of Taylor, in the suit of Glenn against Christian. To that suit Booth was no party. The record would be no evidence against him, and cannot be used for him. But even if the statement were evidence, it proves no such contract. That is inferred from the fact that the papers were deposited with Taylor. But that deposit, I feel satisfied, had reference alone to the transactions between Christian and Booth. They had attempted to settle and ascertain the balance due. By the agreement of the 9th of April 1795, Christian was not to assign until he was paid; and the papers were no doubt deposited with a view to the delivery when he should be paid. And accordingly, when Rentfro did pay the balance, Christian transferred his interest held under Jett's title bond, to Rentfro's vendees.

I think the decree should be reversed, and the bill dismissed.

The other judges concurred on both grounds. Decree therefore reversed, and bill dismissed.

169 *Stout v. Vause and Others.*

August, 1842, Lewisburg.

(Absent ALLEN and BALDWIN,† J.)

Principal and Surety—Who is a Cosurety Entitled to Contribution.—A joint and several single bill being executed in the country by a principal and seven sureties, to enable the principal to borrow money from a bank, and the principal, upon coming to town, finding that the rules of the bank require a town surety, application is made by him to a citizen to become such surety. This citizen having adopted a rule not to put his name on bank paper for any person, but being willing to accommodate the principal, applies to a friend to become bound on the paper, with an assurance that if the principal does not pay it off when it becomes due, he will pay it off for him. Under this assurance, that friend puts his name on the paper as a co-obligor with the other sureties, without their knowledge. And thereupon the paper is discounted by the bank. The principal makes default when the bill becomes due, and soon afterwards the citizen pays it off. **HELD** by two judges (BROOKS and STANARD) that the citizen is to be considered one of the eight sureties, having become such in the name of his friend, and that he is entitled to contribution from all except that friend: dissentiente CABELL, P.

Same—What Suit Pending against Absent Surety Does Not Affect Purchaser of His Land.—The facts being as above stated, a suit in equity was brought by the nominal surety against the cosureties, one of whom was an absent defendant owning land in the commonwealth. The suit was resisted on the ground that no payment had been made by the plaintiff. Subsequently, by an amendment of the bill, the surety who paid was united in the suit as a co-plaintiff. In the interval between the commencement of the suit and the amendment of the bill, the absent defendant returned to the commonwealth, and conveyed the land to a purchaser for valuable consideration. **HELD**, no lien is created upon the land in the hands of the purchaser by these proceedings; not by the proceed-

ings in the name of the nominal surety, because, no payment having been made by him, no decree could be rendered in his favour; and not by the proceedings in the name of the surety who paid, because the conveyance to the purchaser was before those proceedings.

This suit was commenced in the superior court of chancery formerly holden at 170 Clarksburg. The subpoena *was issued the 23d of July 1822, returnable to August rules; at which time the bill was filed in the name of William Vause. It set forth, that Jacob Heiskell of Harrison county was indebted to the Northwestern bank of Virginia in the sum of 600 dollars, and by the request of Heiskell the following persons, to wit, Jedediah W. Goff, David Newton, John Davisson, Christian Geigley, William Lake junior, Jacob Coplin, Absalom Robinson and the complainant, became the sureties of Heiskell for the payment of the debt at the end of 60 days, and joined him in executing a joint and several single bill for such payment: that payment not being made by any of the other obligors, and the complainant being called on by the officers of the bank, he, to save his credit, and to save himself from a suit, was forced to pay and did pay to the bank the said sum of 600 dollars, with a further sum of 19 dollars 20 cents for interest chargeable thereon: that Heiskell and Newton are insolvent, and Robertson resides without the commonwealth, and has no moneys, credits or personal property within the same, but is seized of a tract of land in the county of Harrison, which ought to be made liable for his share of the debt. Heiskell and the cosureties with the complainant were made defendants. And the prayer was, that such of them as were able might be compelled to pay their proportions, by dividing the loss arising from the insolvency of the others; and for general relief.

There was no endorsement on the subpoena explaining the object of the suit. Affidavit being made, at August rules 1822, of the nonresidence of Robinson, an order of publication was then entered, requiring him to appear on the first day of the following term; which order was duly published. And Robinson failing to appear at October term 1822, an order was then entered, stating that the court would proceed to take such proof in support of the bill as the plaintiff should offer.

171 *The other defendants answered the bill. Heiskell admitted that he executed the obligation, and received the amount from the bank; but he did not admit that the complainant paid the debt, and he called for proof thereof. He stated that he (Heiskell) had paid into the bank, on account of the obligation, 400 dollars, for which he ought to have credit. Goff, Geigley, and Coplin admitted the execution of the obligation, and that they were sureties therein, but stated that they did not know whether the same had been paid or not. Newton, Davisson and Lake admitted the execution by them of the obligation,

*For monographic note on *Lis Pendens*, see end of case.

†They had each of them been counsel for the appellant.

§**Sureties—Contribution.**—See foot-note to Preston v. Preston, 4 Gratt. 88. The principal case is cited in Stovall v. Border Grange Bank, 78 Va. 193; Sherman v. Shaver, 75 Va. 10; Hansberger v. Yancy, 33 Gratt. 527.

The principal case is cited in Rosenbaum v. Goodman, 78 Va. 127, to the point that the right of mutual contribution exists only amongst those who are cosureties, that is, sureties for the same thing, and bound for the discharge of the same duty, whether by the same or different instruments at the same or different times, and with or without the knowledge of one another. See also, Harrison v. Lane, 5 Leigh 414, and monographic note on "Subrogation" appended to Janney v. Stephens, 2 Pat. & H. 11.

§**What Suit Pending against Absent Surety Does Not Affect Purchaser of His Land.**—The principal case is cited in Osborn v. Glasscock, 39 W. Va. 760, 20 S. E. Rep. 706; 5 Va. Law Reg. 412.

but called for proof that the complainant had paid the same.

The obligation was filed as an exhibit with the bill, with an endorsement thereon in these words: "N. W. Bank of Virg'a. Received the amount of the within bond from Noah Zane, Heiskell having failed to pay it. T. Woods cash'r."

On the 25th of October 1823, leave was given the plaintiff to amend his bill. An amended bill was filed in the names of William Vause and Noah Zane, stating Zane to be admitted a party complainant in the cause, and setting forth, that when the obligation became payable to the bank, Zane, who had agreed with Vause to stand in his shoes and situation in all respects as regarded said obligation, paid the full amount thereof to the bank, so as to prevent a suit thereon. And the complainants prayed that the money might be refunded to them for the benefit of Zane. Whether this amended bill was filed soon after the 25th of October 1823, or not until after the order of the 18th of May 1826, herein after mentioned, did not clearly appear from the transcript of the record sent to the court of appeals. It was copied immediately after the order of the 25th of October 1823. And yet, according to the entry of the 22d of May 1826, it would seem to have been filed at that time.

172 *On the 19th of October 1824, an order was entered, stating, that on the motion of Benjamin Stout, and by consent of parties, he was made a party defendant in the cause. And on the 22d of the same month, on the motion of the plaintiff, he had leave to amend his bill for the purpose of making Stout a party. At February rules 1825, Stout filed his answer, stating, that he had purchased from Robinson the tract of land in the bill mentioned; that at the time of his purchase, he had no knowledge of the alleged liability of Robinson, as the surety for Heiskell, to the plaintiff; and that, being a purchaser for valuable consideration, and having paid the purchase money, he conceives he ought not to be disturbed in his purchase. He alleges that Heiskell procured Zane to make the payment for him, and contends that if the principal debtor, without the knowledge or consent of the sureties, has procured a third person to make payment, such third person cannot, either by an agreement with one surety, or by any other means, charge the other sureties, but the obligation is as to them extinguished. The fact he states to be, "that the complainant Vause has merely lent his name to the said Zane, in order to prosecute a suit by which it shall appear that the money was paid by a cosurety; and that any recovery that can be obtained is to be for the exclusive benefit of the said Zane."

According to the record sent to the court of appeals, an entry was made on the 18th of May 1826, on motion of the plaintiff, giving him leave to amend his bill by making Zane a party plaintiff; and another

entry was made the 22d of May 1826, of the filing of such amended bill. By agreement of the parties, the answers previously filed were received as answers to the amended bill; and the following facts were also agreed:

"Isaac Heiskell wished to borrow money from the Wheeling bank. By the 173 rule of the bank, an indorser *in Wheeling was required from their borrowers. Heiskell applied to Noah Zane to become such indorser. Zane, having adopted as a rule for his government in relation to the bank, not to become indorser for any person, but being willing to accommodate Heiskell, applied to the plaintiff Vause to become such indorser, with an assurance to the said Vause, that if the said Heiskell did not pay off the said note when it arrived at maturity, he Zane would pay it off for him. Under this assurance by Zane, Vause indorsed the note, and it was discounted by the bank. When the note became due, Heiskell failed to pay it off, and thereupon Zane paid it off. The foregoing arrangements were made without the knowledge or agreement of the other sureties."

The note mentioned in this agreement of facts was the joint and several single bill before mentioned. Before the application to Zane, it had been executed by Heiskell and seven sureties as co-obligors, payable to the Northwestern bank. Vause became an additional obligor.

The cause coming on to be heard the 25th of October 1828, the chancellor was of opinion that the plaintiff Zane had, by an original arrangement with the plaintiff Vause, who executed the single bill at his request, bound himself, if Heiskell did not pay off the same, to pay it for him; and that Zane was invested with all the liability, and all the rights and indemnities, of Vause: and it being admitted that Heiskell was insolvent, and the death of Goff being suggested, the court decreed that the plaintiffs recover of each of the defendants Newton, Davisson, Geigley, Lake, Coplin and Robinson, the sum of 75 dollars with interest from the 21st of March 1822 until payment, and that the defendants pay to the plaintiffs their costs. And there being no personal fund of Robinson within the power or jurisdiction of the court,

174 commissioners were appointed *to go upon the land mentioned in the bill as the property of Robinson, and now in the tenure of Stout, and value and appraise the same. And the cause was continued, with leave to the plaintiff Zane, in case any one or more of the defendants against whom the decree was rendered should prove to be insolvent, to apply to the court by petition for further contribution against such as should be solvent.

The commissioners valued the tract of land, which was said to contain 480 acres, at 7 dollars per acre, making the total value of the tract 3360 dollars. Under the reservation in the decree, Zane filed a petition, setting forth, that executions had is-

sued upon the decree, under which Geigley, Lake and Coplin had taken the oath of insolvency, and Newton and Davisson had been returned no inhabitants of the commonwealth; that previous to the decree, however, the last two named defendants had taken the oath of insolvency in other cases; and that Goff had, in his lifetime, taken the oath of insolvency, and died insolvent. The petition therefore prayed a decree against Robinson for one half the amount decreed against the other sureties, and that the land be decreed to be sold for the same. The facts stated in the petition were proved by depositions and exhibits.

Stout filed a petition for a rehearing of the decree, for reasons set forth in a cross bill.

By the cross bill, and the evidence in support thereof, it appeared, that there were suits in equity against Robinson as an absent defendant, to subject the land, prior to that of Vause; that Robinson returned to Virginia, and requested Stout to become his surety, to enable him to appear and defend those suits; that Stout became such surety, upon Robinson's making a deed of trust on the land to indemnify and save him harmless on account of his suretyship, and also to secure a debt which Robinson owed him; that afterwards Stout
175 agreed to pay the said *creditors of Robinson, other than Vause and Zane; and that Robinson, in consideration thereof, and of the previous debt which he owed Stout, conveyed the land absolutely to Stout. This conveyance bore date the 26th of February 1823, and was admitted to record in the office of Harrison county court on the same day.

The cause was farther heard before the circuit court of Harrison county on the 17th of May 1832. The court denied the petition for a rehearing, and decreed against Robinson the further sum asked by Zane's petition; and there being no personal fund in the power of the court belonging to Robinson, and bond with security being filed by the complainant Zane, conditioned according to law, the court thereupon decreed a sale of the land.

On the petition of Stout, an appeal was allowed. Among the errors assigned in the petition, were the following:

1. That no privity existing between Zane and the cosureties, the payment by Zane ought to be regarded as having been made for Heiskell, and his recourse should be against Heiskell alone, and not against the sureties, who were discharged by the payment.

2. That the proceedings of Vause created no lien upon the land in favour of Zane, the introduction of whom into the cause placed him upon the same footing merely as if he had then brought an original suit, after a dismissal of the one improperly instituted by Vause.

G. N. Johnson for the appellant. Neither Zane nor Vause became a party to the obligation at the same time with the other

sureties. Zane's not putting his name on the bill is proof that he did not mean to be bound with the others. And though Vause put his name on the paper, it was not at the same time with the others, but subsequently, at the instance of Heiskell, and upon the agreement of Zane to indemnify. This being the nature of the contract, it might be maintained with great reason, even if Vause had paid the *debt, that he had no right to call on the other sureties. For the claim to contribution depends on a contract, express or implied, to share equally the burthen. And it is not perceived how such contract could be implied here, when there was no privity whatever between Vause and the others. But the case is much stronger. Zane claims to be substituted in the place of Vause, who has made no payment, and has no right of contribution to which Zane can be substituted. The principle of *Hopewell & al. v. Bank of Cumberland*, 10 Leigh 206, is therefore applicable. Nor can Zane make out his case independently of the doctrine of substitution. If he claims in his own right, he does not shew equality with the other sureties in the time or in any of the circumstances of the suretyship. He is not therefore upon the same footing with them, and upon the principle of *Givens & al. v. Nelson's ex'or & al.*, 10 Leigh 383, and *Douglass v. Fagg*, 8 Leigh 588, cannot claim contribution from them.

II. The original bill, and all the proceedings before Zane became a party, amounted to nothing. They were by a person who had no right. Stout's title was therefore acquired before there was any valid lien upon the land, and must be held good. George H. Lee for the appellees. The rights of Zane arises out of the original contract. The agreement was not that Zane should stand between Heiskell and dishonour, but between Vause and dishonour. Zane's agreement was to pay the money for Vause. Though there is no decision of this court exactly in point, the opinion of Carr, J., in *Enders & c. v. Brune*, 4 Rand. 438, may be referred to for the equitable principles which govern in such cases.

II. The suit might have been maintained in the name of Vause, without making Zane a party. And if such suit there had been a decree, Zane could not have maintained a suit afterwards for the same money. There was such privity between Vause
177 and Zane, that Zane *would have been bound although not a party. If this be so, it is an answer to the second point. And if it be not so, the doctrine of *lis pendens* does not require that every person who appears to be a necessary party should have been before the court at the time of suit brought. On the contrary the doctrine is, that a purchaser is bound by the decree which may be made in the suit, whether the proceedings be regular or irregular. And though it may be necessary to amend the bill and suggest new matter, the *lis pendens* is not brought down to the time of

the amendment. *Walker v. Smalwood*, 2 Amb. 676; *Murray &c. v. Ballou &c.*, 1 Johns. Ch. Rep. 566; *Bishop of Winchester v. Paine*, 11 Ves. 194; *Style v. Martin*, 1 Ch. Ca. 150; *Garth v. Ward*, 2 Atk. 174; *Sorrell v. Carpenter*, 2 P. Wms. 482. The only modification of the principle is where there is great and unnecessary delay. In the present case, the application for leave to amend was not resisted, but the bill was filed without objection, and asserted a claim for the same money that was sought to be recovered by the original bill.

Price, on the same side. Though the name of Vause was used, Zane was the real surety. After Zane paid, if a motion had been made in the name of Vause for the money so paid, though Vause had been unwilling, a court of law would have compelled him to let his name be used. But here we are in a court of equity. And this court will surely regard Zane as the real surety, having the right to call on his cosureties.

II. The proposition seems clear, that when a suit is once instituted, a purchaser of the subject in controversy is bound by all the consequences of the suit. And the introduction of a new party cannot prevent its having this effect.

C. Johnson in reply. The rights of cosureties against each other are rights of indemnity; and when one claims contribution as a cosurety, he must shew that 178 he is such, *and has paid. The sureties need not be bound by the same agreement, or at the same time; but it must in some way be ascertained that they are cosureties. Here it does not appear that there was any privity of contract. It does not appear that any of the sureties except Vause knew what Zane was doing, or that Zane knew what any of them except Vause was doing. Zane did not agree to be surety, but to indemnify a man who would become surety. He never said to Robinson that he would indemnify him if he had to pay more than his share. A cosurety can claim indemnity upon no ground except that the principal is unable to pay. If Vause had paid the money, he could not have proceeded against Robinson until he ascertained that Zane was unable to pay. Suppose that after the bill was executed, the agreement had been made to indemnify, and Zane had then deposited money in bank, which was used, when the bill became payable, to take it up; could Zane have had contribution? If he could not, what difference is there between a prior and a subsequent agreement; between an agreement without, and an agreement with a deposit? When a bill of exchange is taken up, for the credit of the acceptor, by another, that other has no claim against any one but the acceptor. And here, if Zane had paid at maturity, the payment must have enured to the benefit of all the sureties. Every indemnity given to one surety enures to the benefit of all. And this principle applies, whether the indemnity proceeds from the principal debtor or from

a third person. All must be common sufferers. One must not be under guise and free from danger, while there is risk upon all the others. And the contract must be one of equality. A party who could not have been subjected as cosurety, can have no right to recover as such. Here there were no means of resorting to Zane. If Vause had become insolvent before payment, a cosurety could not have obtained indemnity either from him or Zane.

179 *II. What is Stout to be charged with notice of, upon the doctrine of *lis pendens*? It must be of that which appeared in the cause that was pending; to wit, that Vause claimed as creditor, and had attached to satisfy that claim. And if Vause had turned out to be creditor, the purchaser would have been subordinate to his claim. For the title which the purchaser gets is subject to such claim as the plaintiff has asserted against his vendor, provided a decree be rendered for the claim in that suit. But here no decree has been rendered for the claim asserted by Vause. If the suit had been proceeded in upon his bill, he could not have shewn that he was the creditor of Robinson, and his bill must have been dismissed with costs. It was error to permit Zane to be united with Vause, for the purpose of showing that Vause had not title, and that Zane had. The case of *Sorrell v. Carpenter*, cited on the other side, shews that the court ought to have refused leave to the plaintiff to amend his bill for any such purpose. At all events the claim must be regarded as a new claim of Zane, not asserted until the amended bill was filed. And the case of *French v. Loyal Company*, 5 Leigh 627, shews that the doctrine of *lis pendens* is confined to one who purchases, from a party to the suit, a right which the plaintiff has asserted in his bill, and which is successfully prosecuted by him in that suit. Here the purchase by Stout cannot be considered as made pending the suit of Zane. Moreover, at the time Zane commenced his proceedings, Robinson could not have been proceeded against as an absent debtor; and the amended bill alleges no facts to shew that he was liable then to be proceeded against as such. The doctrine of *lis pendens* has in truth nothing to do with the case. It rests upon the foreign attachment law, under which the creditor suing out the attachment, and claiming a lien by it, must shew himself to be a creditor. A plaintiff who has attached for £100.

180 would not be allowed to amend *his bill and make his case an attachment for £1000. to the prejudice of an intervening purchaser; surely not, if, at the time of the amendment, no new attachment could be commenced.

STANARD, J. The first question to be solved in this case is, does the record shew any valid claim in any one subject to the defendants, seven of the sureties of Isaac Heiskell in the bill discounted at bank, to contribution for the payment made (on the

default of the principal) to taken up that bill? This depends on the enquiry, whether the bill was taken up by a surety under circumstances to authorize the sureties against whom the claim of contribution is preferred, to make the payment subservient to their indemnity, in exoneration of the duty to contribute; or under circumstances to leave them subject to that duty. If the obligation of suretyship, by virtue of which the payment was made, be not, in its substance and nature, that of one of several original sureties, then, according to the circumstances under which the obligation may have been incurred, the original sureties may be exempt from the duty of contribution altogether, and the new surety, on the other hand, be liable to indemnify them; or they may be bound to make full indemnity to such new surety paying the debt. Thus if the creditor, in the pursuit of his remedy against the principal debtor, obtains an additional security, as bail on the writ, or surety in the forthcoming or prison bounds bond, and such bail or surety pays the debt, he has no claim to contribution against the original sureties, and those sureties have the right, if they pay, to enforce his obligation for their indemnity. Examples of the application of this principle are furnished by the cases of *Parsons v. Briddock*, 2 Vern. 608, and *Givens & al. v. Nelson's ex'or & al.*, 10 Leigh 382, and many others that might be cited. If, on the contrary, the case be that of a creditor who, having the obligation

181 *of the principal debtor and sureties, and desiring additional security, obtains the undertaking of a third party to pay the debt if the obligors do not, the discharge of the debt by this third party, under the obligation of this undertaking, entitles him to full indemnity from the sureties in the original obligation. If the suretyship be substantially and in its nature that of one of several original sureties, on the payment under its obligation, the duty of contribution attaches to the other sureties. Was the payment in this case made by a party whose obligation was of this nature?

Coupled with the facts agreed by the parties, the following are shewn by the record. Before the application of Heiskell to Zane, he and the seven sureties (defendants) had made their single bill payable to the Northwestern bank. This bill he proposed to discount at the bank, for which purpose it was necessary that he should have an "endorser" (that is, a surety in the bill) living in Wheeling: and accordingly, under the arrangement made with Zane, Vause became a cosurety.

The rights and obligations of the parties depend on the facts so agreed and shewn. It is contended by the appellant that the just conclusion from them is, that Zane undertook to pay the money for Heiskell if he failed, that is, to assume the obligation of Heiskell on his failure, and by performing for him, to relieve and save harmless the surety Vause; and that such obligation,

or at least the performance of it, ensured to the benefit of all the sureties. It seems to me that this conclusion does not result from the facts, and is manifestly at war with any intention that can be rationally ascribed to Zane or Vause, the parties to the arrangement from which the conclusion is deduced. All that was asked of Zane was to become one of eight sureties. All that he was willing or intended to do was to incur such responsibility. This being most manifest, if not uncontested, the arrangement with Vause was but a substitution

182 *of Vause's responsibility for that which Zane was willing to incur, and as between Zane and Vause, made Zane liable for that suretyship which to the bank and the cosureties had been incurred by Vause. As between these parties, it was a suretyship of Zane in the name of Vause. The conclusion which converts the intended responsibility of Zane, from that of one of eight sureties, into one of indemnity to all the sureties for the whole debt, is drawn from a technical or rather a literal adherence to the terms in which the arrangement between Vause and Zane is stated in the agreed facts. That written statement should be expounded in reference to the ascertained intent and object of the parties to it, and the occasion that caused it. Vause had no possible motive to obtain from Zane an engagement that would enure to the indemnity of the other sureties, and Zane clearly did not intend to make such a one; and a construction of the terms of the arrangement deducing an engagement which the one did not seek, and the other neither intended nor was even asked to incur, is, in my estimation, hostile to the clearest principles of justice and of law. For this construction there is no colour, unless the letter of that part of the agreed facts which professes to state the engagement of Zane to Vause, be insulated from the considerations that led to it, and then interpreted without regard to its object and the intent of the parties. The engagement so extracted from the statement of facts is the assurance of Zane to Vause, when he became endorser (or cosurety), "that if Heiskell did not pay off the note when it arrived at maturity, he Zane would pay it off for him." Detached from the circumstances which led to the assurance, and from the position of the parties, such an engagement might justly involve the responsibility which the argument of the appellant has ascribed to it. Had Vause been one of many sureties to an existing obligation of Heiskell, seeking indemnity from his principal, and had

183 *Heiskell given the indemnity, either by a lien on property, or in such an engagement of a third person, the indemnity in either form, certainly in the first, might enure to the benefit of all the sureties. But such is not the case in question. Adhering to the letter of the extracted engagement, it is argued that Zane engaged to pay the note for Heiskell. But how pay it? as the substitute of Heiskell? or in place

of Vause? It is the one or the other, according to the intent and object of the parties Zane and Vause. Had Zane not procured Vause to be the surety, and made no engagement with him, then, on the default of Heiskell, Vause would have been bound to pay the note; and if he paid it, he would pay for Heiskell, and such payment would subject the other sureties to the duty of contribution. Vause was the surety substituted for Zane, with the engagement of Zane to discharge the obligation Vause had incurred at his instance. The stipulation to pay for Heiskell cannot be interpreted so as to place Zane in the position of Heiskell the principal, with his obligations. According to the just interpretation, Zane stipulated to pay for Heiskell as Vause had bound himself to pay for Heiskell, that is, as one of eight sureties; and the payment made in pursuance of that engagement, by necessary intentment, would be in discharge of the obligation that Vause had assumed for him. The payment was the fruit of the obligation of one of eight sureties (all bound in the same obligation), and being made under an engagement which cast on the person making it the duty of one of eight sureties, has thereby imparted to it the quality of a payment, by one surety in discharge of the obligation of all; and the duty of contribution from those who did not pay, is its legal and equitable offspring.

The seven sureties defendants, then, were liable to the claim for contribution for the payment made in discharge of the bill, and this suit was brought to enforce that liability. It was brought in the name 184 of Vause, *and was resisted on the ground that the payment was not made by Vause. Subsequently, Zane was united in the suit as a coplaintiff; and having ascertained that the defendant sureties were liable to contribute, the difficulty in the way of a decree on that liability was removed, as it would certainly be enforced in the name of Vause or Zane.

But the material question in this case is, what is the effect of the *lis pendens*? or rather, what is the time to which it ought to relate? the liability of the land in the hands of the appellant as purchaser, depending on the date from which the *lis pendens* takes effect. If the suit can be supported in the name of Vause alone, then there was an effectual *lis pendens* before Stout purchased, and his title as purchaser is overreached. Zane became a coplaintiff long after the purchase of Stout: and if the claim to contribution could be asserted by and in the name of Zane only, then it is argued with great force, that the suit in the name of Vause was nugatory as a *lis pendens*, as no decree could be rendered in that suit.

That a suit could not be sustained in the name of Vause for Vause's benefit, I have no doubt. The beneficial interest in the claim for contribution was in Zane. It is only by regarding the suit in the name of Vause as one brought for Zane's benefit,

that title can be shewn to a decree in that suit. Could the suit be brought for Zane in the name of Vause, and was it so brought? My first impression was very strong in favour of a negative answer to the first branch of this enquiry. The general rule of the court of equity requires the person having the beneficial interest to be a party, and, if the recovery of that interest be sought, a party plaintiff asserting that right, and asking a decree to enforce it: and unless he be such party, the rule forbids a decree in respect to such interest. There were views of this case presented in the conference with one of my brethren,

and in the course of my own reflections on it, that weakened this *first 185 impression, and furnished at least plausible reasons to extricate the case from the operation of the general rule. But the first impression has not been removed, and I conclude that Zane was a necessary party plaintiff; and if so, there was no *lis pendens* in respect to the only party interested in its operation, until he became a coplaintiff. I adopt this conclusion with the less hesitation in this case, because, had I reached a different one, a difficulty in sustaining the suit in the name of Vause would still be presented by the second branch of the enquiry, to wit, was the suit in the name of Vause so brought by Zane for his benefit? The accession of Zane to the suit as a coplaintiff, long after Stout had been admitted a defendant, and had resisted the claim in the name of Vause, and claimed protections as a purchaser for value, is the only ground for the implication that the suit in the name of Vause was instituted by Zane for his benefit. The propriety of an implication having so large an effect on the interest of the parties, is at least most doubtful.

On the whole, I am of opinion that the decrees in this case, so far as they subjected the sureties to contribution, and required the defendant Robinson to contribute in respect to the insolvent sureties, are right; but that the same are erroneous so far as they charged the land in the hands of the appellant (who purchased it before there was a claim asserted by a party entitled to a decree, and consequently before there was an effectual *lis pendens*) with the amount decreed to be paid by Robinson; and that the bill, as to Stout the purchaser, ought to have been dismissed.

CABELL, P., held, not only that the proceedings created no lien upon the land in the hands of the purchaser, but also that Zane had no right to contribution. He was of opinion that the decree should be reversed and the bills dismissed in toto.

But

186 *BROOKE, J., concurring with Stanard, J., the decree of the court of appeals declared, that the decree of the court below, so far as it subjects the land claimed by the appellant to the amount decreed to be paid by Robinson to Vause and Zane, be reversed and annulled; that the bills of Vause and Vause & Zane be dismissed as to

the appellant; that the appellant recover his costs expended, as well in his defence in the court below, as in the prosecution of his appeal here; and that, in all other respects, the decree of the court below be affirmed.

LIS PENDENS.

- I. Statement of Rule.
- II. Necessity of Rule.
- III. Foundation of Rule.
- IV. Statutory Modifications of Rule.
- V. General Nature and Effect.
- VI. To What Proceedings Applicable.
- VII. Of What Lis Pendens Is Notice.
- VIII. Persons Affected.
- IX. Property Subject to Lien.

I. STATEMENT OF RULE.

One who purchases from a party to a pending suit, the subject thereof, is held bound by the decree that may be made against the party from whom he derives title. The litigating parties are exempt from taking any notice of the title so acquired, and such purchaser need not be made a party. This rule, however, is modified to a considerable extent in some cases by the statutes in relation to the recordation of the *lis pendens*. *Zane v. Fink*, 18 W. Va. 693; *Sharitz v. Moyers*, 99 Va. 526, 30 S. E. Rep. 166. See *post*, "Statutory Modifications of Rule."

II. NECESSITY OF RULE.

The rule as to the effect of a *lis pendens* is founded upon the necessity of such a rule to give effect to the proceedings of the courts of justice. Without it, the administration of justice might in all cases be frustrated by successive alienations of the property, which is the subject of the litigation, pending the suit, so that every judgment and decree would be rendered abortive where the recovery of specific property was the object. *Newman v. Chapman*, 2 Rand. 93, 14 Am. Dec. 786; *French v. Loyal Co.*, 5 Leigh 627; *Stone v. Tyree*, 30 W. Va. 687, 5 S. E. Rep. 878; *Price v. Thrash*, 30 Gratt. 515; *Sharitz v. Moyers*, 99 Va. 519, 30 S. E. Rep. 166; *White v. Perry*, 14 W. Va. 66; *O'Connor v. O'Connor*, 45 W. Va. 354, 32 S. E. Rep. 276.

III. FOUNDATION OF RULE.

It has been said that the rule of *lis pendens* proceeds upon the theory that the purchaser is presumed to have notice of the pending suit. But in a leading case upon this subject this view was repudiated, the court saying that the rule was founded upon necessity and public policy. "This necessity," said the court, "is so obvious that there is no occasion to resort to the presumption that the purchaser really had, or by enquiry might have had, notice of the pendency of the suit to justify the existence of the rule. In fact, it applies in cases in which there is a physical impossibility that the purchaser could know, with any possible diligence on his part, of the existence of the suit." *Newman v. Chapman*, 2 Rand. 93, 14 Am. Dec. 786. And this view has been approved in numerous cases. *French v. Loyal Co.*, 5 Leigh 627; *Sharitz v. Moyers*, 99 Va. 519, 30 S. E. Rep. 166; *White v. Perry*, 14 W. Va. 66; *Stone v. Tyree*, 30 W. Va. 687, 5 S. E. Rep. 878; *Price v. Thrash*, 30 Gratt. 515; *Stout v. Philippi, et al.*, 41 W. Va. 339, 23 S. E. Rep. 571, 56 Am. St. Rep. 843, and extensive *note*.

IV. STATUTORY MODIFICATIONS OF RULE.

General Scope of Statutes.—The common-law rule of *lis pendens* is that a *pendente lite* purchaser from a party to the suit, of the subject-matter thereof, takes it subject to any decree rendered against his vendor in that suit. Because of the harsh operation of this rule upon *bona fide* purchasers, statutes have been enacted in most of the states with a view to protect purchasers who purchase in good faith. These statutes, which have been enacted in Virginia and West Virginia, provide, in substance, that the lien of the *lis pendens* shall not bind or affect a purchaser of real estate without notice unless a memorandum setting forth the title of the cause, the court in which it is pending, the general object of the suit, the location and quantity of the land, and the name of the person whose estate is intended to be affected, is filed with the clerk of the county court of the county in which the land is situated. §13, ch. 139, W. Va. Code; § 3566, Va. Code; *Hurn v. Keller*, 79 Va. 415; *Easley v. Barksdale*, 75 Va. 280; *Osborn v. Glasscock*, 30 W. Va. 749, 20 S. E. Rep. 702; *Harmon v. Byram*, 11 W. Va. 511; *Beckwith v. Thompson*, 18 W. Va. 103; *Cammack v. Soran*, 30 Gratt. 292; *DeCamp v. Carnahan*, 26 W. Va. 839.

Statutes Are Mandatory.—Where the *lis pendens* is not docketed as provided by these statutes, it is well settled that a purchaser without notice of the pendency of the suit takes a good title. *DeCamp v. Carnahan*, 26 W. Va. 839; *Cammack v. Soran*, 30 Gratt. 292; *Easley v. Barksdale*, 75 Va. 274; *Beckwith v. Thompson*, 18 W. Va. 103.

Statutes Inapplicable in Certain Cases.—Notwithstanding these statutes, the doctrine of notice arising from the mere pendency of the suit to recover specific property, real or personal, is still the law of the state of West Virginia. The statute of that state requiring the recording of a *lis pendens* applies only to suits to charge real estate with debt, not to suits to recover it. *O'Connor v. O'Connor*, 45 W. Va. 354, 32 S. E. Rep. 276. It applies neither to suits to recover nor suits to charge personalty. *Osborn v. Glasscock*, 30 W. Va. 749, 20 S. E. Rep. 702; *Bowlby v. De Witt*, 47 W. Va. 323, 34 S. E. Rep. 919; *Harmon v. Byram*, 11 W. Va. 511.

So where judgments are docketed or deeds of trust recorded, or liens otherwise acquired, and a chancery suit to enforce the same is pending, there need be no notice of the pending of such suit, under § 13, ch. 139, W. Va. Code, to bind purchasers purchasing after the docketing of such judgment or recordation of such deeds of trust or other lien, as they are *pendente lite* purchasers under the common-law rule. *Shumate v. Crockett*, 43 W. Va. 491, 27 S. E. Rep. 240. See also, *O'Connor v. O'Connor*, 45 W. Va. 354, 32 S. E. Rep. 276.

Lis Pendens of Petitioning Creditor in a Suit to Set Aside Fraudulent Conveyance.—A creditor at large who successfully sues to set aside a deed conveying property in fraud of creditors, has a lien on the property from the time the suit is brought; and a petitioning creditor, who comes into the suit, has a like lien from the filing of his petition, but, as against creditors with or without notice, and purchasers for value without notice, he has a lien only from the time of filing his memorandum of *lis pendens*. § 2460, Code 1887; *Davis v. Bonney*, 89 Va. 755, 17 S. E. Rep. 229. See also, *Richardson v. Ralphsnyder*, 40 W. Va. 15, 20 S. E. Rep. 854.

The lien thus conferred is only upon the property conveyed, and not, like the lien of a judgment, on

all of the debtor's estate. *Davis v. Bonney*, 89 Va. 75, 17 S. E. Rep. 229.

V. GENERAL NATURE AND EFFECT.

Commencement of Lien.—At common law the lien of a *lis pendens* commenced on the day that the writ bore *teste*, while in chancery it did not exist until the subpoena was actually served. *Newman v. Chapman*, 2 Rand. 93, 14 Am. Dec. 766; *Lyne v. Jackson*, 1 Rand. 114.

Where the bill is not filed at the date of the issuance of the subpoena the lien of the *lis pendens* commences at the time the subpoena is served, though the bill is not filed until some time thereafter. The filing of the bill relates back to the date of the service of the writ, but not to the date of its issuance. *Stone v. Tyree*, 30 W. Va. 687, 5 S. E. Rep. 878; *Harmon v. Byram*, 11 W. Va. 511. Hence where a person purchases after the service of the summons, but before the bill is filed, he is a *pendente lite* purchaser. *Harmon v. Byram*, 11 W. Va. 511.

Purchaser Pendente Lite Is Treated as if He Never Purchased.—Although the maxim is *pendente lite nil innovetur*, that maxim is not to be understood as warranting the conclusion that the conveyance so made is absolutely null and void at all times and for all purposes. The true interpretation of the maxim is, that the conveyance does not vary the rights of the parties in that suit; and they are not bound to take notice of the title acquired under it, but with regard to them the title is to be taken, as if it had never existed. *Zane v. Fink*, 18 W. Va. 603.

Pendente Lite Purchaser Stands in His Vendor's Shoes.—For reasons of public policy, a *pendente lite* purchaser, within the absence of statute, is placed in the shoes of his vendor, and, upon becoming a party to the litigation, will be substituted to the possession and rights of his vendor. *Sharitz v. Moyers*, 99 Va. 519, 39 S. E. Rep. 166.

Pendente Lite Purchaser Does Not Hold Adversely to Party to Suit.—A *pendente lite* purchaser from a debtor, against whom a creditor is seeking to enforce a judgment by suit, does not hold adversely to the party seeking to enforce the lien, and will not be protected by the statute of limitations, by reason of open, exclusive, and notorious possession for the prescribed period. *Parker v. Clarkson*, 39 W. Va. 184, 19 S. E. Rep. 431; *Lynch v. Andrews*, 25 W. Va. 751.

VI. TO WHAT PROCEEDINGS APPLICABLE.

Common-Law and Chancery Proceedings.—It seems to be settled that the doctrine of *lis pendens* exists at law as well as in chancery. In one case upon this subject the court said: "It is not true, that this rule of *lis pendens* was unknown to the common law and was a rule applicable only in chancery causes. By the common law the *lis pendens* existed from the first moment of the day the writ issued and bore *teste*, and of necessity the courts of chancery adopted the general doctrine of *lis pendens* but relaxed in some degree the severity of the common-law rule, and held that no *lis pendens* existed until the service of the subpoena and bill filed." *White v. Perry*, 14 W. Va. 66; *Newman v. Chapman*, 2 Rand. 102; *Harmon v. Byram*, 11 W. Va. 511; *Smith v. Browne*, 9 Leigh 294.

Foreclosure Suit Where Mortgage Is Not Recorded.—Where a mortgage is not recorded, a subsequent purchaser, without actual notice, is not bound by the pendency of the foreclosure suit; the doctrine of *lis pendens* being inapplicable to such case. *Newman v. Chapman*, 2 Rand. 93, 14 Am. Dec. 766.

VII. OF WHAT LIS PENDENS IS NOTICE.

Facts Apparent from Record.—A purchaser having constructive or actual notice of a pending suit, can only be held chargeable with knowledge of the facts of which the record in the suit, as it existed at the time of his purchase, would have informed him. If these facts inform him that the vendor is committing a fraud in making the sale, he becomes a party to the fraud. But he cannot be charged with the knowledge of facts afterwards brought into the case. *Davis v. Christian*, 15 Gratt. 11; *Stout v. Philippi, etc., Co.*, 41 W. Va. 346, 23 S. E. Rep. 573.

Where the facts in the record tell a *pendente lite* purchaser that his vendor has committed a fraud, this rule applies so as to render such purchaser a party to that fraud. Hence, if he purchases under a deed of trust, pending a suit to set it aside for fraud, he becomes a participant in such fraud, so far as the complainants in that suit are concerned. *Stout v. Philippi, etc., Co.*, 41 W. Va. 339, 23 S. E. Rep. 571, 56 Am. St. Rep. 843.

VIII. PERSONS AFFECTED.

Pendente Lite Purchasers in General.—Every person purchasing *pendente lite* is treated as a purchaser with notice, and is subject to all the equities of the persons under whom he claims in priority, and it makes no difference whether the purchaser *pendente lite* be the claimant of a legal or equitable interest, or whether he be the assignee of the plaintiffs or defendants. *Harmon v. Byram*, 11 W. Va. 511; *Simpson v. Dugger*, 88 Va. 963, 14 S. E. Rep. 760; *Zane v. Fink*, 18 W. Va. 603; *Sharitz v. Moyers*, 99 Va. 526, 39 S. E. Rep. 166; *Osborn v. Glasscock*, 39 W. Va. 749, 20 S. E. Rep. 702; *Stout v. Philippi, etc., Co.*, 41 W. Va. 339, 23 S. E. Rep. 571, 56 Am. St. Rep. 843; *Goff v. McLain*, 48 W. Va. 445, 37 S. E. Rep. 566; *Wilfong v. Johnson*, 41 W. Va. 233, 23 S. E. Rep. 730; *Wick v. Dawson*, 48 W. Va. 469, 37 S. E. Rep. 639; *Lynch v. Andrews*, 25 W. Va. 751.

Pendente Lite Purchasers Need Not Be Made Parties.

—Generally, a purchaser *pendente lite* need not be made a party to the bill, nor need he be brought before the court. *Harmon v. Byram*, 11 W. Va. 511; *Lynch v. Andrews*, 25 W. Va. 751; *Stout v. Philippi, etc., Co.*, 41 W. Va. 339, 23 S. E. Rep. 571, 56 Am. St. Rep. 843; *Wick v. Dawson*, 48 W. Va. 469, 37 S. E. Rep. 639; *Wilfong v. Johnson*, 41 W. Va. 233, 23 S. E. Rep. 730.

Purchasers from Pendente Lite Purchaser.—In an early Virginia case, it was intimated that the doctrine of *lis pendens* applied only to purchasers from the parties to the suit, and that if one of such purchasers should in turn make another conveyance, that his vendee would not be bound by the rule, for the reason that he did not obtain his title *pendente lite* from a party to the suit. *French v. Loyal Co.*, 5 Leigh 627.

Where Purchaser Has Actual Notice.—In cases where the purchaser has actual notice of litigation, involving the title to the property purchased, his purchaser will be regarded as fraudulent. *Lynch v. Andrews*, 25 W. Va. 751.

Purchaser of Separate Estate Pending Suit to Subject It to Wife's Debts.—In a suit brought to subject the separate personal estate of a wife to the payment of her debts, until the plaintiff takes the property out of possession of the wife, or acquires a lien upon it in some of the modes recognized by law, the purchaser thereof, for value and without fraud, will not be liable to the plaintiff for the property so pur-

chased, whether he had or had not notice of the pendency of the suit at the time of his purchase. *Bruff v. Thompson*, 81 W. Va. 16, 6 S. E. Rep. 352. But see *Hughes v. Hamilton*, 19 W. Va. 366.

Purchasers Who Have Acquiesced.—A *pendente lite* purchaser, who waits seven years after obtaining a conveyance of land, before asking to be made a party to the suit, will not, after such delay, be permitted to be made a party to the suit in order that he may reopen questions settled therein, where, before the date of the conveyance to him, a report of the debts had been made by the commissioner and confirmed by the court, of which he had notice and in which he acquiesced, by applying a greater part of the purchase money to the payment of the debts. *Arnold v. Casner*, 22 W. Va. 444.

Purchasers of Land.—Where a party, who has notice of a pendency of a suit, to specifically enforce a contract for the exchange of land, purchases one of the tracts of land from one of the parties to the contract, he will be perpetually enjoined from obtaining any advantage of his deed, and will be decreed to convey the legal title to the party to whom it belongs. *Parrill v. McKinley*, 6 W. Va. 67.

Land charged with an annuity, having been sold, pending a suit to enforce the annuity, will be ordered sold to satisfy the arrears of the annuity without noticing the *pendente lite* purchasers. *Phillips v. Williams*, 5 Gratt. 260.

Assignee of Plaintiff's Entire Interest.—When the sole plaintiff voluntarily transfers or assigns his interest in the estate or property which is in controversy, the suit does not thereby abate, nor does it generally become so defective, that it cannot be further proceeded in without making such transferee a party to the suit, for the reason that such transferee is a *pendente lite* purchaser and bound by the decision of the court. *Zane v. Fink*, 18 W. Va. 608.

Parties in a Representative Capacity.—A commissioner, though a party as administrator of the debtor to a creditor's suit, having no knowledge of the object of the suit, who pays money to the heirs under an order of the court, is not affected by the *lis pendens* of the creditor's suit so as to be held liable to pay it over again to the creditor. *Carrington v. Didier*, 8 Gratt. 260.

IX. PROPERTY SUBJECT TO LIEN.

Property Must Be Directly Affected.—The doctrine of *lis pendens*, however necessary, is harsh in its effect upon *bona fide* purchasers, and has always been confined in its operation to the extent of the policy on which it was founded: that is to give full effect to the judgment or decree, which might be rendered in the suit pending at the time of the purchase and it therefore applies only to proceedings directly relating to the thing or property in question. *White v. Perry*, 14 W. Va. 66; *French v. Loyal Co.*, 5 Leigh 681; *Newman v. Chapman*, 2 Rand. 102; *O'Connor v. O'Connor*, 45 W. Va. 354, 22 S. E. Rep. 276.

The doctrine of *lis pendens* only applies where there is a suit to affect the property purchased, and can have no effect upon it unless a decree may be made in the suit to affect it, nor until such decree is made. *Davis v. Christian*, 15 Gratt. 11; *Smith v. Browne*, 9 Leigh 294.

Rents of Real Estate.—Purchasers of real estate, pending a suit, are liable for the rents thereof, if their purchase was made for the purpose of hindering, delaying, or defrauding creditors. *Stoß v.*

Phillippi, etc., Co., 41 W. Va. 339, 23 S. E. Rep. 571, 56 Am. St. Rep. 848.

In *Simpson v. Dugger*, 88 Va. 963, 14 S. E. Rep. 709, the vendee of property sold under a decree in a creditors' suit had notice of a suit setting up the claims of the debtor's children to the right of their deceased mother. Pending the suit the vendee sold the property to an insolvent, and the children being adjudged entitled to the property, were held also entitled to recover the rents from the vendee.

Skeen and Others v. Lynch and Others.

August, 1842, Lewisburg.

(Absent BROOKE and BALDWIN,* J.)

Dedication—Acts of Ownership by Owner—Effect—

Case of a town established on a river, by the plan of which there was an artificial line, leaving a strip of land between the lower range of lots and the river. An express dedication of the strip being claimed to have been made by the proprietor to the use of the citizens, and the proof of such dedication consisting of his declarations, the evidence of which was uncertain, the claim defeated by proving that subsequent acts of ownership, inconsistent with such claim, were exercised over the strip by the proprietor and his representatives, for a long period, and with the acquiescence of the citizens.

This was a bill in the circuit court of Alleghany county, by Hugh Lynch and others against Robert Skeen and others, asserting a right, common to the plaintiffs and the other inhabitants of the town of Covington, in a strip of ground along the margin of Jackson's river.

By an act of assembly passed the 22d of January 1818, a tract of 25 acres of 187 land near the mouth of *Dunlap's creek on the north side of Jackson's river, the property of dr. James Merry, was established as a town, as soon as the same should be laid off into lots with convenient streets. The land was accordingly surveyed

*He had been counsel for the appellees.

+Dedication—Streets—Acceptance—Presumption—Estoppel.—In Virginia there may be a valid acceptance of an easement in a town without any distinct act of recognition by the corporate authorities of such town. The mere user, however, by the public, of the *locus in quo* will not of itself constitute an acceptance without regard to the character of the use, and the circumstances and length of time under which it was claimed and enjoyed. Where property in a town is set apart for the public use and is enjoyed as such, and private and public rights acquired with reference to it and to its enjoyment, the law presumes such acceptance on the part of the public as will operate an estoppel *in pais*, and preclude the owner from revoking the dedication. *Harris v. Com.*, 20 Gratt. 840, citing *Skeen v. Lynch*, 1 Rob. 186, as substantially affirming the above doctrine.

Same—Same—Presumption—Acts of Ownership by Owner.—The principal case is cited in *City of Richmond v. Stokes*, 31 Gratt. 716, to the point that where streets and alleys have been opened by the owner of the soil, and used by the public, with his assent, as a

and laid off into lots, with streets; and by the plat which the surveyor made for the proprietor, the lower range of lots did not extend to the river, but there was an artificial line beyond which neither the lots nor the cross streets extended, and between that artificial line and the river, there was a narrow strip of land. A public sale was advertised in 1818, to be made of the lots; and at the time for the sale, the plat was exhibited. Persons declined bidding, the crier states, because they considered that if Dr. Merry retained the strip as private property, it would be a great injury to the inhabitants of the town, on account of the water. Many depositions were taken to prove what occurred at the sale: but they varied so much, that it seemed to the judge who delivered the opinion in the court of appeals, "difficult to determine what was the extent of the concession intended to be made to the inhabitants" in respect to the strip. The judge stated the following to be the tenor of those depositions: "According to some, Merry declared the strip was left open for the public, unless it should be used for a canal, millrace, or street. One witness proves that he intended it for a canal and public landings: another, that he intended it for a canal, if required; if not, for the benefit of the town. According to some, he wanted it for a canal and millrace, and, said if a millrace was conducted through it, the people should have free access to the river, and he would construct bridges over the race at the cross streets." After the declarations so made by the proprietor, the lots were sold by the plat. The

public thoroughfare for years, a dedication of the easement may be presumed, and the continued and uninterrupted use, with the knowledge and acquiescence of the owner will justify the presumption of a dedication to the public, provided the use has continued so long that private rights and the public convenience might be materially affected by an interruption of the enjoyment. But any acts of ownership by the owner of the soil will repel the presumption.

The principal case is cited in *foot-note* to City of Richmond v. Poe, 24 Gratt. 149.

Same—Obstruction—Encroachment.—The principal case is cited in Buntin v. Danville, 93 Va. 205, 24 S. E. Rep. 830, to the point that when dedication has become complete and irrevocable, no obstruction of the subject of the dedication, or encroachment upon it by the original owner of the soil, or by any one else will affect the dedication, or impair the right of the public to its benefits, unless the land so dedicated has been abandoned by the public, or by the proper authority. See *foot-note* to Harris v. Com., 30 Gratt. 823.

Same—How Made—Statute of Frauds.—The principal case is cited in Buntin v. Danville, 93 Va. 211, 24 S. E. Rep. 830, to the point that a dedication is not within the statute of frauds, and need not be by deed or other writing, but may be as effectually and validly done by verbal declarations.

Railroads in Streets—Rights of Lot Owners to Compensation.—See *foot-note* to Talbott v. The Richmond & Danville R. Co., 81 Gratt. 685. The principal case is cited in Spencer v. Railroad Co., 23 W. Va. 423.

proprietor continued afterwards in possession of the strip, except so much as was necessary to continue the cross streets to the river. He inclosed, "cultivated, and erected houses upon that portion of the strip between the lower end of the town and the first cross street, (this portion being one fourth of the length of the strip,) and he granted permission to certain persons to make brick on another portion between the first and second cross streets. During all the time between the sale and the death of the proprietor (a period of nine or ten years,) he exercised acts of ownership over the property, without any complaint on the part of the trustees of the town, or the citizens. After the death of the proprietor, to wit, in 1831, the strip (except the parts used in continuing the cross streets to the river) was offered at public sale by his representatives. No claim for the public was then set up by the trustees of the town, or the inhabitants. On the contrary, the representatives of the proprietor, at the earnest solicitation of some of the citizens, laid off an alley adjoining the rear of the lower range of lots, and with this arrangement all seemed satisfied. The residue was then sold without objection. During the succeeding year, this suit was brought; the plaintiffs owning each a lot binding on the strip, to which they derived title from the purchasers at the original sale; and the defendants being the executors of Merry, and the purchasers of the strip from those executors. By an agreement between the purchasers, they seem to have considered the streets across the strip as private ways; but those streets have remained open for the public use. No attempt to obstruct their use led to the filing of the bill. The only cause for it was the obstruction of the use of the residue of the strip.

The cause came on to be heard the 22d of September 1835, upon the bill, answers, exhibits, and examinations of witnesses. On consideration whereof, the circuit court decreed a perpetual injunction restraining the defendants and all others from obstructing, building upon, or enclosing the 189 strip, and also from wasting "and destroying the trees growing thereon, and required the said strip to be left open and free to the use of the plaintiffs, and proprietors of lots in the town of Covington, and the public generally, as a public easement, common passway, and outlet to the river. And the court further decreed that the defendants, within ninety days, remove from the said strip the enclosures, buildings and obstructions which were placed or erected thereon by James Merry in his lifetime, or by the defendants since; and that the plaintiffs recover their costs.

From this decree, on the petition of Skeen and the other defendants, an appeal was allowed.

G. N. Johnson, for appellants, argued, that the terms of sale of the lots could be gathered only from the written advertisement, and the plat of the town exhibited at:

the sale, from which it appeared that no part of the strip was intended to be sold: that the parol evidence of Merry's declarations at the time of the sale was inadmissible, both upon common law principles of evidence, and by the statute of frauds. *Starkie's Evid.* part 4, p. 996; 1 *Sugden on Vendors* 31, 132, 136, 143; *Jones v. Edney*, 3 Camp. 284. But if the parol evidence was admissible, he contended that it was vague, contradictory, and not worthy of respect; that so far as it tended to shew that Merry had parted with his property in the strip to the public or to the town, it was outweighed by the facts that for many years after the sale of the town lots, and as long as he lived, he cultivated, enclosed, and exercised other acts of ownership over the strip, without objection, and that no objection was made by any one at the time of the public sale of the ground in question by Merry's executors after his death. The true construction of the evidence was, that Merry, at the sale in 1818, promised the purchasers that their access to the

190 river should not be cut off, *while in other respects he reserved the absolute property in the strip to himself; and this promise had been fulfilled by leaving open an alley along the river range or lots, and by extending the cross streets of the town across the strip to the river.

John B. Baldwin, for the appellees, argued, that parol evidence was admissible to ascertain or explain the terms of the sale, and that the statute of frauds had no application; first, because here had been part performance; and secondly, because this was the case of a dedication of land to public use, which might well be by parol. For these propositions he cited 1 *Sugden on Vend.* 134; *Fife v. Clayton*, 13 Ves. 546; *Trueheart v. Price*, 2 Munf. 468; *Grantland v. Wight*, 2 Munf. 179; *Mayo v. Murchie*, 3 Munf. 358; *Wainwright v. Read*, 1 Desauss. 573; *Cannon's ex'or v. Mitchell*, 2 Desauss. 320; *City of Cincinnati v. lessee of White*, 6 Peters 431. He contended that the evidence sustained the allegation in the bill, of a dedication by dr. Merry of the whole strip to the public use.

G. N. Johnson, in reply, sought to distinguish this case from those cited on the other side; and in relation to the doctrine of parol dedication to public uses, he said, that to support such a dedication, it must be shewn that the uninterrupted possession and control of the property was surrendered by the owner and enjoyed by the public; which was not the case here, but on the contrary, dr. Merry continued to use and occupy the property as his own.

ALLEN, J. The plaintiffs do not allege, or attempt to prove, any special contract with the owners of the river range of lots for the easement claimed. If the easement was granted, it was for the benefit of the public generally. The objections, therefore, founded on the statute of frauds, do not, it seems to me, apply to the case. A grant or writing is not necessary to

191 *constitute a valid dedication of an easement to the public. Where streets and alleys have been opened by the owner, and used by the public, with his assent, as a public thoroughfare for years, a dedication of the easement may be presumed. *Jarvis v. Dean*, 3 Bing. 447; *Lade v. Shepherd*, 2 Strange 1004; *City of Cincinnati v. White*, 6 Peters 431. Nor is it essential, in the investigation of this case, to determine where the fee rests. In *Mayo v. Murchie*, 3 Munf. 358, the court decided that parol testimony was admissible, in aid of the inference deducible from the printed proposals, to establish an equitable title of the inhabitants of the town as tenants in common, and decreed a release to the trustees, for the use of the inhabitants, of the land dedicated. In the case of the *City of Cincinnati v. White*, 6 Peters 431, the court seemed to be of opinion that cases of this kind are exceptions to the general rule requiring a grantee, and that "there may be instances where the fee may remain in abeyance until there is a grantee capable of taking, where the object and purposes of the appropriation look to a future grantee in whom the fee is to vest. But" (continues the court) "the validity of the dedication does not depend on this; it will preclude the party making the appropriation from reasserting any right over the land, at all events so long as it remains in public use, although there never may arise a grantee capable of taking the fee." Nor is any particular form or ceremony necessary in the dedication of the land to public use. S. C. 440.

If, then, no deed or writing be essential to such an appropriation, and its validity do not depend upon the existence of a grantee, it remains to enquire whether the evidence in this record shews such an appropriation to the public, as precludes revocation by the original owner.

192 *On this point I have felt much difficulty. It may be collected from the whole testimony, that the proprietor did not intend to part with his entire interest in the strip of land in question. If a canal should be constructed, the right was reserved to permit it to pass through the strip; and in that event, as he would have reserved it for that purpose, he must have been regarded as the owner of the fee in respect to that subject, and entitled to compensation as such. He also, according to the greater part of the witnesses, reserved the right to conduct a millrace through it: and for this purpose it must have been regarded as private property. In either event, the easement to the public in this narrow strip would have been of little or no value, viewing it as a common. Perhaps the general terms used by witnesses speaking from memory at the distance of many years, can be best understood by a consideration of the circumstances attending the transaction. The use of this strip, except where the cross streets terminated, so as to continue them to the river, could be of little importance to the citizens of

the town. But free access to the river was essential to the comfort of all. By the plan of the town which was exhibited, the cross streets terminated at the line constituting the artificial boundary of the town on the north side. Bidders might well hesitate, who for the first time, on seeing the plat, discovered that they might at any moment be cut off from the water. Accordingly, the crier says that the strip was considered a great injury, on account of the water. One of the witnesses speaks of Merry's engagement to erect bridges at the cross streets, over any millrace he might conduct along the strip; another understood him to promise free access to the water. If the declarations of the proprietor are to be understood with reference to the free access to the water, they are rendered consistent with the privileges he certainly intended to retain in the 193 land; privileges which would be inconsistent with the unreserved appropriation of the subject to the public. And I should incline to the opinion that if the case rested here, this last would be the proper construction to be given to the testimony. But there are circumstances which it seems to me are decisive of this question, and remove the doubts which the parol testimony, if it stood alone, might create.

In the first place the plat of the town excluded the strip: the rear of the river range of lots was bounded by an artificial line. The case of *Barclay & Co. v. Howell's lessee*, 6 Peters 498, was a controversy respecting a strip of ground in the city of Pittsburg, along the Monongahela river. From the plan of the town it appeared that all the streets and alleys were distinctly marked by the surveyor, and their width laid down, except Water street, which lies along the river. No artificial boundary was laid down as the limit of this street: its northern boundary was given, but the space to the south was left open to the river. The court, commenting on this fact, said, "If a line had been drawn in the plat along the southern limit of this street, there would have been great force in the argument that the ground between such limit and the water was reserved by the proprietors. This would have been the legal consequence from such a survey, unless the contrary had been shewn." In the case under consideration, there was such artificial boundary; and the evidence leaves it doubtful to what extent the proprietor agreed to relinquish his right to the ground between it and the river.

In the second place, the proprietor continued in possession of the strip. One part of it was enclosed and cultivated by him, and houses were erected by him on it; on another part, he permitted persons to make brick. He lived nine or ten years after the sale, and during the whole period exercised acts of ownership over the property, without any complaint on the part of the trustees of the town, or the citizens. The use 194 of property by the public with the

assent of the owner, will, under particular circumstances, justify the presumption of a dedication to the public, provided the use has continued so long that private rights and the public convenience might be materially affected by an interruption of the enjoyment. But any acts of ownership would repel the presumption. Thus, in *Roberts v. Karr*, 1 Camp. 262, note, the placing of a bar across the street, to prevent the passage of carriages, was held to rebut the presumption of a dedication. In *Lethbridge v. Winter*, 1 Camp. 263, note, it appeared that a gate had recently been put up in a place where a gate formerly stood, but where for the last twelve years there had been none: this was held to destroy the presumption. The principle of these cases applies, it is true, to dedications presumed from the long acquiescence of the owner, and not to express dedications: but where, as in this case, the evidence of the express dedication is uncertain, such acts of ownership, exercised with the acquiescence of those interested to resist them, furnish persuasive evidence that the dedication was not understood, at the time, to be as extensive as some of the declarations now deposed to would imply. With the arrangement after the death of Dr. Merry, by which an alley was laid off adjoining the rear of the lower range of lots, all seemed satisfied, and the residue of the strip was then sold without objection. If the claim now set up was valid, then was the time to assert it. The citizens probably preferred securing a certain benefit, to the assertion of a questionable right. Whatever the claim was, it seems to me that it must, after these transactions, be considered as abandoned in respect to all the strip between the different cross streets. These streets, having been continued across the strip to the river, and being necessary to afford that free access to the water, which, under any view of the testimony, was assured to the citizens, have been dedicated to the 195 public. To the use of them they are clearly entitled, both from the express declaration of the proprietor at the time of the sale, and his subsequent assent to their enjoyment. It does not appear that any attempt has been made to obstruct the use of them. It is true, that by an agreement between the purchasers of the strip, they seem to consider these as private ways. But they have remained open for the public use. I think it would have been premature to institute proceedings to protect the public in the enjoyment of this easement, until some act of disturbance was shewn. I therefore think the court should have dismissed the bill, without prejudice to the right of the plaintiffs, and other citizens of the town, to the use of the cross streets as extended through the slip of ground in question to the river, in the event of any attempt hereafter to disturb them in the enjoyment thereof; and, under all the circumstances, without costs.

The other judges concurring, a decree was

entered reversing the decree of the circuit court with costs, and dismissing the bill, without costs in the court below, and without prejudice, as declared in the foregoing opinion.

196 *Garrett Ex'or of Allen v. Carr and Wife and Another.

August, 1842, Lewisburg.

(Absent STANARD and BALDWIN, J.)*

Guardian and Ward—Guardian's Account.—The decree of this court at the time the decision reported in 8 Leigh 407, having remanded this cause with directions that the account of the land fund and the hire of the slaves should be stated as a guardian's account, question now whether those directions have been complied with.

Same—Same—Construction of Statute.—Construction of the 7th section of the act in 1 R. C. 1819, p. 407, concerning guardians, which requires every guardian to exhibit to the court which appointed him, once in every year, "accounts of the produce of the estate, of the sales and disposition of such produce, and of the disbursements;" and of the 9th section, which provides that the balance appearing against the guardian "may be put out to interest for the benefit of the ward, upon such security as the court shall direct and approve; or the guardian, if it remain in his hands, shall account for the interest, to be computed from the time his account was or ought to have been passed."

Same—Same—Interest—Balance.†—If, upon the first settlement by the guardian of his account, a bal-

*They had been counsel for the appellees.

†**Guardian and Ward—Death of Guardian—Interest—Balances.**—It was held in McKay v. McKay, 33 W. Va. 737, 11 S. E. Rep. 218, citing the principal case, that when a guardianship terminates by the death of the guardian, simple interest only, and not compound, should be charged from the death of the guardian on the balance found due from him at his death. See *foot-note* to Cunningham v. Cunningham, 4 Gratt. 48; Crigler v. Alexander, 33 Gratt. 674. See monographic *note* on "Guardian and Ward" appended to Barnum v. Frost, 17 Gratt. 398, and monographic *note* on "Interest" appended to Fred v. Dixon, 27 Gratt. 541.

Executors—Annual Balances—Interest.—Where a testator directs his executor to manage his farms and distribute the profits among his grandchildren when of age, the executor should not be charged with compound, but only with simple interest upon the yearly balances left over in his hands, unless the testator directed that those balances should be invested in interest-bearing securities. Lovett v. Thomas, 81 Va. 258, distinguishing in this respect Garrett v. Carr, 1 Rob. 196, because in that case the testator directed that his lands be sold and the proceeds invested in stock of the Bank of Virginia, or in other property as the executors might think advantageous to his children.

Same—Same—Same—Committees of Insane Persons.—In Crigler v. Alexander, 33 Gratt. 675, the court said: "The next question is, whether in stating and settling the accounts of the intestate as committee, he is to be charged with compound interest upon the balance in his hands. It is insisted this ought to be done, by analogy to the rule governing in the

ance remain in his hands on which he is to account for interest, such interest must, in his second annual account, be credited to the ward, like other profits of the estate; and if the interest and other profits credited in this second account exceed the disbursements, the surplus, whether it arise from the interest aforesaid or from other profits, will constitute a balance against the guardian on which, if it remain in his hands, he must account for interest, which interest must, in the third annual account, be credited to the ward; and so on, *toties quoties*.

Same—Same—Same—Rents and Hires.—The case of a guardian indebted to his ward for the annual value of land occupied, and of a slave possessed by him, forms an exception to the general rule that interest is not to be allowed on estimated rents and hires. Such annual value must, in the annual account exhibited by the guardian, be credited to his ward, and the surplus beyond the disbursements will bear interest, like other profits of the estate.

197 *Same—Same—Same—No Account Returned—Effect.—Where a guardian has returned no account to the court which appointed him, and a bill in equity is filed against him, the court of equity will charge him with interest from the time and in the manner that he would have been charged, if his account had been exhibited annually to the court which appointed him; and will settle the accounts, in other respects, upon the principles that would have governed the settlements, if regular returns had been made to that court.

Same—Same—Termination of Relation—How Account Stated.—From the time that the guardianship ter-

mination of guardians' accounts. It is sufficient to say, that the liability of guardians for compound interest grows out of the peculiar provisions of our statutes on that subject. See Code 1873, § 10, ch. 124, and Garrett v. Carr, 1 Rob. 196.

"These provisions have never been considered as applying to other trustees.

"The accounts of the committee of an insane person are to be settled upon principles governing in the settlement of accounts of other fiduciaries having the control of trust funds. They are not chargeable with compound interest, except under very peculiar circumstances. Where there is an express trust for accumulating, and the trustee, instead of investing, retains the funds in his own hands, or where he employs the money in his own business, and refuses to account for the profits, he may be charged with compound interest as a punishment, or as a measure of damages for undiscovered profits. See 1 Perry on Trusts, § 470-474; Barney v. Saunders, 16 How. U. S. R. 535; Hill on Trustees, 571, *note*.

"Much of the reasoning of JUDGE ALLEN in Garrett v. Carr (1 Rob. 196), will apply as well to committees of insane persons as to guardians, and would seem to indicate that in some instances all classes of trustees, except executors and administrators, may be chargeable with compound interest, even upon a mere failure to invest. See page 215.

"All that can be said therefore is, that no inflexible rule can be laid down on the subject which would apply to all cases. Generally, however, it is conceded that a trustee and other fiduciaries, except a guardian, are liable for simple interest only. This doctrine seems to be settled by a great variety

minates, the account between the guardian and ward will be stated upon the ordinary principle that prevails between debtor and creditor. Sums paid after that time by the guardian to the ward will be credited at the respective dates of such payments, so as to stop interest pro tanto from those dates.

By the decree of the court of appeals in this cause, entered at the time of the decision thereof reported in 3 Leigh 407, the cause was remanded to the circuit court of Augusta, with instructions to reinstate the original bill as to all the matters thereof, and to refer the accounts to a commissioner of the court, to be reformed and restated; which commissioner was to be directed to keep the accounts of the personal estate distinct from the account of the land fund and the hire of the slaves; stating and treating the former upon the principles established by the court as to administration accounts, and the latter as a guardian's account, in which the expenses of the ward were to be defrayed out of the annual interest of the fund and hires of the slaves.

A copy of this decree being produced to the circuit court of Augusta on the 4th day

of June 1832, that court, in conformity therewith, reinstated the original bill, and referred the accounts to a commissioner, to be reformed and restated as thereby directed.

Under this order, a report was made by commissioner Francis B. Dyer. The commissioner reported, that he had proceeded to separate the accounts of the executor, according to the decree; carrying into one the proceeds of the personal estate, and continuing it on the usual principal of an administration account; and carrying 198 *into the other account the hires of the slaves and the interest of the money for which the land was sold, treating the subject as if the said hires and interest were punctually paid at the end of every year; and, after deducting the whole expenses of the two wards for each current year out of that fund, carrying the excess or balance into the principal, and charging interest on it accordingly. The commissioner stated, that this seemed to him to be after the fashion of compound interest; but he considered that he was required to state the accounts in this way, by the opinion of the court of appeals, a copy of which had been furnished him.

Although the commissioner reported that he treated the subject as if the hires and interest were punctually paid at the end of every year, yet the account which he stated shews, that credits for hires were not carried into the account of the year for which they accrued, but of the year in which they were received, and that interest was not computed on the same until the end of the year in which they were received. Thus, under the date of January 21st 1818, Alexander Garrett, one of the executors, is charged "part hire Lucy 1817," \$20.50. This forms part of a balance of \$2671.85½ which was due the estate on the 31st of December 1818, and on which a year's interest is charged as due the 31st of December 1819.

The defendant Garrett, in his own right, excepted to the report:

1. Because, in stating the account as to the land fund and hires of slaves, the commissioner had charged him with compound interest, which the said defendant insisted was not warranted by the decree of the court of appeals; that decree not requiring (as he contended) that the surplus interest should be converted into principal, and made to carry interest.

2. Because, if interest is to be charged on interest in arrear, as if it had been so much money actually received, 199 *then it should be treated as money received from another debtor, and a reasonable time should be allowed for its collection and reimbursement, so that it should never be carried into the account of the year for which it is due, but should be carried into the account of the succeeding year.

3. For not giving the defendant credit for the payments made to the legatees after they came of age, at the respective dates of

of authorities, both English and American. 1 Perry on Trusts, § 470-474; Barney v. Saunders, 16 How. U. S. R. 535; Hill on Trustees 571, *note*."

The principal case is cited for these propositions in Knight v. Watts, 26 W. Va. 218, 219; Lovett v. Thomas, 81 Va. 259.

Same—Rule Where Beneficiaries Are Minors—Accumulation Ruling Intention—Compound Interest.—In Strother v. Hull, 23 Gratt. 662, the court said: "There can be no doubt, as a general rule, that executors and administrators are not to be charged with compound interest; but it is as well established that this general rule will be modified when required by the nature of the trust or the express terms of the will. When the beneficiaries are minors, and accumulation for their benefit is the ruling intention of the will, compound interest will be charged, whether the fiduciary be an executor or guardian. He will be treated as having done what it was his duty to do, and his accounts will be settled as a guardian's accounts. *Garrett v. Carr*, 1 Rob. 196; same case 3 Leigh 407. * * * We think there is no material difference between the will in this case, and that in case of *Garrett v. Carr*; that under each alike, it was the duty of the executors to improve the estate; accumulation for the benefit of minors being the 'governing intention of the will.'"

Infants—Debts of—Liability of Real Estate.—In Gayle v. Hayes, 79 Va. 548, the court said: "The third section, ch. 127, Code 1873, relied on by appellant, has been, in one form or another, the law since March, 1862, and it was intended to make real estate legal assets for the payment of all debts. Before that time it was only bound for the payment of specialty debts. When it was enacted, and long afterwards, till 19th March, 1873, the real estate of infants was not liable to the payment of any charges of his guardian, or quasi guardian, for his maintenance or education. 1 Minor's Inst. 443; *Garrett v. Carr*, 1 Rob. 209; Jackson v. Jackson, 1 Gratt. 150." See *foot-note* to Jackson v. Jackson, 1 Gratt. 148.

such payments, so as to stop interest on the sums so paid from those dates.

4. For carrying the credits for hire of slaves into the account of the year for which they accrued.

The said defendant Garrett, as executor of Dabney Minor, made exceptions similar to those made by him in his own right.

Before the decision of the court of appeals, a supplemental bill had been filed, which is mentioned in 3 Leigh 411, but the matter thereof is not there stated. It was as follows:

David Yancey of Louisa county, by his will, made the following devise and bequest: "I give to the brothers and sisters of my beloved wife, and to the children of those who are dead, to be divided in the same manner as if my said wife had died unmarried and intestate, all that part of my estate now coming to me in right of my beloved wife, from the executors of her father James Minor. I also give them, to be divided in the same way, my negro man Bartlett, the money due me from Dabney Minor by bond for the purchase of negroes which I got by my wife," &c. This will was duly admitted to record. The complainants Mary and James were children of a sister of the testator's wife, and their mother had died before the testator. They were therefore legatees under the said will; and one object of the supplemental bill was to recover what they were entitled to under the same. Another object of the supplemental bill was to assert the rights of the complainants as heirs of Mrs. Yancey.

200 *The supplemental bill set forth, that James Minor died seized of valuable real estate, to one seventh part whereof Mrs. Yancey became entitled at the death of the widow of James Minor; and Mrs. Yancey having died without children, the complainants became entitled to one sixth part of her share: that Dabney Minor, Garrett Minor and Launcelot Minor are the executors of James Minor: that from the time of Mrs. Yancey's death, Dabney Minor has had in possession her part of the said real estate (called lot no. 2), and has had in cultivation a large proportion of the same; and that the rents of the same would, the complainants believe, amount to a considerable sum, if properly estimated. Dabney Minor, in his own right and as executor of Richard H. Allen, and Dabney Minor and Launcelot Minor the surviving executors of James Minor, were made defendants.

Dabney Minor, by his answer, admitted that James Minor and his widow Mary left seven children, of whom Mrs. Allen was one, and Mrs. Yancey another. He stated, that upon a bill in chancery by Yancey and wife in the county court of Albemarle, a division was made of the real and personal estates of James and Mary Minor, and the proportion of Yancey and wife was allotted to them: that afterwards he purchased of Yancey, at the prices fixed on them by the commissioners, all the slaves except Bartlett (Yancey having removed him to

Louisa): that it was also agreed he should take of said Yancey, at the price fixed by the said commissioners, the lot no. 2, (160 acres of land), he Minor owning most of the other lots; but before any conveyance of the same was made, Mrs. Yancey died without issue, and Yancey admitted he had only a life estate in the land, and could not make a conveyance of the same to him Minor: that after the death of Yancey, he proposed to all of those interested, except the complainants, who were infants, to take the boy Bartlett and the lot of land,

201 at the valuation fixed by the commissioners, and interest on the same, to which they readily agreed, and he had accounted with the respective parties interested for the same, crediting the estate of Richard H. Allen on account thereof; and that the balance appearing due on that account had been paid, without any dissatisfaction on their part in relation to this matter, till the filing of the supplemental bill: notwithstanding all which, the defendant is willing that the land and negro Bartlett be divided, and the part of each of the complainants allotted them respectively; they refunding him the money paid them for the same, with interest, and compensating him for his improvements on the land.

Under an order made upon the supplemental bill, commissioner Dyer took an account of the rents and profits of the lot no. 2, and of the slave Bartlett. Various witnesses being examined before the commissioner as to the annual value of the lot and slave, he took the average of their estimates, and put the annual value of the lot at 60 dollars 36 cents, and of the slave at 56 dollars 50 cents. He charged interest on the annual value of the lot and slave, from the end of the year from which the estimate was made, to the first day of July 1834, the day to which his account was made up. And after making such charges as seemed to the commissioner proper because of the credits previously given by Minor on account of the lot and slave, one sixth of the balance was reported by the commissioner to be due the plaintiffs.

In the court below, the original bill and the supplemental bill were treated as two causes. On the 21st of November 1834, they came on to be heard together. In the first suit, the court, sustaining the defendant's exceptions, recommitted the report to the commissioner, to reform and restate the same according to the decree of the court of appeals as understood by the circuit court, to wit: keeping the accounts of the personal estate distinct from the land and hire fund, and stating "it upon the principles applicable to administration accounts; and stating the land and hire fund upon the principles of a guardian's account, in which the disbursements for the expenses of the wards are to be defrayed out of the annual interest of the fund and hires of the slaves, taking care not to carry the surplus of interest to the principal, so as to subject the guardian to compound

interest, as had been done by the commissioner incorrectly (the court thought) in his statement of that fund. In the second suit, the court also recommitted the report to the commissioner, to reconsider the same, and make two special statements according to the pretensions of both parties.

The account which was to be stated upon the principle of an administration account, having been pronounced by the circuit court, at the time of its decree of the 21st of November 1834, to be correctly stated, the commissioner did not, after that decree, make any change in that account. The other account in the first suit, to wit, of the land fund and hire of slaves, the commissioner proceeded to state upon the principles directed by the circuit court, in accordance with its interpretation of the decision of the court of appeals. In the second suit, special statements were made as directed.

The causes came on to be heard the 26th of November 1836, upon the report of the commissioner, and exceptions by Garrett, as executor of Minor, to so much thereof as related to the accounts in the first suit. Whereupon the court, sustaining the first and second of those exceptions, whereby the balance reported against Minor's executor in the first suit was reduced to the sum of 20 dollars 48½ cents as of the 9th of April 1822, decreed against Minor's executor that balance, with interest from the said 9th of April 1822: and there being no exception in the first suit to the account of Garrett in his own right and as executor of Allen, the court decreed against him the balance of 319 dollars 93 cents

203 *appearing due thereby, with interest on 229 dollars 69 cents, part thereof, from the 31st of December 1824. In the second suit, the court pronounced the opinion that the plaintiffs had never been divested of their right to one sixth of the lot of land and one sixth of the slave Bartlett, and were therefore entitled to a due proportion of the rents and hires of the same; but the court held the plaintiffs not to be entitled to interest on the rents and hires, as they were estimated and conjectural. A statement being made on these principles, shewing due from Garrett, as executor of Minor, the sum of 554 dollars 66 cents, with interest thereon from the first day of January 1811, and also the sum of 516 dollars 13 cents, with interest from the day of the decree, the same was decreed accordingly. The court further decreed, in the original suit, that the plaintiffs pay their own costs, and pay unto Garrett the costs expended by him about his defence in his own right; and in the supplemental case, that Garrett, as executor of Minor, pay to the plaintiffs their costs.

On the petition of the plaintiffs, an appeal was allowed them.

Cooke, for appellants. The former decision of the court of appeals would have been proper, though the will had been less

plain and explicit than it is. That decision is in accordance with the true intent and meaning of the statute concerning guardians, 1 R. C. p. 408, § 9, under which the annual balance on the guardianship account is to be ascertained, and if the same appear against the guardian, it is to be "put out to interest for the benefit of the ward; or the guardian, if it remain in his hands, shall account for the interest:" in other words, if the balance remain in his hands, he is to be charged with interest on it. With this statute, and with the former decree of this court, commissioner Dyer

204 complied, in the report made by him under the "order of the fourth of June 1832; and the first exception to that report ought not to have been sustained. Neither ought the second; because, it being the duty of the guardian on the one hand to pay, and on the other to receive, the interest when it accrued, we are not to presume that he did not perform that duty. The third exception alone was properly sustained; the fourth not being founded in fact. With respect to the matters arising on the supplemental bill, it is as just, where the land of a ward is occupied or his slave possessed by the guardian, that interest should go on the annual value, as it is, where the land is rented or the slave hired to another, that interest shall go on the rent and hire received.

Michie, for appellees. The decree of the court of appeals directing the account to be settled on the principle of guardians' accounts, does not contemplate its being settled on the principle of compounding the interest, but the reverse of that. The opinion delivered by the president declares that the guardian shall account on the principle of debtor and creditor. And in reference to debtor and creditor, it has been repeatedly decided that the interest shall never be compounded, so as to increase the principal and make the interest bear interest. Childers v. Deane & c., 4 Rand. 406. This case, and the cases cited by judge Carr in his opinion, shew the aversion of the courts to the compounding of interest. Even a contract by which interest in futuro is to be compounded will not be sanctioned. And under some circumstances, a bond for the interest which has accrued will be deemed usurious. If these be the principles in regard to the ordinary case of debtor and creditor, what is there in this case to induce a stricter rule? The decisions of this court in relation to guardians do not require it. Tabb v. Boyd, 4 Call 453; Carter's ex'ors v. Cutting and wife, 5 Munf. 223. All that this court has said is, that the disburse-

205 ments must be "out of the income, and interest calculated on the balance. It has never said that the principal and interest shall be compounded, so as to make the interest bear interest. There is no ground for compounding, unless the statute concerning guardians requires it. Does that statute require it? The ninth section relates entirely to the case of the

disbursements exceeding the profits, and a sale to raise the deficiency; and when it speaks of "the balance appearing on the contrary side," it means the balance of the proceeds of sale. How is this case stronger than the case of interest due on a debt which the guardian neglects to collect? Surely, in the case just supposed, the guardian would not be charged with interest on the interest. But the appellants go further. They claim interest on the conjectural rents of land and conjectural hires of a slave, against an adversary claimant. This claimant, we are told, stood in the relation of guardian. But this will not sustain the claim. In *Colton v. Bragg*, 15 East 223, the court decided that interest shall in all cases depend on the contract of the parties. The difference between the english courts and the american is, that the american more often imply a contract to pay interest. But there must be such contract, either express or implied, to authorize interest to be allowed. And here, no such contract can be implied. The statement on the other side, that the fourth exception is not founded in fact, is not admitted by us. In *Hooper v. Royster*, 1 Munf. 119, the time allowed the guardian was six months. Here, since the allowance of the 4th exception, the executor and guardian together have twelve. And this seems reasonable. Where a bond for negro hire is collected, though two or three months have elapsed, interest is not usually received. And then there must be time to invest.

C. Johnson, on the same side. Upon the question as to compound interest, regarding it as an original question, there cannot be much serious doubt; whether it be
206 *considered upon the authorities belonging to the question of compound interest, or upon the authorities in relation to guardians' accounts. But the question is presented at the outset, whether the point has been adjudged by the court of appeals in the very case. To ascertain this, we must look, not to the opinion delivered, but to the decree. And when we look to the decree, we find no such point adjudged. The decree merely directs the account of the land fund and the hire of the slave to be stated as a guardian's account. If we look into the opinion, to see the principles by which the court was guided, we find that those principles will not authorize this compounding of interest. In the opinion, two modes of settlement are referred to, as more suitable than that of settling executors' accounts; to wit, 1. the ordinary case of debtor and creditor; and 2. the case of guardian and ward. The appellees are willing to be guided by the ordinary rule of debtor and creditor, and say that under the opinion of the court of appeals, that rule ought to be applied. That the rule of debtor and creditor is the rule laid down in this case, is the interpretation of this court in *Handly v. Snodgrass & others*, 9 Leigh 484. Is it necessary to enquire what is the rule in the ordinary case of debtor

and creditor? That has been long since perfectly understood. It is stated in 1 Rob. Prac. 257. Under it, it is not legal to charge compound interest. *Lewis's ex'or v. Bacon's legatee*, 3 Hen. & Munf. 89. But suppose the decree establishes that the accounts are to be settled on the principle of guardians' accounts; does any case settle that interest shall be charged as contended for here? Not the case of *Carter's ex'ors v. Cutting & wife*, 5 Munf. 240,—for that lays down that interest is not allowed on profits not received. The charging compound interest is, in truth, against the spirit and meaning of the statute of usury. And there is no ground on which it can be sustained, unless the statute concerning
207 ing guardians authorizes *it. Does this statute mean that the guardian shall pay compound interest? The 7th section requires the guardian to deliver into court an inventory "of all the estate he shall have received," and to exhibit, once in every year, "accounts of the produce of the estate, of the sales and disposition of such produce, and of the disbursements." We might here say, that outstanding interest is neither produce, nor sales of produce. But let us construe the act according to its spirit, and hold that any thing which has been received is to be embraced; still it cannot extend to outstanding interest not received. That would not be included in the account. And not being included in it, interest would not go on it as part of the balance. But suppose the interest shall be received, be included in the account, and form part of the balance: to what time is interest to go on this balance? The answer is, till the guardian pays it. These views of the statute are just and proper, even supposing the latter part of the 9th section to stand by itself, in a separate section from the part which precedes it. With respect to the claim of interest on estimated rents and hires, it may be remarked, that the attempt to charge such interest has uniformly failed. *M'Connico &c. v. Curzen*, 2 Call 358; *Shields adm'r &c. v. Anderson &c.*, 3 Leigh 729; *Payne v. Graves*, 5 Leigh 561; *Roper &c. v. Wren &c.*, 6 Leigh 38; *Cunningham v. Flournoy*, 6 Johns. Ch. Rep. 1. There is no pretence that Minor interferred as guardian with this subject. He held as tenant in common and is only chargeable, as a tenant in common would be, with interest on rents and hires actually received.

Cooke, in reply. The opinion delivered by the president when this case was formerly before the court, was concurred in by the other judges, and is based essentially upon the will of Richard H. Allen. Accumulation during a long minority is the leading idea of the will. The testator intended that the annual balances
208 *should be reinvested. And the opinion declares that the executors were bound at least to loan to good borrowers, securing interest to be reinvested. The decree does not, in terms, direct what is to be done with the surplus of interest after

deducting disbursements; but it directs the account to be settled as a guardian's account. And under the act of assembly, the guardian's account is to be settled on the principle of reinvesting the balance. Neither the opinion nor the decree justifies the conclusion that the principle of debtor and creditor is to be so applied as to prevent the surplus interest from bearing interest. If a loan were made, the interest accruing from the borrower would be ascertained on the principle of debtor and creditor: but then it would be the duty of the executor to invest the aggregate sum, and get interest on that aggregate. The executors would have a reasonable time allowed them to reinvest, if they chose to reinvest. But here they have not chosen, and are not entitled to the benefit of the rule allowing time to reinvest. The argument of Mr. Michie upon the ninth section of the statute is explained and answered by adverting to the history of our legislation on the subject. The original statute did not have the provision for a sale, that is now found in the 9th section. 12 Hen. stat. at large 196. That provision was made by the act of December 1794. Sess. Acts 1794-5, p. 11, § 6. But before the act of 1794, all was contained in our statute that is now contained in the 9th section, except these words in the middle of it—"and so much and such part thereof may, with the approbation of the court, be sold at public auction to the highest bidder, after reasonable notice of the time and place of such sale has been given, as shall be necessary for that purpose." The cases cited respecting interest on estimated rents and hires, are not between guardian and ward, but are cases where there were adversary claims. Here, the statement of the 209 guardian is, that he made *himself purchaser. He admits that he had no right. As guardian, he should have returned an account of the rents and hires, and interest would have gone thereon. If he occupied and possessed, he cannot avail himself of his own wrong, either in claiming the property or otherwise, to diminish the rights of his ward.

ALLEN, J. This court, by its former decree, merely decided that these executors, under the will of their testator, were, in respect to the land fund and hires of slaves, to be treated as guardians, and their accounts to be settled on the principles of guardians' accounts. The question still remains to be determined, how a guardian's account is to be settled, where, as in this case, he has wholly neglected to return his annual settlements to the court to which he is amenable, according to law. This court, in *Myers &c. v. Wade &c.*, 6 Rand. 444, determined, that in a suit by the awards against guardian for an account, the latter, having neglected to return annual settlements, and failed to procure the permission of the court to appropriate any part of the principal of the wards' estate to their maintenance, should not be allowed

for disbursements beyond the annual interest or income. And in the case of *Wormley's adm'r v. Boswell*, decided at the last term and not yet reported, the court held, in a suit by the guardian against the representative of the ward, to recover disbursements beyond the receipts, that it was not competent for the chancery court to allow for such disbursements beyond the income, the guardian having neglected for many years to settle with the proper court and procure an order allowing such disbursements. The effect of these two decisions is, to secure the principal of the estate against misapplication by the guardian. In the latter case, I had occasion to review the various provisions of the law respecting guardians, for the purpose of shewing the anxiety of the legislature 210 to guard against abuse, *by enforcing annual settlements, and securing the controlling supervision of the proper court over the conduct of the guardian, whilst the transactions are recent. These cases having established principles which protect the principal of the estate against misapplication, it becomes necessary to decide in the present case, what principle shall govern in respect to balances of revenue which may remain after deducting the disbursements. This will depend in a great measure upon the terms of the act of assembly.

The 7th section of the law respecting guardians requires the guardian appointed by a court, at the first or second session after his qualification, to deliver into such court and inventory, upon oath, of all the estate he shall have received; and, within two successive courts after the receipt of any other estate of the ward, an inventory of such other estate, to be entered of record in a separate book. This provision looks to the principal of the estate, and furnishes record evidence by which to charge the guardian for the amount thereof. The law then provides that he shall annually, and at the September term, if it be a county court from which he has received his appointment, exhibit accounts of the produce of the estate, of the sales and disposition of such produce, and of the disbursements. The 8th section provides for the mode of enforcing such annual settlements; and the 9th, amongst other things, directs that the balance, after deducting disbursements, "may be put out to interest for the benefit of the ward, upon such security as the court shall direct and approve; or the guardian, if it remain in his hands, shall account for the interest, to be computed from the time his account was or ought to have been passed."

If the guardian complies with the requisitions of the law, all difficulty as to the mode of settling is avoided. His inventory shews the estate received; his annual account, the income; and he is entitled 211 to the aid and *instruction of the court as to the disposition of the surplus. This surplus of any one year, not being required for disbursements, becomes a part of the principal, and, as such, cannot

be expended by the guardian to meet disbursements of succeeding years, except by the permission of the court. As a general rule, the court, looking to the benefit of the ward's estate, would direct the surplus to be either invested in stock producing an annual return, or loaned out to punctual borrowers who would pay the interest. If under any circumstances a secure investment at simple interest should be deemed advisable, the guardian, acting under the advice of the court, would be justified in making it. The money being so invested, the guardian would be held to account annually for only so much of the interest as he received. But where the guardian is guilty of neglect; where he fails to make his settlements, and keeps the money of the ward in his own hands, using it for his own purposes, how is the account to be stated? The words of the law require annual settlements; its policy looked to the constant superintendence and control of the proper court; and no principle should be adopted, which, in the case of such failure to settle, would place the guardian in a more favourable position, or hold out inducements to him to neglect his duty. For this would be enabling him to profit by his own wrong. An account should therefore be raised against him annually, and the disbursements applied to the annual receipts. This is necessary to satisfy the requisitions of the law, which requires interest to be computed from the time the account ought to have been settled. But as to the mode of computing interest upon the balances thus ascertained, I was at first under the impression that the provisions of the statute would be satisfied by adopting the mode prevailing between ordinary debtor and creditor, and permitting the debt to stand as an investment at simple interest,

212 *aggregate at the close of the account.

For as the court, I presume, could, in the exercise of a proper discretion, and under peculiar circumstances, authorize such an investment, it seemed to me that the same indulgence might properly be extended to the guardian; and that in consequence of his failing to settle, he was to be treated as a borrower of the surplus, and should be permitted to hold it on as favourable terms as the court might have directed. The cases in this court, too, seemed to lean against the principle of compounding interest. Thus in *Childers v. Deane &c.*, 4 Rand. 406, judge Carr, after reviewing the cases, states that the general rule, as settled by the later cases, is, that it shall not be allowed. And in the case of *Carter's ex'ors v. Cutting & wife*, 5 Munf. 223, the court decided, that moneys directed to be invested by executors in government securities, should be accounted for as if invested, after a reasonable time for that purpose; but that the executors ought not to be charged with interest upon the dividends of stock, if such dividends had not actually been received. The last was the case of executors; as to whom this court

has established principles of great liberality. The peril which their office imposes on them; the necessity of disposing of the estate on a credit; the risk of loss from this source; the hazard of being subjected to a devastavit, by paying the assets to creditors of inferior dignity; their ignorance of the condition of the testator's estate; the exposure to loss from agents, counsel &c.—all these considerations have induced the courts in this country to relax the more rigorous rule adopted in England with respect to this class of fiduciaries. But in reality, few of the considerations applicable to executors apply to the guardian. His duty is simple. He is to receive the estate, collect the rents, hires &c. and dispose of the produce. He is not required to keep funds in hand to meet possible claims.

His disbursements are generally con-
213 fined *to the support and education of the ward, and the preservation of the property. The general principle is, that a trustee using the trust money must account for all the profit of it. But where that profit is not ascertained, some mode of computation must be adopted by which to arrive at it. In *Raphael v. Boehm*, 11 Ves. 82, the direction was, to take an account against the executor (who was a trustee) with a computation of interest on all sums received by him, while in his hands; and that the master do, in such computation, make half yearly rests. The object of the direction was to charge compound interest. Lord Eldon remarks in that case, that "where there is an express trust to make improvement of the money, if he will not honestly endeavour to improve it, there is nothing wrong in considering him to have lent the money to himself, upon the same terms upon which he could have lent it to others, and as often as he ought to have lent it, if it be principal, and as often as he ought to have received it and lent it to others, if the demand be interest, and interest upon interest." And in another place, that "the court would shamefully desert its duty to infants, by adopting a rule that an executor might keep money in his hands without being answerable as if he had accumulated." These remarks apply with great force to the case under consideration; where the estate was considerable, the wards young, and accumulation for their benefit is the governing intention of the will. But they apply with almost the same force to the case of every guardian who acts under our law, which has guarded the interests of wards with so much jealous caution. This case was reheard before lord Erskine, 13 Ves. 407, and he fully concurred with lord Eldon. The subject was very fully considered by chancellor Kent, 1 Johns. Ch. Rep. 620, who there held, that if an executor convert the trust moneys to his own use, or employ them in his business or trade, he is chargeable with compound interest. After
214 shewing the injustice *which would be done to the infants by denying compound interest, he observes—"The

fund, instead of accumulating for the benefit of the infants, would accumulate for his benefit. A man in trade could afford a large premium for letters of administration on a rich estate, especially if the infant heirs were young. What temptation would thus be held out for negligence and delay in rendering an account!" In the case of *Childers v. Deane &c.* judges Green and Carr both admit there are many cases in which the taking of compound interest is lawful. Judge Carr says, "There are still some special circumstances, under which compound interest is allowed; as where a settlement of accounts takes place after interest becomes due, and an agreement is then made, that interest due shall thereafter carry interest." This is, in effect, the precise condition in which the guardian neglecting to settle under our law is placed by the law. He should have settled; and the law treats him as though he had settled. The balance in his hands is a debt then ascertained to be due to the ward, and is to be loaned out for his benefit. Being retained by the guardian, he is to be treated as the borrower, and is to pay interest. Borrowing from himself, he guarantees the punctuality of the borrower. It would be unjust to the ward, to permit the guardian to apply the current income of the year to defray his own disbursements, whilst at the same time he was a debtor to his ward for the interest then due on former balances. This is conceded by the decree in this case, which applies the disbursements to the interest. But the excess of interest is as much a debt as that which is so extinguished. As between debtor and creditor, the latter may permit it to remain a dead capital in the debtor's hands: this is matter of contract between them. But the statute requires annual settlements; thereby, as it seems to me, requiring annual investments. A contrary principle would violate the spirit of the act, 215 which *not only for the purpose of investing these balances, but to ensure the constant superintendence of the court over the proceedings of the guardian, enjoins annual settlements, and even subjects the judge and justices to amercement for neglect in enforcing them. A premium would be held out to omit the performance of this duty. The contrary rule subjects the guardian to no hardship. When he settles his account, the balance due is invested under the order of the court, and all responsibility is avoided. Though, under special circumstances, the court might authorize an investment at simple interest, such cases would be rare in our country, where money is always in demand. Little difficulty would be found in lending, on good security, to individuals willing to pay the interest annually; especially when, if they did so, they would be permitted to retain the principal in their hands for a long period. The guardian at least should not, by his election to retain the money, deprive the ward of the chances of such a profit.

I think, therefore, that the chancellor erred in sustaining the exceptions to the first report on this ground. That report, however, was erroneous in not crediting the payments to the legatees after the termination of the guardianship, as of their respective dates, so as to stop interest pro tanto at those dates. With that exception, it should have been confirmed.

As to the matters involved in the supplemental bill: The subject in controversy did not come into the hands of Dabney Minor as executor of Richard H. Allen. It was an increment to the estate of the wards, accruing after the death of their father, from a source distinct from his estate. I think the account should be kept separate from the accounts of Dabney Minor as executor of that estate. He held the land and slave under an arrangement with the other heirs and legatees of Mrs. Yancey and her husband, by which he purchased their interests in the subject at 216 a stipulated price; and *he charged himself, in his account with his wards, with their proportion of the same subject. It is admitted that he had no right to do this; that it was not in his power, by a charge in his books, to appropriate to himself the estate of his wards. And the question arises, how his account respecting this subject is to be adjusted. In the opinion delivered in this case by the president of the court, he observes (3 Leigh 417,) that "one of the parties" (meaning Dabney Minor) "seems to have been the actual, though not indeed the legal guardian of the children; and he who so acts, ought to be charged as such. It is absurd to suppose that he can be justified in doing that which even the legal guardian cannot do. It is for his own benefit to consider him as sustained in his acts, as quasi guardian. In tenderness to him, he is justified in doing what the guardian might do; but upon no principle is he justified in doing more." Treating this defendant then as actual guardian, his duty required him to deliver into court an inventory of any other estate belonging to his ward, and afterwards to settle his annual accounts of the produce. This he failed to do: but the court, upon the principles already adverted to, must settle with him as though he had performed his duty. In adjusting the account, it must treat him as if he had returned an inventory of this additional estate, and in his annual settlements had charged himself with the hires of slaves and rent of land. The surplus of such rents and hires, upon the principles already discussed, must be brought into the account, and bear interest. Otherwise the defaulting guardian would be in a better condition than he would have been if he had complied with his duty. The rule which in most cases denies interest on conjectural hires and rents, ought not to be extended to such a case; for that would be to hold out an inducement to guardians to neglect their duty in rendering accounts. It therefore seems to me, that this account should

217 be settled upon precisely *the same principles which govern the other; that annual rests should be made in the account, and the balances be added to the principal, so as to constitute an interest-bearing fund; and that the account should be so stated and settled until the wards respectively arrived at age or married, or the guardianship terminated, from which period the account should be stated upon the ordinary principles between debtor and creditor.

CABELL, P. The decree of this court, which remanded these causes to the court below for the purpose of reforming and restating the accounts, having directed that "the accounts of the land fund and the hires of slaves" should be stated and treated "as guardians' accounts," the question now arises whether those directions have been complied with; or in other words, whether those accounts have been stated and settled upon the principles which ought to govern the statement and settlement of guardians' accounts.

The appellants insist, that these accounts should be stated and settled annually; that, at every annual statement and settlement, the excess of interest due from the guardian, over and above the expenses of the ward, should be so charged to the guardian, as that it may become an interest-bearing fund until the next annual settlement; that then, if the interest due from the guardian should again exceed the expenses of the ward, the excess of such interest should again be so charged as to become an interest-bearing fund as aforesaid; and so on, toties quotes, until the final settlement of the accounts.

I am of opinion that the claim of the appellants to have the accounts thus stated and settled is just in itself, and is sanctioned and required by the obvious spirit, if not by the express terms, of the act of assembly.

218 *The 7th section of the act concerning guardians and wards requires every guardian to exhibit to the court in which he qualified, "once in every year, accounts of the produce of the estate, of the sales and disposition of such produce, and of the disbursements; which accounts shall be examined by the court, or by such persons as the court shall refer them to."

The importance which the law attaches to these annual settlements is manifested by the provisions of the 8th section, which declares that every guardian who fails to render such accounts as are required by the 7th section, "shall, by order of the court to which he is amenable, be summoned, and if he remain in default, be compelled to perform his duty, or be displaced;" and, what is not a little remarkable, the act goes on to declare, that "every judge or justice of the court, sitting therein at any time during the term of session in which such process ought to have been ordered, if it be not ordered accordingly, shall be amerced."

Then comes the 9th section, which pro-

vides, that "if the disbursements of such guardian, being suitable to the estate and circumstances of the ward, shall exceed the profits of his or her estate in any year, the balance, with the allowance of the said court, may be debited in the account of a succeeding year, and paid out of the personal estate of the infant. And the balance appearing on the contrary side may be put out to interest for the benefit of the ward, upon such security as the court shall direct and approve; or the guardian, if it remain in his hands, shall account for the interest, to be computed from the time his account was or ought to have been passed."

It is clear, then, that the law requires annual settlements, on which a balance shall be struck, in order that that balance, if found in favour of the ward, may be made an interest-bearing fund for the benefit of the ward, either by actually putting 219 it out to interest, or *making the guardian, if it remain in his hands, accountable for the interest.

Suppose, then, a guardian, honestly desiring to comply with the law, shall, at the first proper court, exhibit his accounts for settlement. At this first settlement no question can arise as to a charge of interest against the guardian, because no interest can as yet have become due from him as guardian. But all must admit that if on this settlement a balance shall be found in favour of the ward, the guardian becomes accountable for interest on that balance, if it remain in his hands, to be computed from the time his account was passed.

Let us next see what is to be done at the second regular annual settlement, when the guardian, as before, actually exhibits his accounts.

He will, of course, credit himself with all his proper disbursements; and he ought to debit himself with every item of "the produce of the estate;" an expression sufficiently broad to include not only the proceeds of crops, hires of slaves, &c. but all sums of money belonging to the ward and received by the guardian, from whatever source they may have come. It will clearly embrace money which he has actually received; as interest on a debt, from a debtor of the ward. It will also, in my opinion, embrace any interest due to the ward from the guardian, as guardian, at the date of the settlement. Such interest may emphatically be said to be, in the language of the 9th section of the act, a part of the "profits" of the ward's estate; and being due from the guardian, and in his own hands, the policy of the law and the dictates of justice require that it should be charged to him in the annual settlement, in order that the excess of interest beyond the expenditures may be converted into an interest-bearing fund for the benefit of the ward. I can perceive no difference in principle between interest due from 220 him as *guardian, and actually in his own hands, and interest which he may have received from a debtor of the ward.

The surplus of interest due from the guardian at the date of the second settlement, being thus converted into principal bearing interest, what disposition is to be made, at the third regular annual settlement, as to the interest which may have then accrued upon it? If we bear in mind that the law requires annual settlements at the hands of guardians, in order that each successive balance in favour of the ward (of whatever it may consist) may become an interest-bearing fund for the benefit of the ward, we cannot avoid the conclusion, that the interest which has accrued on the balance found due from the guardian at the date of the second settlement, must be charged to him in the third. It is in this way only, that the just and beneficent object of the legislature can be effected. And the same principles of justice and policy, which thus govern the second and third settlements, will apply to and must govern all succeeding settlements, until the termination of the guardianship, by the ward arriving to age, or otherwise.

If such be the principles which are applicable to guardians' accounts, when the guardians settle regularly according to the requisitions of the law, what shall be done in the case of guardians who (as in the present case) disregarded the law, and exhibit no accounts until they are called upon by their wards, in a court of equity, for a final settlement of their transactions? It would indeed be a strange anomaly if a court of equity should treat such guardians with more indulgence than is extended to those who have faithfully and punctually obeyed the law. It would be to offer a premium for negligence, and something for dishonesty. All that the courts can be expected to do in such cases, is to have the accounts stated with annual rests, and to have them settled upon the same principles as would have governed the settlement if the guardians had regularly and

221 *annually exhibited their accounts; always charging them with interest from the time when they would have been accountable for it if the accounts had been in fact settled. This is justice to the ward; and although it may operate with hardship upon the guardian, he has no right to complain of it; for it is the result of his own culpable violation of a positive duty. If he wishes to avoid the hardship of the operation, let him settle up his accounts, carry the balance due from him into court, and request that it may be put out to interest, under the direction of the court.

It will be observed, that my opinion has been formed by an exclusive regard to the provisions of our law concerning guardians and wards. It derives additional strength from the case referred to by judge Allen, which shew, that even in the settlement of executors' accounts, interest due from them is sometimes converted into principal.

I am further of opinion that the accounts in relation to the estate or interests claimed by the appellants in their supplemental

bill, ought also to be stated and treated as guardians' accounts; Dabney Minor having, by his acts in relation to said interests, made himself guardian de facto.

I am farther of opinion that the case of a guardian indebted to his ward for estimated rents of land and hires of slaves, forms a just exception to the general rule, that interest is not to be allowed on estimated rents and hires. We have seen that even the surplus of interest due from a guardian, over and above the expenses of the ward, is to be carried into the accounts, so as to become an interest-bearing fund; and surely the guardian cannot claim to stand on higher grounds as to estimated rents and hires due from himself. They should be carried into the accounts at the annual settlements, and become thenceforward an interest-bearing fund, as in the case of other balances.

222 *BROOKE, J., concurring, the decree of the court of appeals was to the following effect:

The court is of opinion that the circuit court erred in sustaining the first, second, fourth and fifth exceptions of the defendant to the report of commissioner Francis B. Dyer, made in pursuance of the decretal order made in the first suit on the fourth day of June 1832; and also erred in the second suit, in considering that the plaintiffs were not entitled to interest on their share of rents and hires, but only to the principal money: Therefore decreed that the said decree be reversed, and that the appellee pay to the appellants their costs by them expended in the prosecution of their appeal here. And the cause is remanded to the circuit court, with instructions to recommit the accounts to a commissioner of said court, to be restated; who is to be instructed, in settling the account of the land fund and hires of slaves (in the first cause), to charge the defendants respectively with the hires actually received, or for which they were accountable, and with the interest due from them on the sums in their hands at the end of every year; and after deducting the disbursements properly chargeable to the wards, for each current year, out of that fund, the balance to be carried to the principal, and interest to be charged on it accordingly, to the period when *the wards arrived at age** after which the account is to be stated on the ordinary principles as between debtor and creditor: and in the second case, to state and settle the accounts with annual rests, upon the principles which apply to guardians' accounts; carrying the interest of the money fund and estimated rent and hires due from the guardian, at each annual settlement, to the principal, and

*The decree, as entered in the order book, used the words in *italics*; but the words "the guardianship terminated" would have expressed more correctly the meaning of the judges as indicated in their opinions.—Note in Original Edition.

223 charging interest* *thereon thenceforward accordingly, until *the wards arrived at age*;† from which latter period the account is to be stated as between ordinary debtor and creditor.

*Note by the reporter. Some of the points adjudged on the supplemental bill are not without precedent, even in England. In *Quarrell v. Beckford*, 1 Madd. Ch. Rep. p. 268 of eng. ed. and p. 151 of am. ed. it appeared, on taking an account between a mortgagee in possession and the mortgagor, that the former had been overpaid; and it was claimed that he should account for what had been overpaid, with interest. It was admitted on both sides, that the question as to interest was perfectly new. The vicechancellor (sir Thomas Plumer) considered it on principle altogether, and held that the mortgagee was to be charged with interest. He so held, upon the ground that the mortgagee, as soon as he was paid, was a mere trustee, holding the legal estate for the benefit of his cestui que trust, the mortgagor, with whom he was bound, by the nature of his trust, faithfully to account. "The case," says the vicechancellor, "is assimilated to a simple contract debt which does not carry interest; it is compared also to the case of mesne profits improperly received by a trespasser; in which cases, it is clear, the courts of law and equity are not in the habit of charging the party with interest. What analogy do these cases bear to the present? The main point here does not exist in those cases; viz. a sum due from a trustee to a cestui que trust. The mesne profits are received by an adverse holder, by a trespasser, where there is no privity between the one and the other; but here the profits are received under an implied contract by the mortgagee to account. That is not like the case of a trespasser receiving mesne profits. This mortgagee received the rents as trustee. He received them to pay himself first, and afterwards to account to the mortgagor. He has therefore made himself liable to account. A relation is established as between trustee and cestui que trust, and the moment the mortgage is paid off, he is converted into the situation of a bare naked trustee. All the money received from that time is money received by a trustee, having a legal estate in his hands, and receiving the rents and profits of such estate, which he holds as trustee for another." In *Wilson v. Metcalfe*, 1 Russ. 580, the mortgagees were in the occupation of part of the mortgaged premises, and in the receipt of the rents and profits of the remainder. In respect to the part in their occupation, an occupation rent was directed to be fixed by the master. When his report came in, it appeared that the mortgagees had been long overpaid. And then the question was made, whether the court

224 could order annual rests* to be made in the account of the occupation rent, as well as of the other rents and profits of the mortgaged premises, and interest to be computed against the mortgagees. The master of the rolls (lord Gifford) had no doubt on this question. "If," said he, "a mortgagee, receiving the rents of a mortgaged estate after his debt has been satisfied, does not immediately pay them over to the mortgagor, but retains them to his own use, he is availing himself of another man's money, and ought to be charged with interest. Is his situation substantially differ-

ent, when he is in the actual occupation of the mortgaged premises? Though he is not in receipt of rent, he is, in fact, in receipt of profits; and these he keeps in his pocket. What the master has done in fixing an occupation rent of these premises, has merely been, to estimate the fair yearly rent which an occupier ought to pay for them; he does not consider what ought to be done in respect of the rent having been retained for many years by the actual occupier." It was therefore referred back to the master, to make annual rests in the account of the rents received by the mortgagees, and the occupation rent due from them, and to compute interest after the rate of 4 per centum per annum upon such rents and occupation rents. These decisions sustain the court of appeals, 1. in allowing interest upon the yearly value of the land and slave of the ward, possessed by the guardian; and 2. in making annual rests, so that interest may be computed from the end of every year, upon the value for that year. To what time the interest on such value should be computed; whether until payment, without any compounding; or only until the end of a year, so as to make the surplus interest beyond the disbursements of the year an interest-bearing fund,—was a question in this case, depending upon the interpretation of the statute concerning guardians.

225

*Cosby v. Lambert.

August, 1842, Lewisburg.

(Absent BROOKE and BALDWIN,* J.)

Joint Tenants—Interest Inter Se of Joint Purchasers of Land.—A tract of land is purchased by a bricklayer and carpenter, who are to pay part of the price in money at stipulated times, and the rest in a house to be erected by them. The work to be done by each is agreed upon between them, and they commence its execution: but the carpenter, from misfortune in business, becomes unable to comply with his portion of the agreement. Thereupon a new agreement is made, that the carpenter shall cover in the house, and that for the work he has done, and for covering the house, he shall be allowed the value thereof, and receive that amount in land out of the tract. The carpenter nevertheless fails to cover in the house, and the bricklayer has this part of the work done. HELD, 1. that by the new agreement, the carpenter's interest in the land is such proportion thereof, as the amount of work then done, and under that agreement to be done by him, was of the original price of the land; and 2. that this proportion is charged to the bricklayer with the value of the work which under that agreement ought to have been, but was not, done by the carpenter.

Same—Redemption—Purchase by One Tenant of Other Tenant's Interest.—The carpenter makes a deed of trust conveying his interest in the land to secure two persons, sureties for him in a bond, one of whom is the bricklayer. Being afterwards taken in execution at the suit of other creditors, the carpenter is discharged as an insolvent debtor, and his interest in the land is sold by the sheriff, and purchased, at the price of 50 cents, for the bricklayer. The bricklayer afterwards declares that the carpenter shall have such benefit from the land as his work entitles him to, and upon applying to his cosurety in the bond to contribute

†See (*) on p. 187.

*He had been counsel for the appellee.

to the satisfaction thereof, states that he does not mean to keep the land for what it sold for; that he wants no advantage of that kind. The cosurety makes contribution. Eleven years afterwards, upon a bill in equity being filed by the carpenter, the bricklayer insists that the sale by the sheriff is valid. *HOLD*, the carpenter is entitled to redeem the interest sold by the sheriff; and a decree should be made for partition of the land, so as to assign him his due proportion, holding the

226 same chargeable with such amount *as may be ascertained to be due the bricklayer, after crediting him for the value of the work done by him that ought to have been done by the carpenter, the sum paid by him in discharge of his suretyship, and the 50 cents paid the sheriff, and debiting him with such portion of the rents and profits as the interest of the carpenter in the land entitles him to.

On the 28th of February 1818, articles of agreement were entered into between James M'Dowell Moffett of the one part and Dabney Cosby and William Lambert of the other part, whereby it was witnessed that Moffett had bargained and sold to Cosby and Lambert a tract of land in Augusta county. Possession of the land was to be immediately delivered, and Moffett bound himself to convey the land to Cosby and Lambert on demand. In consideration of which, Cosby and Lambert bound themselves to pay to Moffett the sum of 5600 dollars in manner following, to wit: 4455 dollars as full consideration for certain building agreed to be done by Cosby and Lambert for Moffett; and the residue to be paid in six equal instalments, commencing on the first day of October 1820; the payment of the said instalments, and the performance of the said contract on the part of Cosby and Lambert, to be secured by a lien on the land sold.

About the same time, to wit, in March 1818, articles were entered into between Cosby and Lambert, the former of whom was a bricklayer and the latter a carpenter, by which, after reciting the purchase of land from Moffett for 5600 dollars, for part of which they were to do work and for the residue whereof they had given their joint bonds, it was set forth, that Lambert was to find all his own materials, locks, nails, glass &c. and do his part, for 2055 dollars, and that Cosby was to do the brick work and plastering, and find his own materials &c. for 2000 dollars, and that the painting, which was estimated at 400 dollars, was to be done at their joint expense.

227 *On the 12th of November 1819, a new agreement was made between Cosby and Lambert, whereby, after reciting the preceding contracts, and setting forth, that from unexpected misfortune in business, Lambert had become unable to comply with his portion of the agreement, it was agreed that Lambert should proceed forthwith to cover in the dwelling house mentioned in the contract, in the true spirit of the contract, and then be released from any further obligations imposed on him thereby;

and that, for the work he had theretofore done agreeably to contract, materials furnished, and covering in the dwelling house, he Lambert should be allowed their value, and receive that amount in land, out of the tract before mentioned. Cosby agreed, on his part, to perform all the covenants of Lambert in the agreement aforesaid, except as before excepted, and to receive, as full compensation therefor, the residue of the land.

On the 16th of November 1819, William Lambert made a deed of trust to Erasmus Stribling, conveying his interest in the land to indemnify Cosby and Abraham Lambert in consequence of their having become bound, on the 9th of November 1819, as sureties for William Lambert in a bond to Silas H. Smith for 585 dollars 20 cents, payable one half on the 9th of November 1820, and the residue one year thereafter, with interest from the date of the bond. This deed was admitted to record in the office of Augusta county, on the 27th of February 1821.

Before it was admitted to record, judgments had been obtained against Lambert, and he had been compelled to take the oath of insolvency. At the time of his being discharged as an insolvent debtor, to wit, on the 27th of December 1820, Lambert made a deed to J. M'Nutt sheriff of Augusta county, conveying, besides a moiety of another tract of land in Augusta, his interest in the tract conveyed by Moffett. This deed was admitted to record a few days after its date.

228 *On the 26th of February 1821, a deed was made, purporting to be between James M'Nutt sheriff of Augusta county, of the one part, and Henry J. Tapp of the other part, wherein it was set forth that John Churchman, a deputy for M'Nutt, had, on a court day, advertised the lands conveyed by Lambert to the sheriff, and had afterwards, pursuant to the advertisement and to the act of assembly, proceeded to sell the same, and that Henry J. Tapp became the purchaser of Lambert's interest in the second tract conveyed by the deed, at 50 cents, (the other tract, to wit, that first named in the deed, not being sold for want of bidders). Thereupon the deed witnessed that M'Nutt sheriff as aforesaid, by his said deputy, in consideration of the said sum of 50 cents, conveyed to Tapp the said Lambert's interest in the said tract of land acquired by Cosby and Lambert from Moffett. The deed stated in the conclusion thereof, that M'Nutt sheriff as aforesaid, by Churchman his deputy, had thereunto set his hand and seal. And it was accordingly signed, "James M'Nutt S. A. C. by John Churchman deputy."

The purchase at the sheriff's sale, though in the name of Tapp, was for Cosby.

Some months after the sale by the sheriff, in a conversation between Cosby and another person, the latter remarked that he thought Lambert was badly treated at the sale; to which Cosby replied that the land

was bought in with the intention that Lambert should have the benefit of it, so far as his work and materials would entitle him thereto. He said it was not intended to take any advantage of Lambert.

In 1822, judgment was entered in the county court of Augusta against Cosby on the bond to Smith, wherein Cosby and Abraham Lambert were co-obligors with William Lambert. An execution having issued the 8th of April 1822, returnable to May court following, Cosby, on the 15th of May, addressed a letter to Abraham *Lambert, urging him to contribute promptly to the satisfaction of the judgment, and concluding in these terms: "William has sent word to me to know if I meant to keep his part of the land for the amount sold for. I have said, no, I did not. I repeat the same to you. I want no pitiful advantage of that kind, and I request you not to let me suffer."

For part of the bond to Smith, to wit, 100 dollars, Cosby was principal debtor. For the residue thereof, he and Abraham Lambert were co-sureties. The latter contributed, on the 5th of August 1822, on account of the debt, the sum of 229 dollars 39 cents.

On the 20th of January 1823, Cosby addressed a letter to Lambert, commencing thus: "I am endeavouring to prepare my Moffett accounts for a general settlement, and I wish you to say how long you consider me bound for the hire of your boys, whether from the time they quit Moffett's work, or whether until they were free." After some other remarks, he says, "I shall have the painting done this spring, and endeavour to settle as shortly thereafter as possible."

Having paid off the creditors at whose suit he took the oath of insolvency, Lambert, in November 1833, exhibited a bill in the circuit court of Augusta against Cosby, wherein, after setting forth the contracts of February and March 1818 and of November 1819, he stated, that his affairs requiring him to remove to Shenandoah county, he found it inconvenient to cover in the dwelling house, and Cosby consented to relieve him from that part of his engagement, and employed a person to do that part of the work. That the work done and materials furnished by the complainant amounted to a considerable sum; and he exhibits an account of the same. That the complainant had been under the necessity of taking the oath of insolvency, and his interest in the land had been sold by the sheriff. That the complainant had no notice of the sale, and was not present when

230 *it occurred. That he does not know whether it was conducted in the mode prescribed by law, and he requires evidence on the subject. That Cosby became the purchaser of the complainant's interest for the paltry sum of 50 cents, though no one knew its real value better than himself. That since the sale, Cosby has disclaimed all intention of keeping said property from the complainant, but has never made him

any compensation. That the complainant was for a considerable time prevented from seeking redress against Cosby in a court of justice, by his the complainant's embarrassed circumstances, the distant residence of Cosby, and the hope, encouraged by his repeated declarations, that he would adjust the matter amicably. The prayer of the bill was, that the complainant's account for his work, materials, and other advances about the buildings, might be stated and settled before a commissioner; that the last contract between him and Cosby might be specifically executed; that Cosby might be compelled to surrender and convey to him a due proportion of the land, if to be had, and if not, to pay in money what is due the complainant, with interest thereon; and for general relief.

The cause coming on to be heard upon the bill taken for confessed, and exhibits, the court made an order referring the accounts between the parties to a commissioner.

Cosby afterwards filed his answer, denying that he ever consented to release the plaintiff from the contract of the 12th of November 1819, and stating on the contrary, that the plaintiff, without his consent, violated it, and left him to have the building covered and the work completed in the best manner he could, whereby he was subjected to great disappointment and loss. The answer controverted the correctness of the plaintiff's account, and stated the conviction of the defendant that on a fair and

231 full settlement the plaintiff would be *largely his debtor. The lapse of time and loss of evidence, the defendant feared, would render it impossible to make such a settlement; and he insisted upon the statute of limitations. The plaintiff, he contended, could not claim under the contract, but only on a quantum meruit, so much as his work &c. were worth; and such a claim, the defendant insisted, was clearly barred. He further objected to the jurisdiction of equity, insisting that the plaintiff could only proceed at law. The answer did not admit that the plaintiff was prevented from sooner impeaching the sale by any of the causes mentioned in the bill, but required proof of the same. The defendant averred that the sale was fair; alleged that the interest of Lambert sold for its full value; and insisted that the sale was in every respect legal and valid, and that after such a lapse of time, it ought not to be disturbed. He stated, that he had long been under the impression that he was the purchaser at the sale; but it appeared by the records that Henry J. Tapp became the purchaser, and that the sheriff conveyed to him; and the heirs of Tapp, he said, should therefore be made parties. The defendant acknowledged that he had hitherto claimed and possessed the land, and stated that he was sure Tapp never intended to claim any interest in it. He supposed that Tapp, being a friend and near connexion of his, happening to be at the sale, bought the land to protect his the defendant's interest. The defendant denied

having disclaimed to hold under the purchase without settlement or remuneration. He supposed that he might have said, that if the complainant would settle fairly and pay the money due, he was willing the complainant should take a fair proportion of the land. But no such declaration, he urged, could give the complainant any right, since he declined acting upon it when a fair settlement was practicable.

232 *The commissioner made a report, stating a balance due the plaintiff of 425 dollars 35 cents, with interest from the 5th of August 1822, and that if the plaintiff should be considered entitled to interest on his claim anterior to the 5th of August 1822, then the balance on that day would be 548 dollars 59 cents, bearing interest from that time.

It appeared by a certificate of the clerk of Augusta county court, that Cosby and wife, on the 5th of May 1824, conveyed to Samuel Todd 100 acres, part of the tract conveyed by Moffett.

The cause came on to be heard the 26th of November 1836; and there being no exception to the report of the commissioner, the court affirmed the same, declared that the plaintiff was entitled to recover agreeably to the second statement therein, and further declared that as the defendant has sold and conveyed the land, or part thereof, the said plaintiff had a right to receive compensation in money. Thereupon the court decreed that the defendant pay to the plaintiff the sum of 548 dollars 59 cents, with interest thereon from the 5th of August 1822 till paid, and the costs of suit; subject however to a deduction of 50 cents, the price at which the land was sold by the sheriff of Augusta county, with interest thereon from the 4th Monday in January 1821, which sum of 50 cents was to be retained by the defendant without prejudice to any claim thereto on the part of the representatives of Tapp. And the court declared that the decree was without prejudice to any claim on the part of the plaintiff to subject the land in the hands of the purchaser or any other person, if payment could not be coerced from the defendant.

On the petition of Cosby, an appeal was allowed.

Michie for appellant. By the statute 1 R. C. p. 538, § 34, the interest of Lambert in the land became vested in the sheriff of Augusta county. Being so vested, 233 *whatever sale the debtor could have made, the sheriff might make; whatever interest the debtor could have passed, the sheriff might pass. The sheriff may do more than the debtor. He may part with an interest which the debtor could not dispose of; for example, where the debtor has made a deed valid between the parties. Not only does the statute authorize the sheriff to sell and convey, but it requires him to do so, and it provides no other means of making the interest available. The 35th section prescribes, it is true, another remedy for the recovery of money due or personal property

belonging to the insolvent, in the possession of another; but it extends no farther. Other interests in property, the sheriff is compelled by the imperative terms of the statute to sell. He is under no obligation to go into equity to ascertain the extent of liens thereon. *Shirley v. Long &c.*, 6 Rand. 764.

II. The suit is not brought until more than 12 years after the conveyance to Tapp. It is an application to rescind a contract made and executed, which will not be done if the case be clear of fraud. *Thompson v. Jackson*, 3 Rand. 504; *Shelly v. Nash &c.*, 3 Madd. C. R. 125. Here there is no ground for the imputation of fraud, except the ground of inadequacy of price. But that is no badge of fraud where the sale is by auction. Still less should it be so considered here, where the sale is by a sworn officer. The objection of lapse of time is not obviated by the proof of Cosby's declarations: they were connected with a settlement which then might have been easily made, but could not be made now. He had claims then, the evidence of which is now lost.

III. The plaintiff has not convened the heirs of Tapp, who may claim under the sale, nor the sheriff, who, if there be misconduct, is the party that has been guilty.

IV. The effect of the decree is to make Cosby a purchaser of the land in spite 234 of himself. This operates *unjustly, because of the great fall in the price of land since 1818. Interest too is allowed from the time the work was done on the estimated value of the work; whereas the annual rent or value of the land, instead of amounting to six per cent. would not be more than three. The court should at most only have decreed to Lambert land in proportion to his work and materials.

John B. Baldwin and Robinson for appellee. If, according to the agreement of February 1818, Moffett made a conveyance, Cosby and Lambert acquired the legal title to the land, and were joint tenants thereof. If no such conveyance was made, still they had an equitable title, and whenever turned into a legal title, it must necessarily be in the two jointly and equally. Moffett, under his contract, could convey no other. He was not to look to the proportions in which they separately performed. Their performance was to be secured by a lien on the land; and no matter which failed, the lien equally existed on the whole. If the case had stood on the agreement of February 1818, and Cosby had paid more than half the consideration money, his claim against Lambert would have been for so much money paid and advanced, with an implied lien on Lambert's part for whatever Cosby had paid exceeding his half. The agreement of March 1818 does not materially change the condition of the parties. Had it been carried out, both parties would still have been equal owners of the land. In respect to the 55 dollars, Lambert would have had a claim against Cosby, and a lien on Cosby's part of the land. Or if one paid what was intended to be paid by the other, still it would have been the same case of a claim for so much money paid,

with an implied lien therefor. But on the 12th of November 1819 a new agreement was made. Lambert, having already done work and furnished materials, was, upon the principle of this last agreement, entitled to a proportion of the land; 235 and if he proceeded to cover *in the dwelling house, that proportion would be increased. He was thus entitled to a proportion of the land, when, on the 16th of November 1819, he made the deed of trust to Stribling. After making that deed, he took the oath of insolvency, and made a deed to the sheriff, who sold his interest in the land. That sale was improper and illegal, being of a contingent interest of uncertain extent. An equitable and contingent interest in goods is not permitted to be sold under a *fieri facias*. *Clayton v. Anthony*, 6 Rand. 285. The same reason applies to a sale by a sheriff of an insolvent's interest: and the statute ought not to be construed to require the sale of such an interest. The construction should be, that the sheriff is to sell that which is a fit subject for sale, not choses in action, nor equitable and contingent interests. It is conceded that choses in action ought not to be sold, and the reason assigned is, that in respect to them a remedy is prescribed by the 35th section. But that section gives no remedy against debtors out of the commonwealth; and such debts, it would be necessary to contend, are to be sold. This cannot be. Were a merchant to fail, having debts due him from numerous consignees abroad, it could never be endured that such debts should be sold at public auction. The opinions of the judges who went farthest in *Shirley v. Long* (6 Rand. 747, 753,) only ascertain that the sale and conveyance by the sheriff will pass the legal title, like the sale and conveyance of any other trustee; not that the same will be sanctioned by a court of equity, when the sale ought not to have been made, or has not been made in a proper manner. The difference between the two tribunals has more than once been recognized in this court. *Taylor v. King*, 6 Munf. 358; *Harris v. Harris*, 6 Munf. 367. Here, besides that a deed of trust had been made, and the interest in the land might be subject to that deed, that interest was itself of an uncertain extent, depending on 236 the value of *the work done and materials found. That value ought to have been ascertained in a suit against Cosby, before any sale was made. The nature of the interest, and the price for which it was sold, furnish of themselves sufficient reasons for not allowing Lambert's rights to be diminished by the sale. But however it might be otherwise, there is no room for question after the verbal declaration of Cosby, and his letter of the 15th of May 1822. After buying subject to the lien created by the deed of trust for the amount of the debt due Smith, and getting relieved from part of that debt by saying he would take no advantage of the sale, he cannot be permitted to take that advantage now. If the sale for 50 cents was fair when subject to the whole amount of that debt, it is very different now.

II. The suit being for land, no time short of that which would bar an ejectment is a bar here. Besides, it does not lie in the mouth of Cosby to object that the suit has been unreasonably delayed: for it was as much incumbent on him to bring suit for an adjustment of the accounts with Lambert, and partition between them, as it was incumbent on Lambert. This, too, is not a case in which Cosby has been sleeping in security, and is now surprised with a claim. His verbal declaration, and his letters of May 15, 1822 and January 20, 1823, shew that it is not. The last of the bonds to Moffett did not become payable until the 1st of October 1825, and until those bonds were paid, the due proportion of each could not be ascertained. Add to this the embarrassed circumstances of Lambert, the fact of the schedule creditors being so long the parties in interest, and the other circumstances mentioned in the bill, and all ground of objection because of the lapse of time is removed.

III. Though the conveyance to Tapp is in the name of M'Nutt as grantor, it is not executed by him, nor by any person as his attorney in fact, but by his deputy. It therefore conveys no legal title. Still, if 237 Cosby had *simply stated that Tapp purchased, there might have been some reason for making him a party. But according to the answer of Cosby, Tapp did not acquire either the legal or equitable title: whatever title he acquired was Cosby's. And the enquiry here should simply be in relation to Lambert's rights, as between him and Cosby.

There can be no occasion for making the sheriff a party. He had merely an equity after the deed of trust should be satisfied, and that equity was in him for the benefit of creditors who are now satisfied.

IV. Perhaps, in strictness, Lambert should have had a decree giving him a portion of the land, bearing the same proportion to the whole land as 790 dollars 86 cents to 5600 dollars (which would be about a seventh), and a due proportion of the rents and profits, and compelling him to pay the balance due on the deed of trust. But Cosby has sold part of the land; and it is because he has gotten into possession, and done acts which interfere with a fair division of the land, that the circuit court considered itself authorized to decree money instead of land. He ought not to be permitted to object that his vendee is not interfered with. And even though his liability shall be held to be for the value of the land, yet that value ought to be shewn by him; and not being shewn to be less than when the contract was made with Moffett, the objection is not open to him that the value is actually less.

C. Johnson in reply.

I. All the estate of the insolvent passing to the sheriff, what is the sheriff to do? As to debts and personal effects in the possession of another, particular provision is made; but as to every thing else, there must be a sale. The sheriff is a trustee, as completely as if made so by the contract of the parties, in which case there is no doubt a sale might be

made. If creditors perceive that injury will be done, they may go into equity within the 60 days, and ask that the sale be en-
238 joined; *and the court, in any case in which the direction of the law ought not to be followed, will give relief. But where there is no injunction, it is the duty of the sheriff to sell. There is no analogy between this case and that of a *fieri facias*. That issues against the goods and chattels of the debtor; and the sheriff cannot take goods which are not legally the debtor's. He cannot take goods in which the interest of the debtor is merely equitable. But here the sheriff is owner of the estate, whether legal or equitable. If the sheriff might have sold, he did sell; and no fraud is alleged. There are no materials even, from which to ascertain that the equity of redemption was worth more than the 50 cents for which it sold. There is no evidence shewing the value of the land, except that which shews the price contracted to be paid for it. That was in 1818, when property was at an inflated value. Since that time, it has never been worth 50 per cent. of what it sold for then.

II. The lapse of time is a valid objection, under the circumstances. Cosby's statements only bound him in case Lambert should come forward in a reasonable time and shew the state of the accounts. Lambert shews no good reason for not having then come forward and settled; and now it would be difficult to settle properly.

III. Tapp's heirs ought to be parties, to ascertain whether they are interested or not.

IV. Nothing is said in the bill about a sale of any part of the land, and the only evidence on the subject is a certificate of a deed having been made for 100 acres. There being no proof of a sale of the residue, the sale of the 100 acres is no obstacle in the way of doing ample justice. In ascertaining Lambert's share of the land, we have not merely to look to the value of his work and materials; but what Cosby had to pay for covering in the house must be added thereto, and
239 after giving Lambert a part of the land in proportion to the *combined amount, there will be an incumbrance on Lambert's part of the land in favor of Cosby, for the amount paid by the latter for covering in the house, and also for the balance due on the deed of trust.

STANARD, J., delivered the opinion of the court.

The court is of opinion that under the agreement of the 12th November 1819, Lambert's original interest in the land was reduced to such proportion thereof, as the amount of the work then done and under that agreement to be done by him, was of 5600 dollars, the original price of the land; and had he done the work to be performed by him, the proper partition of the land would have been in the proportions aforesaid.

The court is further of opinion that the failure of Lambert to do the work, did not (at least for his benefit) change the said proportion of the land on the partition thereof; but the effect of that failure, and the doing

of the work by Cosby, left Lambert's proportion of the land unchanged;—chargeable however to Cosby for the amount of the value of said work which Lambert ought to have done, but which, on his failure, was done by Cosby.

The court is further of opinion that notwithstanding the surrender of Lambert's interest in the land when he took the oath of insolvency, and the sale thereof by the sheriff, and purchase by Tapp for Cosby, the subsequent transaction, especially the demand by Cosby of contribution from his cosurety for the debt to Silas H. Smith, which was an incumbrance on Lambert's share of the land by virtue of the conveyance of Lambert to Stribling for the indemnity of the sureties for that debt,—coupled with the assurance that the land, notwithstanding the sheriff's sale, was still redeemable by Lambert, and the receipt of contribution from that surety, entitled Lambert to redeem, on paying all that was justly chargeable thereon in favour of Cosby.

240 *The court is further of opinion that such right of redemption was all that Lambert could justly claim, and the court below had no authority to convert this into a money demand, and by subjecting Cosby to a decree for such money demand, make him a purchaser of the equity of redemption against his will, and that too at a price fixed without enquiry into its value at the time of the decree, or any evidence of such value.

The court is further of opinion that the alleged sale by Cosby of one hundred acres of the land was no effectual impediment to a partition, so as to assign to Lambert his due proportion of the land; that the proper relief to him would have been a decree for such partition, holding the share allotted to him chargeable with the amount that might be ascertained by account to be due Cosby; that amount to be ascertained by crediting Cosby for the amount of the work done by him that Lambert ought to have done under the said agreement of the 12th November 1819, and the payments of Cosby in discharge of the said debt to Silas M. Smith, and the 50 cents, the amount of the purchase at the sheriff's sale, and debiting him with the just proportion of the rents and profits that the interest aforesaid of Lambert in the land entitled him to; and subjecting the said share of Lambert to sale, to satisfy the amount so ascertained to be due Cosby, if the same should not be paid in a reasonable time.

The court is further of opinion that in fixing the value of the work done by Lambert, with a view to the ascertainment of his share as aforesaid of the land, respect should be had, as far as practicable, to the standard furnished by the prices that may have governed the original contract, rather than the current prices of other work of the like kind.

The court is further of opinion that as the sheriff sold to Tapp, and no conveyance appears to have been made by Tapp to Cosby,

Tapp's heirs ought to have been parties. *Though the record affords

strong ground for the inference that Tapp purchased for Cosby, the proceedings in this case, if Tapp's heirs be not parties, would not bind them, or be evidence against them; and if the case were to proceed to decree without making them parties, an ostensible title would be left outstanding, to the assertion of which the decree in this cause would be no bar.

Therefore the court doth adjudge, order and decree, that the decree be reversed with costs, and that the cause be remanded for farther proceedings in conformity with the foregoing principles.

Campbells v. Bowen's Adm'rs & Another.

August, 1842, Lewisburg.

(Absent CABELL, P., and BROOKE, J.)

Insanity*—Institution of Enquiry—Guardian ad Litem

—Practice.—In a suit in equity to foreclose a mortgage, after the defendant has answered, an account been taken before a commissioner, and a decree of foreclosure made, the sons of the defendant file a petition, suggesting that the defendant is, and was at the time of the mortgage, a lunatic; and they exhibit some affidavits in support of the suggestion. The circuit court thereupon appoints the petitioners guardians ad litem to the defendant, suspends the decree of foreclosure, and (the petition being traversed) directs an issue to try the validity of the mortgage. Afterwards, considering it improper that there should be an enquiry as to the validity of the mortgage until the fact of lunacy at the time of the suggestion is first established, the court sets aside the order directing the issue, leaves those interested to furnish proof of the fact of lunacy by procuring the appointment of a committee by the county court, and declares that if this be not done in a reasonable time, it will rescind the order suspending the decree. The court waits 18 months, and then (no such step having been taken) allows the decree of foreclosure to

242 operate, and orders *the parties who filed the petition to pay the costs incurred in consequence thereof. Whereupon those parties, as well as the original defendant, appeal. **Held**, 1. that on the petition and the traverse thereof, the circuit court should have instituted an enquiry as to the state of the defendant's mind at that time, and ascertained whether it was such as to require for him the protection of a guardian ad litem. 2. That the court erred, when, without making this enquiry, it appointed guardians ad litem, and directed an issue to ascertain whether the defendant was of unsound mind when he made the mortgage. 3. That the order directing the issue was properly set aside, to correct the error in making it. 4. That, for the purpose of ascertaining whether there was such incapacity as made it proper to appoint a guardian ad litem, the court might have taken such a course as is resorted to in England in like cases; that is to say, it might have referred the matter to a master, for him to report, on a personal examination of the

party, aided (if need were) on such examination, by physicians. 5. (ALLEN, J., dissenting.) That, under the circumstances of the case, the appellate court ought to consider that which was done in the circuit court, as equivalent to an enquiry before the master, and a report by him against the suggestion. And 6. that as the parties who filed the petition were not interested as parties in the original suit, and can only claim to be injured by the decree for costs, the appellate court must dismiss the appeal from such decree for costs, as a matter of which it has not jurisdiction.

On the first of June 1829, Rebecca Bowen administratrix and William Gillespie administrator of Rees Bowen deceased, and John Crockett, filed a bill in the superior court of chancery holden at Wythe courthouse, against William Campbell, to foreclose a mortgage theretofore (to wit, on the 4th of November 1823) executed by Campbell to Rees Bowen and John Crockett, to secure debts arising out of contracts made in 1821, 1822 and 1823.

At May term 1830, Campbell filed his answer. The answer was duly sworn to before a justice of the peace, and was very full in its statements and views. It furnished strong evidence on its face that it was prepared by counsel; and indeed the record shewed that counsel appeared for the defendant and filed it.

243 *After the establishment of circuit superior courts, the cause was removed to the circuit court of Washington county.

The accounts between the parties being referred to a commissioner, and a report returned, the court, on the 19th of May 1834, decreed that unless payment should be made, on or before the first day of the succeeding term, of the sums ascertained to be due, the mortgagor should be barred and foreclosed of his equity of redemption, and the mortgaged lands sold by a commissioner appointed for the purpose, in the manner and upon the terms mentioned in the decree.

At the next term, to wit, on the 20th of October 1834, Alexander H. Campbell and George W. Campbell sons of William Campbell, filed a petition, representing that their father had for more than twenty years been labouring under mental derangement; that this was notorious, and was known, at the time the mortgage was taken, to the agent who obtained it for the mortgagees, and to the mortgagees also; that at the time of the mortgage, as well as before and since, he was incompetent to make a contract, or sanction one, which would be binding on him, either in law or equity; that the contract was moreover an unconscionable one, and upon the least taint of fraud, ought to be dissolved by a court of equity; that even if their father be held to the contract, great injustice has been done him in ascertaining the amount due. The petitioners expressed their belief, that, from the mental incapacity of their father, much had been omitted in his defence, which by proper attention could be shewn, and which would materially change the aspect of the case. And the

*See monographic note on "Insanity" appended to Boswell v. Com., 20 Gratt. 860.

prayer of the petition was, that the decree might be set aside; that a guardian or committee be appointed to represent the interest of the defendant, with permission to answer the bill; that an enquiry might
244 be instituted in regard *to his mental capacity, and such relief afforded as justice and law required.

The petition was sworn to by George W. Campbell, before a justice of the peace; and the petitioners, in support of their petition, relied upon various contracts entered into by Campbell at different times before the mortgage (which contracts formed the basis of the mortgage, and had been filed with the bill and answer), and also relied upon the following affidavits of other persons; to wit—

Of John T. Campbell; that at least three times in the course of 8 or 10 years, he had seen William Campbell in a perfect state of derangement.

Of Jeremiah Ayres; that since 1819, he had been acquainted with Campbell, and during that time never thought he was capable of doing business, and frequently knew him to be in a state of derangement.

Of Charles Tate; that he had been acquainted with Campbell for upwards of 20 years, and for the last 15 years had regarded him as of unsound mind, and incompetent to the transaction of business of importance; that the affiant believed his state of mind to be such at this time, that he was no way capable of given to any business proper attention.

Of Edward Fulton; that he had been acquainted with Campbell since 1831, and had seen him, at periods during that time, mentally disqualified safely to transact any sort of business.

Of Francis Smith; that he had been acquainted with Campbell upwards of 30 years; that for 20 years or upwards, he had thought Campbell's mind unsound,—much more so at some times than at others; that though capable generally of managing common business, he was inadequate to what was material and intricate.

Of Richard Roberts; that he had been acquainted with Campbell for more than
245 20 years, and from his peculiar *actions on some occasions, concluded that he was in a state of derangement.

Of Theodore G. Pearson; that he had been acquainted with Campbell for 12 years, and once or twice in the course of that time had seen him when the affiant thought his mind was impaired. On one occasion, when the affiant saw him and spoke to him, he would not speak, and from external appearances the affiant thought that his mind was certainly very much disordered.

Upon this petition, thus supported, the court made an order suspending the execution of the decree; appointing Alexander H. Campbell and George W. Campbell guardians ad litem of the defendant; and giving leave to the complainants to traverse the suggestions in the petition.

At May term 1835, it was entered of record that the complainants traversed and denied

the petition, and all the allegations thereof; and thereupon the court ordered that issues be made up, to be tried at its bar, to ascertain, first, whether Campbell, at the time of making the several contracts before mentioned, was of unsound mind, and in consequence thereof incapacitated to make the said contracts; and secondly, whether, at the time of executing the mortgage, he was of unsound mind, and incapacitated thereby to execute the same.

At October term 1835, the cause was continued.

At May term 1836, on motion of the complainants, it was ordered that the issues be so changed, as that it should first be ascertained by the verdict of the jury, whether, at the time of executing the mortgage, Campbell was of unsound mind, and thereby incapacitated to execute the same; and if so, secondly, whether at the time of making the several other contracts before mentioned, Campbell was of unsound mind, and thereby incapacitated to make the same. During the same term, a jury was impanelled to try the issues; but, after hearing the evidence, the jurors were unable to agree upon a verdict, and were discharged.

246 *At May term 1837, for reasons appearing to the court, the issues were ordered to be tried at the bar of the circuit court of Scott county. A trial was had in that court in September 1837, which again resulted in the failure of the jury to agree.

At October term 1837, a motion was made by the complainants to set aside the issues made up on the petition, to dismiss the said petition at the costs of the petitioners, and to rescind the order suspending the decree of foreclosure. On consideration thereof, the court decreed that the issues be set aside and the petition dismissed. It made no decision at that time upon the question of costs, but held the same for advisement and refused at that time to rescind the order suspending the decree, for reasons set forth in a written opinion.

"It seems," says the judge in this opinion, "that the chancellor has no power to appoint a committee for a lunatic. This power was exercised in England by commission from the king, which, though usually directed to the chancellor, might be directed to any body; and it was in virtue of the commission that the chancellor acted, and not virtue officii. The king, by virtue of his office, having the care and custody of all such persons, and not being able to exercise the office in person, delegated it to another, who, by virtue of such delegation, thus exercised a personal trust. But the courts of chancery, as such, have power to appoint guardians ad litem to defend the interest of persons disabled in law or fact from defending themselves, and the only question seems to be whether the guardians were regularly appointed." After remarking upon the nature of the petition and proofs, the judge thus proceeds: "It seems to the court that it was wrong, upon these suggestions and proofs, to have made the appointment; which the court regrets, on account of the

expense to which the parties have been thereby subjected: and it is now questionable whether the proper mode to have

247 this subject *investigated is by a committee appointed by the county court, (to whom, and to magistrates, the legislature seems alone to have confided the power over this subject usually exercised in England under a commission from the king) which committee may file a bill asking a suspension of the decree, or that the court should have an investigation before a jury ordered by it, and if the defendant is found now of unsound mind, appoint guardians ad litem to defend this suit for him. One or the other of these modes ought to have been pursued, and the first seems most proper, not only as the mode pointed out by statute, but as presenting parties liable for costs in such expensive litigation, to be paid out of the lunatic's estate. As the courts of chancery are vested with power, in all analogous cases, to appoint guardians ad litem for all persons disabled or incompetent from infancy &c. to defend their own interests, the power might be exercised in a proper case in relation to a lunatic. But it certainly ought not to be exercised upon mere suggestion." After some farther remarks upon the former proceeding, the judge continued as follows: "The court now thinks the proceeding wrong, and must set aside the issues as improvidently ordered. But the court has seen enough in the proceedings to induce the belief that some investigation of the sort may be proper; and were the court now to rescind the order suspending the decree of foreclosure, it would operate a surprise upon the defendants: and although the court would not suspend its decree for an indefinite length of time, merely to see whether any body would place himself in condition properly to have the matter of the issues investigated, yet it thinks a suspension till the next term but reasonable; when, if no steps shall have been taken by persons interested to oppose the decree of foreclosure, the suspending order will be rescinded, and the decree allowed to operate."

The cause was continued at May term 1838, and was again continued at October term 1838.

248 *At May term 1839, the case was again examined by the judge, and on this occasion he adverted to the first proceeding on the petition, in the following terms: "The error in that proceeding seems to be this, that on the suggestion of the petitioners, and affidavits offered by them, the court took for granted a fact which ought to have been shewn in another manner, viz. that the defendant was at that time a lunatic, and incompetent to manage his case or to be impleaded therein. From the proofs made on the trial of those issues, the court might, if it had power, direct that matter to be enquired into; but believing it possessed no such power, the court left it to defendant's counsel, and to his sons, or any other feeling interest in the matter, to provide the proper means for investigating that subject, through the action of the county court or otherwise,

and afforded them ample time to do so. It has not been done, though a proceeding was instituted in the county court of Smyth (defendant's residence) and afterwards abandoned, so that the defendant stands before me in a situation no way different from other defendants, and the court is called upon to decide the cause upon the papers before it, freed from other considerations than those afforded by the pleadings and testimony in the cause."

Thereupon the court, rescinding the order which suspended the former decree of foreclosure, made another decree of foreclosure, and ordered the petitioners to pay the complainants their costs expended about the defence of the petition, and upon the issues.

From the said decree and proceedings, an appeal was allowed on the petition of William Campbell, Alexander H. Campbell and George W. Campbell.

The cause was argued by Preston and B. R. Johnston for the appellants, and by Leftwich for the appellees. The argument was full, upon the merits as well as upon the questions growing out of the petition suggesting the fact of lunacy.

249 *In the course of the argument the following authorities were referred to, to shew the power of the chancellor in England, and the power and duty of the circuit court, upon such suggestion: 4 Bac. Abr. title Idiots and Lunatics; C. G. Ex parte Barnsley, 3 Atk. 168; Oxenden v. Lord Compton, 2 Ves. jun. 71; Ex parte Ward, 6 Ves. 579; Sherwood v. Sanderson, 19 Ves. 280; 2 Madd. Ch. Pract. 739; Wilson v. Grace, 14 Ves. 172; Howlett v. Wilbraham, 5 Madd. Ch. Rep. 423; Sackville v. Ayleworth, 1 Vern. 106; Mitf. 29, 94, 5; 1 Newland's Ch. Pract. p. 146 of Lond. ed. of 1830; 1 Smith's Ch. Pract. 124, 186; Grant's Ch. Pract. 594; 2 Fowler's Excheq. Pract. 422; Shelford on Lunacy 445; Story's Eq. Plead. 67; 1 R. C. 1819, p. 413, § 3, 6; Id. p. 415, § 9; Id. p. 417, § 22; Id. p. 212, § 73; Bolling v. Turner, 6 Rand. 584; Hall v. Warren, 9 Ves. 605.

Leftwich also referred to the following authorities, to shew that no appeal would lie for the petitioners from the decree against them for the costs incurred in consequence of the petition: Cook v. Piles, 2 Munf. 152; Garnett v. Childers, Id. 277; Henry's ex'or v. Elcan, Id. 541; Ashby v. Kiger, 3 Rand. 165; 1 R. C. 1819, p. 206, § 51.

STANARD, J. The first enquiry in this case is, whether it was brought on prematurely, before the court below had, by the appointment of a guardian ad litem to the defendant Campbell (alleged to be under the disability of lunacy), provided for a proper defence of an incompetent defendant, or at least instituted suitable proceedings to ascertain the fact on which the necessity of such an appointment depended.

The suggestion of the disability of lunacy was not made until the lapse of years after the institution of the suit, and after a defence ostensibly full, and a decree. It was then made on an affidavit of parties, who

petitioned for the appointment of a guardian ad litem, supported by other ex parte affidavits. The affidavit speaks of the general incompetency of the defendant for a period of more than twenty years, and the supporting affidavits speak generally of a fluctuating capacity during that time, which rendered him incompetent "to give proper attention to any business;" or as, "at periods, mentally disqualifying him safely to transact any sort of business;" or as rendering him, though "capable generally of managing common business," yet "inadequate to what was material and intricate;" or as betraying, "by his peculiar actions on some occasions, that he was in a state of derangement;" or as having been seen, when, from his silence, and "from external indications, the affiant thought his mind certainly disordered." The affidavit of the petitioners seems to point more to the incapacity at the time of the contract, and to the consequent invalidity of the contract, than to its influence on the measures of defence in the suit; for in respect to that, there is only a general declaration of their belief that in consequence of the mental incapacity of the defendant, "much has been omitted in his defence, which by proper attention could be shewn," without the specification of any omission; and the supporting affidavits do not apply specially, nor are they directed, to the mental capacity at the time of preparing and filing the answer, or at the time of any other proceeding of the defendant in defence of the suit.

Nothing is more certain than that, on such a suggestion, the only proper subject of enquiry for the court was the then capacity or incapacity of the defendant to superintend his defence. If he was labouring under mental disability in the decree to require the superintendence of a guardian ad litem, that protection should have been given him. If he was not, the court had no power to supersede his free will and put him in wardship, and through such agency, to obtrude on him a defence on the ground of incapacity at the time the contract was made; a defence which, on the supposition of existing capacity, he did not think proper to urge for himself, and which he by implication disavowed. If the allegations of the petition of existing incapacity had been admitted, the court might and ought to have appointed a guardian ad litem, and (the guardian being thus introduced into the case) it would depend on what he might suggest and shew to the court, whether or not he would be permitted, on behalf of the defendant, to change the defence, by adding to it the objection to the validity of the contract on the ground of incapacity at the time it was made. He would probably not be allowed to make such change, without suggesting and shewing that the defendant laboured under the alleged incapacity at the time he made his defence. But though the allegations of the petition were immediately traversed, the court, without making the only enquiry proper to be made on the petition, that is, to ascertain the then

state of the defendant's capacity, passed by that enquiry, appointed the petitioners guardians ad litem, and directed an issue to ascertain whether the defendant was of unsound mind at the time he made the contracts and mortgage in the bill mentioned, and thereby incapacitated to make the contracts and execute the mortgage. All this was certainly most irregular. This issue was improperly directed, and the abortive attempts to get a verdict on it may be passed over without further notice. The order directing it was properly set aside, to correct the admitted error in making it, and under the well founded conviction that the preliminary question was, whether the then state of the defendant's mind was such as to require for him, at the hands of the court, the protection of a guardian ad litem. The judge thought he had no right to enquire into the insanity of the defendant; that the statute had prescribed the manner of making such enquiry, and the organs to make it; and that

the appointment of a guardian ad litem could not regularly be made, but as a consequence of such enquiry, and in the person of the committee that such enquiry might provide for the lunatic.

The argument of the appellant's counsel, and the authorities vouched in support of it, have, I think, most successfully shewn that the judge of the court below mistook the extent of his powers, and erroneously thought them more limited than they were. He may not have the power that the lord chancellor in England, as the delegate of the crown, possesses—that of issuing a commission of lunacy, nor of appointing a committee. His power in this respect need not here be enquired into or adjudicated. If a defendant in a suit in equity be lunatic, the court in which the suit may be pending has power to appoint a guardian ad litem, not only as a part of its general jurisdiction, but by express authority of the statute, 1 R. C. 212. And the authorities before referred to also ascertain, that if a party lunatic have not a committee, he should have a guardian ad litem appointed to superintend and protect his interests; that such protection is extended even to those who, from age and imbecility, are shewn to need it; and that the interposition of such protection is a matter of sound discretion of the court. When, however, the fact of lunacy or incapacity is contested, the rightful exercise of the power to appoint a guardian ad litem depends on the previous ascertainment of the fact, and the power to enquire into it is incident to that which is to be exercised on the ascertainment of it. In England, there is no statutory provision for a summary and compendious enquiry into the fact of lunacy. The enquiry there, with a view to the appointment of a committee to be charged with the care of the lunatic and his estate, is by commission from the chancellor, acting as the delegate of the crown; and where it is suggested that a party defendant in equity, who has not been found lunatic under a commission, is a lunatic, and the enquiry is made for the purpose of deciding whether or no the court should

provide for this incapacity by appointing a guardian ad litem, that enquiry is referred to a master for his report on a personal examination of the party, the master being aided (if need be) in such examination, by physicians. Shelford on Lunacy 445; 1 Smith's Ch. Pract. 186. Such enquiry is instituted under the sound discretion of the court; and sometimes, instead of appointing a guardian ad litem to act for the incapable defendant, that duty is directed to be performed by the clerk in court. In the case under consideration, such a course might have been taken, though the judge below thought he had no power to resort to it. So thinking, he (instead thereof) suspended the decree for 18 months, avowedly for the purpose of affording the defendant, and those who assumed the superintendence of his interests, an opportunity to resort to that summary enquiry which the statute here (but not in England) allows, to ascertain the existence of the suggested incapacity. The resulting question then is, ought this, under the circumstances of this case, to be regarded in the appellate court as an equivalent for the enquiry before a master, which the court in its sound discretion might have directed?

The suggestion of incapacity was made under circumstances calculated to excite distrust and suspicion. The suit was instituted in 1829, to foreclose a mortgage executed in 1823; and the existing debts secured by the mortgage had been contracted in 1821 and 1822: and the first decree of foreclosure was rendered in May 1834, after a defence ostensibly full and active. From the time of the first contract in 1821 to the decree in May 1834, the defendant continued in the uncontrolled management of his property, and unrestrained enjoyment of his liberty, as a person of sound mind; and not an intimation is made in the progress of the suit, until

after the decree, that he laboured under any incapacity *requiring a guardian ad litem to conduct his defence: and during the time that elapsed from 1834 to 1837 in the abortive attempts to get a verdict on the issue that was erroneously directed, he still continued unrestrained in his personal liberty and the management of his property. If counsel prepared his answer, the proper evidence of his incapacity then would be that counsel, and yet no such evidence is offered; and if it was prepared by himself, it furnishes most persuasive if not conclusive proof of the presence of capacity. The opportunity afforded by the suspension of the decree, for enquiry into the capacity of the defendant by a personal examination, if used (as the opinion of the court below states that it was) resulted in as satisfactory a refutation of the suggestion of existing incapacity, as would have been furnished by a report of a master; and if not used, the failure to use it is inferential proof, almost as cogent as direct, that it could not be successfully used. Under the circumstances of the case, I think the appellate court ought to consider that which was done in the court below, a full equivalent for an enquiry before a master, resulting in a

negation of the suggestion: and thereafter the court below soundly exercised its discretion, in proceeding with the case as one in which the defence had been, and would continue to be, made by a competent defendant.

On the merits, I think the decree is right. (The judge proceeded to give his view of the evidence, and of the operation of the contracts, and then concluded as follows:)

It is not necessary to enquire whether the court ought to have given costs against the petitioners, on the dismissal of their petition. They had no rights in the matters in controversy in the original suit. They were not interested as parties, and could claim no decree therein. The utmost injury they can sustain by the decree, is the amount of 255 costs decreed against them; *and for the correction of this error, if it be one, this court has not jurisdiction.

On the whole, I think the decree in the original suit ought to be affirmed, and the appeal of Alexander H. Campbell and George W. Campbell, from the decree for costs on the dismissal of their petition, dismissed, as not within the jurisdiction of this court.

BALDWIN, J., concurring, the decree was entered accordingly.

ALLEN, J., said, he would have concurred with the majority of the court on the merits, if he had considered it proper, at this time, to make a decision upon the merits. He was of opinion that it was competent for the circuit court, upon the suggestion of the insanity of the defendant, verified by the affidavits and other circumstances of the cause, to have enquired into the fact; that if such enquiry resulted in satisfying the court that the defendant was insane when he filed his answer, and so continued, the court had the power, and it was its duty, to appoint a guardian ad litem, and give him leave to file an answer; that as, by the pleadings, the competency of the defendant to contract at the time the contracts and mortgage were executed had not been put in issue, the order directing issues to enquire into that fact was premature and irregular; but that, upon the proofs in the cause, the court should have suspended proceedings until it had ascertained, by an issue or otherwise, whether the defendant, at that time, and when he filed his answer, was insane or not. It therefore seemed to him that the decree of the circuit court ought to be reversed, and the cause remanded for the proper enquiry to be made.

256

*M'Cann v. Janes.

August, 1842, Lewisburg.

(Absent BROOKE, J.)

Specific Performance*—Contract to Convey Wife's

*Specific Performance—Title.—A party is not entitled to a specific execution of a contract for the sale of land unless he can make a good title thereto. *Middleton v. Selby*, 19 W. Va. 174; *Linkous v. Cooper*, 2 W. Va. 70, both citing the principal case.

See foot-note to *Clarke v. Reins*, 12 Gratt. 90, and

Land.—A husband sells land in which his wife has an estate in fee, and executes a bond to the purchaser, conditioned that he and his wife will make a deed to the purchaser within a specified time. After that time the husband states that his wife has declined joining him in the deed, and has forbidden him to convey his estate, and he refuses to make any conveyance. Thereupon a bill is filed by the purchaser against the husband, stating that there are children of the marriage, claiming that the husband is therefore entitled to a life estate, and praying that he may be decreed to convey to the complainant all his interest in the land, reserving to the complainant his right of action at law upon the bond against the husband for failing to procure his wife to unite with him in the conveyance. The bill being demurred to, the circuit court sustains the demurrer and dismisses the bill; and this decree is affirmed.

John Ross having an estate of inheritance in a tract of land in the county of Harrison, and dying intestate, the same descended to his children, ten in number, of whom one was Patsy. She, after the death of her father, married Joseph Janes, and there were children of the marriage. James M'Cann purchased, for the sum of 110 dollars, so much of the land and the rents thereof as Janes and wife were entitled to; and Janes executed a bond to him in the penal sum of 200 dollars, with condition that Janes and his wife should make him a good deed for the same within two years from the date thereof. After the two years had expired, M'Cann exhibited a bill in the circuit court of Harrison, setting forth, that since the expiration of the two years, he had frequently applied to Janes to have a deed made by himself and his wife according to the bond, and

Janes had promised him it should be done; but after those promises, *Janes stated that his wife would not join him in a deed: that by the marriage and the birth of children, Janes was at all events entitled to a life estate; but he said that his wife had forbidden him to convey that, and he refused to convey it. The bill prayed, that Janes might be decreed to convey to the complainant all his interest in the land, reserving to the complainant his right of action at law upon the bond against Janes, for failing to procure his wife to unite with him in the conveyance; and that the court should grant such other, further and general relief in the premises, as to equity appertains.

The cause coming on to be heard upon the bill and a demurrer thereto, Duncan, J., delivered the following opinion:

"If this were a bill for a specific execution of the entire contract, that is, to obtain a

decree for conveyance of the wife's estate, then my judgment would incline to the opinion expressed by judge Story in his excellent commentaries on equity, vol. 2, p. 38-40. See also Sugden on Vendors, p. 152 (9th London ed. p. 198, 9). To grant such a prayer would, to my mind, be undertaking to enforce a contract against the policy of the law, as it would tend to a violation of conjugal duties, and it would be 'offering a premium to the husband to be ungenerous as well as unjust to his wife.' Weighty authorities exist, however, shewing that the courts have thought otherwise, and that upon a contract of this kind, the husband might be thrown into jail until the affections of the wife could be so worked upon as to induce her to surrender perhaps the only means that remained to her to save herself and children from penury. I confess, that unless borne down by the weight of authorities, I should decide differently.* The
258 *plaintiff has relieved the court from a more full-examination of the ques-

*Note by the reporter.—In *Howel v. George*, 1 Madd. Ch. Rep. 1, the defendant, when he entered into the agreement, thought he had an absolute power over the estate, but afterwards found that he was only tenant for life; and his wife and son, who had interests in the estate, refused to join with him in suffering a recovery. The vicechancellor (sir Thomas Plumer) said: "It was not much pressed in argument, that the defendant ought to be decreed to procure his wife and son to join in a recovery. It could not be argued that a man should be compelled to use his marital and parental authority to compel his wife and son to do acts which ought only to be spontaneously done. In *Hall v. Hardy*, 3 P. Wms. 189, the master of the rolls says, there have been a hundred precedents where, if the husband, for a valuable consideration, covenants that his wife shall join with him in a fine, the court has decreed the husband to perform his covenant; and in *Morris v. Stephenson*, 7 Ves. 474, a husband was, under the circumstances, decreed to procure his wife to join in a surrender of a copyhold estate; but in *Emery v. Wase*, 8 Ves. 506, lord Eldon reviews the cases, and expresses great doubt whether, under a contract by a husband to sell the estate of his wife, the court will decree him to procure her to join. In *Davis v. Jones*, 1 New Rep. (4 Bos. & Pul.) 267, the chief justice of the common pleas (sir James Mansfield) who was very conversant in the doctrines of a court of equity, thought nothing could be more absurd than to allow a married woman to be compelled to levy a fine through the fear of her husband being sued and thrown into jail, when the general principle of the law was that a married woman shall not be compelled to levy a fine. Those cases in which a husband was compelled to make his wife concur have been where he has agreed she should convey, and her consent might be supposed to have been previously obtained; but in this case there is no pretence that the defendant agreed that his wife and son should join in a recovery. None of the cases have gone so far as to say that a father can be compelled to procure his son to join in a recovery."

Afterwards, in *Martin v. Mitchell*, 3 Jac. & Walk. 425, the same judge (being then master of the rolls) expressed himself in these terms: "If it was only

monographic note on "Specific Performance" appended to *Hanna v. Wilson*, 3 Gratt. 248.

The principal case is cited in *Clarke v. Reins*, 12 Gratt. 108.

Somet.—Contract to Convey Wife's Land—Mutuality.

—The principal case is cited in *Graybill v. Brugh*, 8 Va. 899, 17 S. E. Rep. 560. See *Chilhowie Iron Co. v. Gardiner*, 79 Va. 805.

See generally, monographic note on "Specific Performance" appended to *Hanna v. Wilson*, 3 Gratt. 248.

tion, by shaping his cause differently. He seeks for a partial execution of the contract, and a right to resort to law to recover compensation for the residue. Can this be done? There are indeed many cases decided in Virginia, where a vendee has obtained a decree for a part of the land he purchased; for example, where there was a small deficiency in the quantity, but yet the vendor was capable of giving a title to what was the substantial inducement to the contract, the deficiency lying in compensation. There are cases also in which a vendee has obtained a decree for a conveyance from a husband who had bound himself to obtain a relinquishment of his wife's dower. But in such cases the vendee has gotten substantially what he purchased, to wit, the fee simple title of the husband.

259 This, it is true, the vendee *has taken subject to a contingent right of dower; but he has gotten also the husband's covenant of warranty for his protection against the claim of dower, and as he purchased with a knowledge of the contingent right of the wife, it is no great hardship that he should be compelled to take the husband's deed alone, with a risk of the possibility of his wife's having an estate in dower, and be made to rely for compensation in that event, upon his covenant of title. The question may be asked, whether, if the vendee be willing to take the title of the husband such as it is, the court ought not to decree it to him? As a general rule, I suppose that equity will decree specific performance so far as the vendor is capable of performing his contract, if the vendee be willing to receive the same. See Sugden on Vendors, p. 159 (9th London ed. p. 209).

But I apprehend that the vendee 260 must take the decree of equity *as full satisfaction, or not at all. He cannot be permitted to come into equity for part satisfaction, and resort to a court of law for further satisfaction. But even in a case in which the vendee is willing to take from the vendor a less estate than he bargained for, it must appear that the vendor has a lawful right to convey such less estate. Thus the question arises, whether the vendee can have a decree for a conveyance by the husband of his life estate in the lands of the wife, during her life? A tenancy by

the agreement of the husband, what becomes of the plaintiff's case? The point, that the court should compel the husband to coerce the wife to join with him in the conveyance, was abandoned. The counsel did not urge that that is the law now, and that the husband was to go to prison if she refuses to concur. It is not necessary, therefore, to go into the class of cases upon that subject, the authority of which has been very much weakened. They were much shaken by the remark of the lord chancellor, upon the difficulty of a court of equity compelling her to consent to a fine, while the court of common pleas always examines her to ascertain whether she acts freely, and if they find her to be under constraint, still her consent must be taken, or the husband will be punished. That point, however, is not pressed here."

the curtesy is only consummated by the death of the wife; and I apprehend that the husband has only a limited usufructuary right during the life of his wife, a right to receive the rents and issues. His right to lease his wife's lands, without her joining in the lease, is doubted: See Lomax's Digest vol. 2, p. 90. I am therefore of opinion that the demurrer to the bill must be sustained, on two grounds; to wit, 1. That any decree which equity can render must be in full satisfaction of the plaintiff's claim; it cannot sustain a bill for a specific performance in part, with a right to resort to a court of law for the recovery of damages for the residue: and 2dly, That a husband cannot be decreed to convey a life estate in his wife's lands, during her life. The plaintiff suggested, that although the court might refuse to give a decree for a specific performance of the contract, it might rescind the contract, under the prayer for general relief. I think otherwise. The prayer for general relief in addition to a prayer for specific relief, will only authorize such a decree as is consistent with the specific relief sought."

In conformity with this opinion, the circuit court, sustaining the demurrer, decreed that the bill of the plaintiff be dismissed, and that the plaintiff pay to the defendant his costs.

On the petition of the plaintiff, an appeal was allowed.

261 *The cause was submitted without argument, by William A. Harrison for the appellant, and George H. Lee for the appellee.

PER CURIAM. Decree affirmed.

Note by the reporter.—In *Mortlock v. Buller*, 10 Ves. 316, lord Eldon says: "I agree, if a man having partial interests in an estate, chooses to enter into a contract, representing it, and agreeing to sell it as his own, it is not competent to him afterwards to say, though he has valuable interests, he has not the entirety, and therefore the purchaser shall not have the benefit of his contract. For the purpose of this jurisdiction, the person contracting under those circumstances is bound by the assertion in his contract; and if the vendee chooses to take as much as he can have, he has a right to that, and to an abatement; and the court will not hear the objection by the vendor, that the purchaser cannot have the whole." Lord Eldon repeats the same doctrine in *Mestaer v. Gillespie*, 11 Ves. 640. "It is familiar," he says, "to come to this court for a specific performance of an agreement, the whole benefit of which the party cannot have; and if he waives that part, it is not competent to the other party to refuse to perform the rest."—"No one," he observes in *Wood v. Griffith*, 1 Swanst. 54, "will dispute this proposition, that if a man offers to sell an estate in fee simple, and it appears that he is unable to make a title to the fee simple, he cannot refuse to make a title to all that he has. The purchaser may insist on having his estate, such as it is. The vendor cannot say that he will give nothing, because he is unable to give all that he has contracted to give. If a person possessed of a term for 100 years contracts to sell the fee, he cannot compel the purchaser to take, but the purchaser can compel

him to convey, the term, and this court will arrange the equities between the parties." Other authorities sustain the same view. See *Milligan v. Cooke*, 16 Ves. 1; *Todd v. Gee*, 17 Ves. 274; *Western v. Russell*, 3 Ves. & Beam. 192; *Waters v. Travis*, 9 Johns. 450; *Morgan's heirs v. Morgan*, 2 Wheat. 303, note d.; *Sugden on Vendors* 198, 9.

The plaintiff in a bill for specific performance must not, however, call upon the other party to do an act which he is not lawfully competent to do. "If," says Lord Redesdale, "a party is compelled to do an act which he is not lawfully authorized to do, he is exposed to a new action for damages at the suit of the person injured by such act: and therefore, if a bill is filed for a specific performance of an agreement made by a man who appears to have had a bad title, he is not compellable to execute

263 it, unless the party seeking performance is willing to accept such a title as he can give; and that, only in cases where an injury would be sustained by the party plaintiff, in case he were not to get such an execution of the agreement as the defendant can give. I take the reason to be this, amongst others; not only that it is laying the foundation of an action at law, in which damages may be recovered against the party, but also that it is, by possibility, injuring a third person by creating a title with which he may have to contend." *Harnett v. Yielding*, 3 Sch. & Lef. 554. See also *Ellard v. Lord Llandaff*, 1 Ball & Beat. 261.

Neither (it seems) must the plaintiff by his bill seek that which was prayed by the bill here, viz. a decree giving the plaintiff a conveyance of that which the defendant can convey, and allowing the plaintiff to proceed at law to recover damages against the defendant for that which he cannot convey. The first ground taken in the opinion of the judge of the circuit court, to wit, that a court of equity ought not to sustain the bill for a specific performance as to part, and allow the plaintiff to proceed at law for the recovery of damages as to the residue, is that on which the court of appeals affirmed the decree, as the reporter has been informed by one of the judges. On this subject, see *Wood v. Rowe*, 3 Bligh 595.

263 *Hill v. Salem and Pepper's Ferry Turnpike Company.*

August, 1843, Lewisburg.

(Absent BROOKE, J.)

Appeals—Matter of Right—Roads—Construction of Statute.—Construction of the act of April 16, 1831, declaring that appeals to the circuit courts shall be demandable as of right from the orders of the county or corporation courts in controversies concerning mills, roads, or the like.

Same—Same—Same.—Where, upon the application

*For monographic note on Appeal and Error, see end of case.

†**Appeals—Matter of Right—Roads.**—See foot-notes to *Hancock v. Richmond* and *Petersburg R. Co.*, 3 Gratt. 328; *Trevillian v. Louisa R. Co.*, 3 Gratt. 326; *Chesapeake & Ohio Canal Co. v. Hoyer*, 2 Gratt. 511. See monographic note on "Appeal and Error" at end of case.

The principal case is cited in *Chesapeake & Ohio Canal Co. v. Hoyer*, 2 Gratt. 522, 523; *Senter v. Pugh*, 9 Gratt. 361; *Wheeling Bridge & Terminal Ry. Co. v. Wheeling Steel & Iron Co.*, 41 W. Va. 751, 24 S. E. Rep. 652.

of a turnpike company, a county court appoints freeholders to assess damages to a tract of land which will result from opening a turnpike road through it, and upon a report being made by the freeholders, it is affirmed by the county court and entered of record, an appeal to the circuit court is not demandable of right from such order of the county court.

By an act of assembly passed the 21st of March 1838 (Sess. Acts 1838, p. 120,) a company was incorporated by the name and style of "The Salem and Pepper's ferry turnpike company," subject to the provisions of the act prescribing certain general regulations for the incorporation of turnpike companies, 2 R. C. p. 211, ch. 234.

Application being made by the Salem and Pepper's ferry turnpike company to the court of Montgomery county, under the 7th section of the act last cited (p. 213, 14,) the court appointed five freeholders to assess the damages which would result from opening the turnpike road through certain lands of James A. Hill and others. Upon a report being afterwards returned by the freeholders, Hill, for himself, and as agent for the other land-owners, moved the court to quash the same; but his motion was overruled, and no good cause being shewn against the report in the opinion of the court, the same was affirmed and entered of record.

264 *From this order, Hill prayed an appeal to the circuit court; and upon his entering into bond with security, conditioned to pay all costs which might be awarded against him, the county court allowed the appeal.

In the circuit court, the appellees moved the court to dismiss the appeal, upon the ground that the county court had no power to grant the same; and this motion prevailed.

Thereupon, on the petition of Hill, a supersedeas was awarded by a judge of this court to the judgment of the circuit court.

The act of April 16, 1831, establishing the circuit superior courts, (Sess. Acts 1830-31, p. 50, § 30,) declaring that appeals to the circuit courts shall be demandable as of right from the orders of the county or corporation courts in controversies concerning mills, roads, or the like, and in certain other cases which are specified, and then declaring that all other cases may be brought before the circuit courts by writ of error or supersedeas, upon petition assigning error; the question was, whether the order of the county court appealed from in this case was an order in a controversy concerning a road, within the meaning of the said act of April 1831?

The attorney general, for the plaintiff in error, said, that in this case, as well as in cases under the act concerning public roads, 2 R. C. p. 233, ch. 236, the controversy is about the injury which the individual sustains by taking his private property for public uses; that whether the public right be exercised at the instance of a turnpike company or a county court, the case is not varied; it is still a public proceeding. The act prescribing regulations for the incorporation of turnpike companies does not regulate

the mode of taking appeals; and in the absence of any special regulation, 265 *the general law allowing appeals in controversies concerning roads ought to govern the case.

M'Comas was counsel for the defendants in error, but did not argue the case.

PER CURIAM. The judgment of the circuit court is affirmed.

APPEAL AND ERROR.

I. General Principles.

- A. Right of Appeal Not Absolute.
- B. Real Controversy Must Exist.
- C. Whether New Action or Not.
- D. Changes in Law.
- E. Special Courts of Appeal.
- F. Military Court.
- G. Definitions and Distinctions.
 1. Writ of Error.
 2. Appeal.
 3. Supersedeas.
 4. Writ of Error Coram Vobis.
 5. Distinctions.
 - a. Appeals and Writs of Error.
 - b. Appeals and Bills of Review.
 - c. Writ of Error and Certiorari.

II. Appealable Judgments, Orders and Decrees.

- A. Finality of Decision.
- B. Particular Instances.
- C. Interlocutory Decrees.
- D. Character of Proceedings.
 1. Generally.
 2. Tax Valuation.
 3. Mandamus Cases.
 4. Certiorari Cases.
 5. Condemnation Proceedings.
 6. Habeas Corpus Cases.
 7. Disbarment Proceedings.
 8. Contempt Proceedings.
 9. Award of Arbitrators.
10. Decision on Motion to Quash or Issue Execution.
11. Refusal to Order Surveyor's Report to Be Recorded.
12. Order of Removal to United States Court.
13. Contested Election Cases.
14. Order Appointing or Displacing Guardian.
15. Bastardy Proceedings.
16. Decision of Circuit Court on Claim Disallowed by Auditor.
17. Refusal of Leave to Sue in Forma Pauperis.
18. Ex Parte Allowances to Attorney.
19. Ex Parte Vacation Order.
20. Prohibition Proceedings.
21. Criminal Cases.
- E. Matters of Discretion.
- F. Judgments by Confession.
- G. Judgments and Decrees by Default.
- H. Void Decrees.
- I. Consent Decrees.

III. Who May Appeal.

- A. Parties Only Can Appeal.
- B. Who Are Parties.
- C. Must Be Aggrieved.
- D. The Commonwealth.
- E. Joint Appeals.
- F. Estoppel to Appeal.

IV. Transfer of Cause.

- A. Generally.

B. Stay of Proceedings.

C. Notice of Appeal.

D. Petition for Appeal.

E. Appellate Process.

F. The Record.

1. Printing of the Record.
2. Record at Law.
3. Record in Chancery.
4. Amendment of Record after Term Ended.

G. Certiorari.

V. Effect of Appeal.

- A. Law Governing.
- B. Technical Appeal.
- C. Writ of Error.
- D. Supersedeas.

VI. Review of Cause in Appellate Court.

- A. Law Applicable.
- B. Rule of Stare Decisis.
- C. Court Equally Divided.
- D. Scope.
 1. Confined to the Record.
 2. Matters Not Acted Upon by the Lower Court.
 3. Previous Appealable Decrees.
 4. Previous Nonappealable Decrees.
 5. Contempt Proceedings.
 6. Judgment Sustaining Demurrer to One Count.
 7. Proceedings Subsequent to Appeal.
 8. Judgment on Forthcoming Bond.
 9. Appeal from Order Refusing to Dissolve Injunction.
 10. Two Causes Heard Together.
 11. Appeal from Decree Refusing to Allow Bill of Review to Be Filed.
 12. Appeal from Judgment Quashing Execution.
- E. Correction of Errors against Appellee.
 1. Where He Cross-Assigns Error.
 2. Joint Judgments.
 3. Appellees Standing on Same Ground with Appellants.
 4. Appellees Standing on Different Ground.
 5. Rules as to Appellate Jurisdiction Apply.
- F. Rules of Decision.
 1. Generally.
 2. On Demurrer to Evidence.
 3. Where Jury Is Waived.
 4. Where Facts Proved Are Certified.
 5. Where There Have Been Two New Trials.

G. Making Objection for the First Time in Appellate Court.

H. Setting up Claims for the First Time in Appellate Court.

I. Affirmance.

1. Generally.
2. Where Evidence Is Conflicting.
3. Decision Substantially Right.
4. Amendment.
5. Damages.

J. Reversal.

1. General Rule.
2. When Cause Will Be Remanded.
3. Effect of Reversal on Dependent Decrees and Judgments.
4. Restitution.

K. Execution of Decree.

L. Costs in Appellate Court.

VII. Presumptions on Appeal.

VIII. Reversible Error.

A. In General.

1. Must Be Manifest.
2. Must Appear by the Record.
3. Burden of Proof.

- B. Must Be Prejudicial.
 - C. Must Be Material.
 - D. Errors Not Available on Appeal.
 - 1. Invited Error.
 - 2. Errors Consented to.
 - 3. Estoppel.
 - E. Errors in Pleadings.
 - F. Errors in Evidence.
 - G. Errors Occurring at the Trial.
 - H. Errors in Verdict.
 - I. Errors in Instructions.
 - J. Errors in Costs.
 - K. Errors in Parties.
 - L. Errors in Interlocutory Decrees.
 - M. Errors in Chancery Proceedings.
 - N. Statute of Jeofails.
 - O. Release of Errors.
 - IX. Abatement of Appeal.
 - A. By Death of Party.
 - B. By Dissolution of Corporation.
 - X. Dismissal of Appeal.
 - A. Constitutes Valuable Consideration.
 - B. Grounds.
 - C. Dismissal by Cestui Que Trust.
 - D. Effect of Dismissal.
 - XI. Reinstatement.
 - XII. Successive Appeals.
 - XIII. Jurisdiction of Supreme Court of Appeals.
 - A. Generally.
 - B. Where "Matter in Controversy Is Merely Pecuniary."
 - 1. Generally.
 - 2. In Virginia.
 - 3. In West Virginia.
 - 4. Matter in Controversy.
 - 5. Costs.
 - 6. Interest.
 - 7. Damages.
 - 8. As to Plaintiff Below.
 - 9. As to Defendant Below.
 - 10. Assignments.
 - 11. Appellants Occupying Representative Capacity.
 - 12. Suits to Subject Property to the Lien of a Judgment.
 - 13. Suits to Set Aside Fraudulent Conveyances.
 - 14. Consolidated Claims.
 - 15. Controversy of Jurisdictional Amount Must Be Continued in Appellate Court.
 - 16. Fraud on Jurisdiction.
 - C. Matters Not Merely Pecuniary.
 - 1. Must Be Directly the Subject of Controversy.
 - 2. Controversies Touching the Title or Boundaries of Land.
 - 3. Right to Levy Tolls or Taxes.
 - 4. Controversies Touching a Franchise.
 - 5. Controversies Touching the Constitutionality of a Law.
 - 6. Controversies Touching the Probate of Wills.
 - 7. Controversies Touching Mills.
 - 8. Mandamus Cases.
 - 9. Certiorari Cases.
 - XIV. Limitation to Appeal.
 - A. Generally.
 - 1. Law Governing.
 - 2. Changes in Law.
 - 3. Statutes Mandatory.
 - 4. No Objection Necessary.
 - 5. Applicable to Commonwealth.
 - 6. Laches.
 - B. Period of Limitation.
 - 1. Final Decrees and Judgments.
 - a. Virginia.
 - b. West Virginia.
 - 2. Interlocutory Decrees and Judgments.
 - 3. Calculation of Period.
 - C. No Inquiry into Merits.
 - XV. Conclusiveness of Decrees of Appellate Courts.
 - A. Of Court of Appeals.
 - 1. Generally.
 - 2. On Questions of Jurisdiction.
 - 3. On Lower Court.
 - 4. On Rehearing.
 - 5. On Bill of Review.
 - 6. Power of Court of Equity.
 - 7. On Second Appeal.
 - 8. Persons Bound.
 - B. Of General Court.
 - XVI. Appeal Bonds.
 - A. Not a Contract.
 - B. Dependent on Judgment.
 - C. When Required.
 - D. Time to Execute Bond.
 - E. Failure to Give Bond.
 - F. Suspension of Decree.
 - G. Obligor in Bond.
 - H. Obligee in Bond.
 - I. Where Appeal Bond Should Be Given.
 - J. Condition of Bond.
 - K. Effect on Attachment.
 - L. Defective Bonds.
 - M. Filing of Bond.
 - N. Insufficiency of Security.
 - O. Rights of Surety.
 - P. Action on Bond.
 - XVII. Appeals from Inferior Tribunals.
 - A. In Civil Cases.
 - 1. Generally.
 - 2. Appeals from Justices.
 - a. Technical Appeal.
 - b. Certiorari.
 - 3. Jurisdictional Amount.
 - 4. Cases Tried by Jury.
 - 5. Harmless Error.
 - 3. Appeals from County Court.
 - 4. Appeals from Decision of Mayor.
 - 5. Appeals from Decision of Recorder.
 - 6. Appeals from Decision of City Council.
 - 7. Appeals from Decision of Board of Supervisors.
 - 8. Appeals from Decision of County Commissioners.
 - 9. Appeal from Corporation Court.
 - 10. Appeal from Auditor.
 - 11. Review in Appellate Court.
 - a. Generally.
 - b. Errors Correctible.
 - c. Informal Plea.
 - d. Amendment of Pleadings.
 - e. New Evidence in Superior Court.
 - f. Where Judgment Is Reversed.
 - 12. Review of Action of Circuit Court.
 - B. In Criminal Cases.
 - 1. Generally.
 - 2. Appeal from Justices.
 - 3. Appeal from Decision of Mayor.
- XVIII. Appeals of Right.
 - A. Controversies Concerning Roads.
 - B. Controversies Concerning Wharves.
 - C. Controversies Concerning Mills.
 - D. Appointment or Qualification of Personal Representatives.

E. Judgment on Forthcoming Bond.

F. Remedy for Refusal.

XIX. Appeals to Supreme Court of United States.

I. GENERAL PRINCIPLES.

A. RIGHT OF APPEAL NOT ABSOLUTE.—The right to have a decision reviewed is not an absolute right like the right to be heard in an original suit, but is subject to such conditions and restrictions as the legislature may put upon it. *Casanova v. Kreusch*, 21 W. Va. 720.

But the right to an appeal or writ of error is a legal right where it exists at all, and if the appellate court thinks there is error in the decree prejudicial to the appellant, an appeal and supersedeas must be granted, though the court were satisfied that the only object of the appeal, was to keep the property in the appellant's hands as long as possible without giving security for the rents and profits. *Perry v. Horn*, 21 W. Va. 732.

Rests with Appellate Court.—Whether a party has a right to appeal is not a question for the lower, but for the appellate court. *Todd v. Gallego, etc., Mfg. Co.*, 84 Va. 586, 598, 5 S. E. Rep. 676.

How Taken Away.—The right to appeal can only be taken away by express enactment or by implication equally plain. *Leighton v. Maury*, 76 Va. 805; *Ex parte Lester*, 77 Va. 663.

B. REAL CONTROVERSY MUST EXIST.—Whenever it appears from the record, or is shown by extrinsic evidence, that there is no controversy existing between the litigants, or, if it once existed, it has been settled or has ceased to exist, the writ of error or appeal will be dismissed. Courts do not sit to determine moot questions. *Franklin v. Peers*, 95 Va. 602, 29 S. E. Rep. 321; *Shumate v. Spilman*, 1 Va. Dec. 604.

Settlement of Controversy Pending Appeal.—Generally, if, pending an appeal or writ of error, the matter of controversy in the suit be settled, the court of appeals will simply dismiss the appeal or writ of error without deciding the merits merely to determine as to costs, and will not pass on the question of costs. *Ferguson v. Millender*, 32 W. Va. 30, 9 S. E. Rep. 38.

So where, after a writ of error was granted to the judgment of the circuit court refusing to grant the plaintiff in error a mandamus to compel the clerk of the board of election commissioners to give him a certificate of election, it appeared that the contest had been decided in a proper proceeding, the writ of error was dismissed. *Franklin v. Peers*, 95 Va. 602, 29 S. E. Rep. 321.

Matter in Controversy Ceasing to Exist.—When the matter in controversy is the possession of an office, and the plaintiff in error fails to file a brief or prosecute his writ of error until after the expiration of the term of the office in question, the writ of error will be dismissed at the costs of plaintiff in error. *Taylor v. Maynor*, 46 W. Va. 588, 33 S. E. Rep. 260.

That the term stated in a declaration in ejectment has expired, previous to the decision on an appeal, is a circumstance of no importance. *Baker v. Seekright*, 1 H. & M. 177.

An appeal from a judgment in ejectment does not abate by the death of the lessor of the plaintiff, notwithstanding such lessor claimed the land for life only. *Medley v. Medley*, 3 Munf. 191.

C. WHETHER NEW ACTION OR NOT.—Writs of error and appeals in chancery causes are in their nature new actions. *Bailey v. McCormick*, 23 W. Va. 95.

Suitors' Oath Laws.—A supersedeas is a new suit within the meaning of the "suitors' oath" laws, and the error in the judgment below is a cause of action within the meaning of the statute, hence where it occurred after the 1st of April, 1865, the act of Feb. 28, 1865, does not apply but that of March 1st, 1866, governs. *Nadenbousch v. Sharer*, 2 W. Va. 226; *Higginbotham v. Haselden*, 3 W. Va. 17.

A motion by the defendant in error against the plaintiff in error, for a rule requiring him to take the "suitors' oath" as provided by Act of Feb. 28, 1865, is not made too late, when made at a term preceding that at which the cause could under the rules of the court be heard. *Higginbotham v. Haselden*, 3 W. Va. 17.

The act of March 1st, 1866, relieving appellants under a writ of supersedeas from the necessity of taking the "suitors' oath" applies as well to appeals and writs of error as to a technical supersedeas. *Higginbotham v. Haselden*, 3 W. Va. 17.

D. CHANGES IN LAW.—Where a change in the mode of correcting errors is made while a suit is pending, the new law is applicable. *Lewis v. Arnold*, 13 Gratt. 454.

E. SPECIAL COURTS OF APPEALS.

Constitutionality.—The Act of March 31, 1848, Secs. Acts, p. 51, establishing a special court of appeals is constitutional, and does not impair vested rights since a suitor in an appellate court has no vested right to a judgment in his suit pending therein; *BALDWIN, J.*, saying: "The right to an appeal or a writ of error, is a remedy provided for a supposed injustice. It may be entirely withheld, as it is in many instances; and when allowed, can be exercised only under such limitations and regulations as the law prescribes. Legislation respecting it relates to the remedy merely. Justice requires, that when once allowed, it should not be arbitrarily taken away. That when it becomes expedient to abolish a court, or to divide the business before it amongst other courts, or to relieve an existing court from a mass of business which it cannot transact within a reasonable time, some other tribunal should be substituted to dispose of the cases then pending and undetermined. The character of that tribunal must be left to the discretion of the legislature, under the general and unlimited authority to regulate the jurisdiction of the courts and the judges thereof; subject to the single limitation, that the persons authorized to determine the cases, are judicial functionaries, appointed and compensated in the mode pointed out in the constitution, and holding office by the tenure there prescribed." *Sharpe v. Robertson*, 5 Gratt. 518.

When, in pursuance of the Act of 1860-70, ch. 171, § 5, p. 227, the court of appeals sent a cause which had been pending in a district court of appeals, to a circuit court, that was a decision that the act was constitutional, and that the circuit court had jurisdiction to rehear and decide the same. *Cowan v. Doddridge*, 22 Gratt. 458; *Cowan v. Fulton*, 23 Gratt. 579; *Kent v. Dickinson*, 25 Gratt. 817.

If in such a case the judge of the circuit court refuses to rehear and decide the same, and directs it to be struck from the docket, no appeal can be taken from his judgment where the matter in controversy is less than \$500. The remedy is by application to the court of appeals for a mandamus to the circuit judge, to compel him to rehear and decide the case. *Cowan v. Doddridge*, 22 Gratt. 458; *Cowan v. Fulton*, 23 Gratt. 579; *Kent v. Dickinson*, 25 Gratt. 817.

The act of February 28, 1872, to provide a special

court of appeals. Acts of 1871-72, ch. 124, p. 98, which creates a special court of appeals to consist of three judges of the circuit courts, is constitutional, and the decisions of the court are valid and binding on the parties in the causes decided. *Bolling v. Lersner*, 26 Gratt. 26.

Proper Cases for Their Decision under Act of 1872.—All cases pending on the docket of the supreme court of appeals, not involving a constitutional question and not decided in the court below by one of the judges of the special court of appeals, are proper cases to be sent to said special court of appeals for decision; and it is for the judges of the supreme court of appeals under the constitution and the statute to select the cases to be sent to said special court. *Bolling v. Lersner*, 26 Gratt. 36.

F. MILITARY COURT.—An appeal allowed by a judge acting under military authority in 1860, was a valid appeal, and was confirmed by the act of March 5, 1870, styled the enabling act. *Bolling v. Lersner*, 26 Gratt. 36.

G. DEFINITIONS AND DISTINCTIONS.

1. WRIT OF ERROR.

Formerly a Writ of Right.—At common law the mode of correcting the error of an inferior court in its final judgment was by a writ of error issued by the appellate court as a matter of course, it being a writ of right, except in cases of treason and felony; and it is only by reason of statute-law, that it ceases to be a writ of right. *Board of Education v. Hopkins*, 19 W. Va. 84; *Dryden v. Swinburn*, 15 W. Va. 234; *Wingfield v. Crenshaw*, 3 H. & M. 245.

Only Lies from a Court of Record.—The writ of error, at common law lies only to remove a cause from a court of record of competent jurisdiction to an appellate court. It does not lie to renew the proceedings of a court or tribunal not of record. *Railway Co. v. Board of Public Works*, 28 W. Va. 264; *Abrahams v. Com.*, 11 Leigh 675.

Hence the general court has no jurisdiction to award a writ of error to a refusal of a judge of a circuit superior court in vacation, to award a writ of error to a judgment of an inferior court. *Abrahams v. Com.*, 11 Leigh 675.

Proceeding Must Be Judicial.—The writ of error must be not only from a court of record, but it must be from a judgment of such court rendered in a judicial proceeding, a judgment founded upon a judicial determination of a controversy in a suit or action *inter partes*.

It does not lie, even from a court of record, when the order or judgment of such court sought to be reviewed is simply an *ex parte* or administrative order or proceeding. *Railway Co. v. Board of Public Works*, 28 W. Va. 264.

In Criminal Cases.—It is only by the common-law writ of error, and not by appeal or supersedeas, that the judgment of an inferior court upon a presentment for a misdemeanor can be reviewed and reversed by a superior court; and the writ of error may issue without regard to the costs or value of the judgment, and without the assent of the commonwealth's attorney. *Temple v. Com.*, 1 Va. Cas. 162.

2. APPEAL.—The *prima facie* and most proper, meaning of an "appeal,"—though it has different meanings, according to its use,—is a process continuing the same suit, in order to obtain a rehearing in the appellate court, wherein new evidence may be allowed, and a new trial as if never tried, as in appeals from justices. See *Bailey v. McCormick*, 23 W. Va. 102, 103; *Bratt v. Marum*, 24

W. Va. 652; *Mackin v. Taylor County Court*, 38 W. Va. 338, 18 S. E. Rep. 632.

Unknown at Common Law.—Appeals in civil cases were altogether unknown at common law. They are a proceeding of the civil law. *Wingfield v. Crenshaw*, 3 H. & M. 245.

The appointment of a guardian by election of the infant, after he arrives to the age of fourteen, being made on the chancery side of the county court, no writ of error lies by a superior court of law, to review the proceedings on such election and appointment. *Ficklin v. Ficklin*, 2 Va. Cas. 204.

Dependent on Statutes.—The right of appeal from the judgment or proceedings of a court of record, being unknown to the common law, must depend upon the statutes which allow it in certain cases. *Cooper v. Saunders*, 1 H. & M. 418.

Must Be Taken at Once.—By an appeal the whole testimony may be re-examined by the higher court, but the appeal must be taken at once. *Wingfield v. Crenshaw*, 3 H. & M. 245.

3. SUPERSEDEAS.—A supersedeas in England is merely an auxiliary process, and so it is in some instances in this country, but in general it is a mode by which the record of a judgment of an inferior court is removed before a superior jurisdiction. *White v. Jones*, 1 Wash. 116.

It was said in *Wingfield v. Crenshaw*, 3 H. & M. 245, that in practice in Virginia the supersedeas is a substitute for a writ of error of which there are few or no instances in Virginia.

A supersedeas is the proper remedy, only where the error is apparent on the face of the proceedings, and where the person seeking to reverse the judgment is a party in the court below. *Wingfield v. Crenshaw*, 3 H. & M. 245.

Failure to Perfect Appeal.—If an appeal be taken, but not perfected by giving bond and security, a writ of supersedeas to the same judgment may be obtained. *Day v. Pickett*, 4 Munf. 104.

Law Governing.—A supersedeas must be governed by the law in operation at the time it was awarded. *Clark v. Brown*, 8 Gratt. 549; *Yarborough v. Deshazo*, 7 Gratt. 374.

One Supersedeas to Several Judgments.—One supersedeas to five judgments, though between the same parties, and upon claims of the like nature, and though the question be the same in all the cases, is irregular, and ought to be quashed as improvidently allowed. If not quashed by the circuit court the appellant is entitled to his costs in both circuit court and court of appeals, but not to damages. *Ayres v. Lewellin*, 3 Leigh 609.

Presumption That Supersedeas Was Granted.—Although the petition only asks for an appeal and there is nothing to show that a supersedeas was granted, except the fact that a supersedeas bond was executed, the presumption is not that an appeal only was granted but that a supersedeas also was granted, so as to stop the running of the statute against the issuance of an execution of the decree appealed from. *Baltimore, etc., R. Co. v. Vanderwarker*, 19 W. Va. 265.

4. WRIT OF ERROR CORAM VOBIS.—The remedy for a mere clerical error was formerly by writ of error *coram vobis* in the same court in which the error was committed, but it is now by motion to amend only and no appeal or writ of error lies. *Goolsby v. St. John*, 25 Gratt. 146.

By the statute of 1819 the remedy by motion in the same court was extended to mistakes in the judgment of the court which can be corrected by any ver-

dict, bond, note, bill, etc., in the record. *Eubank v. Ralls*, 4 Leigh 308, 316; *Com. v. Winstons*, 5 Rand. 546.

As to what is such an error as may be corrected by motion in the lower court, see monographic notes on "Judgments" appended to *Smith v. Charlton*, 7 Gratt. 425, and "Amendments" appended to *Snead v. Coleman*, 7 Gratt. 300.

In *Bent v. Patten*, 1 Rand. 25, the court decided that by the adoption of § 108, 1 Rev. Code, p. 512, it was not the purpose of the legislature to enlarge the subjects amendable; that the 108th section looked only to clerical errors—errors made by the clerk and depending upon comparisons and calculations to be made by him, and which might be readily and safely reformed by reference to other statements contained in the proceedings; that judicial errors—errors growing out of a mistaken application of the law to the facts—were still to be remedied by appeal to a superior tribunal. *Compton v. Cline*, 5 Gratt. 137.

Does Not Lie in Court of Appeals.—A writ of error *coram vobis* does not lie in the court of appeals, nor is the power to grant them conferred by act Feb. 24, 1830. *Reid v. Strider*, 7 Gratt. 76.

Certiorari.

At Common Law.—The writ of *certiorari* lies at common law to examine and reverse or affirm proceedings and judgments in inferior courts, and for the purpose of removing not only legal, but equitable proceedings also. *Cooper v. Saunders*, 1 H. & M. 413.

A *certiorari* may be awarded in cases before justices of the peace, in orders, summary proceedings and trials, before newly-created jurisdictions, and where the party cannot have a writ of error. It will lie after verdict, and before judgment, and an inquisition in case of rioters, not being a verdict, it will lie to bring up such inquisition. *Mackaboy v. Com.*, 2 Va. Cas. 268.

In *Morgan v. Ohio River R. Co.*, 39 W. Va. 17, 19 S. E. Rep. 588, *BRANNON, P.*, said, that it might be questioned whether § 2, ch. 110, Code W. Va. 1887, extended the writ of *certiorari* to any additional cases, but that § 3 merely widened the remedial powers.

Where a new tribunal acts in a cause in a manner different from the common law, no writ of error would lie to its judgments. In such case the common law gave a mode of reviewing such judgments. This mode was by writ of *certiorari*, which however was not a writ of right. *Board of Education v. Hopkins*, 19 W. Va. 84; *Dryden v. Swinburn*, 15 W. Va. 234; *Cunningham v. Squires*, 2 W. Va. 423; *Ridgway v. Hinton*, 25 W. Va. 554.

The *ex parte* settlement of a sheriff, confirmed by the county court, being purely statutory and not according to the course of the common law, in the absence of a statute authorizing the review by writ of error, must be reviewed by *certiorari*. *Board of Education v. Hopkins*, 19 W. Va. 84.

Or a contested election case before the board of supervisors of a county. *Cunningham v. Squires*, 2 W. Va. 423; *Burke v. Supervisors*, 4 W. Va. 371.

Or a contested election case before the county court under ch. 118, Acts 1872-3 of W. Va. *Dryden v. Swinburn*, 15 W. Va. 234.

In West Virginia the writ of *certiorari* will lie from the circuit court to the county commissioners assembled in special session to ascertain the result of an election. *Chenoweth v. Commissioners*, 26 W. Va. 230.

The common-law function of the writ (now ancillary) was to remove a civil cause from an in-

ferior to a superior court, before judgment, where the superior court had original jurisdiction, and could administer the same justice as the court below, and the case was there retained and tried. *Bee v. Seaman*, 36 W. Va. 381, 15 S. E. Rep. 173.

The principal use of this writ before 1868 was to bring up records, in whole or in part, in aid of some other proceeding; but the statute of 1882, as now found in the Code, p. 742, ch. 110, has very much enlarged its scope, giving power to rehear after judgment on the evidence certified, as well as correct errors in law, and in a proper case to retain for trial *de novo*, being thus in effect an appeal from the judgment of a justice in a certain class of cases. *Long v. Ohio River R. Co.*, 35 W. Va. 333, 13 S. E. Rep. 1010.

Ex Parte or Administrative Proceedings.—*Ex parte* or administrative orders or proceedings when reviewable, are likewise the subjects of a writ of *certiorari*, and they are never reviewable by writ of error. *Railway Co. v. Board of Public Works*, 28 W. Va. 264.

Copy of Record Must Accompany Writ.—A copy of the record must accompany every application for a *certiorari*. *Triplett v. Tyler*, 4 H. & M. 413.

By Statute.

Generally.—The original writ of *certiorari* now so extensively used, and performing such important functions, in West Virginia, (the common-law original writ of *certiorari* enlarged in its functions and efficacy by ch. 110, § 2, Code,) is an appellate writ,—the counterpart of the writ of error. *Morgan v. Ohio, etc., Co.*, 39 W. Va. 17, 19 S. E. Rep. 588.

"The use of this writ is now pretty well understood and its limits well defined, though the practice is not the same in all jurisdictions. It is generally used in such cases as might otherwise, without its intervention, leave the party remediless. It is considered as an extraordinary remedy resorted to for the purpose of supplying a defect of justice in cases obviously entitled to redress, and yet unprovided for by the ordinary forms of proceeding. Even in cases where the law has provided a remedy by writ of error or appeal this writ may, under special circumstances, be invoked, as for instance, if by the act of the court, either oppressively or erroneously, the writ of error or appeal is refused; or, if by the act of the clerk, negligently or wilfully caused, the writ of error was defeated; or, if by the contrivance or procurement of the adverse party the same result is effected; or, even, if by inevitable accident, or the misfortune without blame of the party injured he has been prevented from having the benefit of a second investigation of the facts of the cause, by the prescribed mode of a writ of error or appeal, *certiorari* may be resorted to as a substitute for redress. But in all cases the party, praying for this extraordinary remedy, must have merits on his side and pursue it in proper time. Time has always been considered an important circumstance in the application of this writ, and redress by this means should be sought as soon as possible after the happening of the event which rendered it necessary to resort to it." *SNYDER, J.*, in *Poe v. Machine Works*, 24 W. Va. 517.

A Discretionary Writ.—The writ of *certiorari* is not a writ of right except at the suit of the commonwealth. It is a discretionary writ, but it should not issue where there is other adequate remedy, or if it be a matter of no serious complaint or injury. But this discretion is not a purely arbitrary discretion, but a discretion to be regulated by precedents and

established principles; hence, the decision would be reversed, which awarded the writ of *certiorari* when according to the precedents and principles laid down as governing in such cases, no writ should have been awarded, and on the other hand if a writ had properly been awarded, and was afterwards quashed as improvidently awarded, the appellate court would reverse such decision, and it would also reverse it if the court below had improperly refused to grant such writ when the appellant had a right to have it awarded in accordance with the precedents and principles laid down as regulating such writ, and he had no other redress except such review and reversal. *Welch v. County Court*, 29 W. Va. 63, 1 S. E. Rep. 337.

No Other Remedy Available.—The general rule is that where the party aggrieved can obtain redress by appeal or writ of error he will not be allowed the unusual remedy by *certiorari*. *Poe v. Machine Works*, 24 W. Va. 517.

If persons having a remedy by appeal, permit the time to expire, *certiorari* will not issue for their relief, unless upon a special showing that it was not due to the applicant's negligence. *Poe v. Machine Works*, 24 W. Va. 517.

So in *Beasley v. Beckley*, 28 W. Va. 88, the denial of the writ of *certiorari* to the judgment of a mayor imposing a fine for the violation of a city ordinance was approved by the court of appeals upon writ of error, because the applicant had an adequate remedy by appeal to the circuit court by § 230, ch. 56 Code of W. Va., as amended by ch. 145, Acts 1883.

Decision Need Not Be Final.—It is not necessary that a decision be final, in order to be reviewed by writ of *certiorari*. *Board of Education v. Hopkins*, 19 W. Va. 84.

A. DISTINCTIONS.

a. Appeals and Writs of Error.—The proceeding by way of appeal is a proceeding of the civil law, while that by writ of error is a proceeding of the common law. *Wingfield v. Crenshaw*, 3 H. & M. 245.

One of the most prominent differences between an appeal and a writ of error is that the former must be prayed and allowed in the court, whose sentence or decree is sought to be reviewed, unless by statute further time is allowed, while the latter being a writ of right and grantable *ex debito iustitie*, may by the common law, be sued out without leave of the court unless barred by the statute of limitations. *Wingfield v. Crenshaw*, 3 H. & M. 245.

At law, a party may appeal at the time the judgment is rendered; or he may afterwards obtain a writ of error which may issue after the judgment is executed. *White v. Jones*, 1 Wash. 116.

The express grant of an appeal of right from the county to the circuit courts in such cases does not take away the general right to have the case reviewed in the circuit court by writ of error and supersedeas, or to have the decision of the circuit court reviewed by appeal, or writ of error and supersedeas. *Ex parte Lester*, 77 Va. 663.

b. Appeals and Bills of Review.—If the errors complained of be errors of judgment in the determination of facts, such errors can be corrected only by appeal and not by bill of review. *Rawlings v. Rawlings*, 75 Va. 76, 88; *Kern v. Wyatt*, 89 Va. 885, 891, 17 S. E. Rep. 549; *Wethered v. Elliott*, 45 W. Va. 486, 33 S. E. Rep. 209; *Thomson v. Brooke*, 76 Va. 160.

c. Writ of Error and Certiorari.—The writ of error corrects errors of record committed by courts of record proceeding according to the course of the common law, whilst the original writ of *certiorari*

corrects the errors of inferior tribunals, in matters where the proceeding is not according to the course of common law, and where no appeal or writ of error lies. *Morgan v. Ohio, etc., Co.*, 39 W. Va. 17, 19 S. E. Rep. 588.

Where the legislature erects a new court of record, if that court exercises a particular jurisdiction according to the course of the common law, a writ of error would lie to its judgments. *Board of Education v. Hopkins*, 19 W. Va. 84.

The county and corporation courts being courts of record, the writ of *certiorari* does not lie to a judgment of a corporation court affirming a judgment of a single magistrate, though his is not a court of record, for a fine imposed by a penal law, or in a civil case: if there be error in the judgment of such court affirming the judgment of a single magistrate for a fine, the writ of error lies. *Tankersley v. Lipscomb*, 3 Leigh 813.

Under the act of December 31, 1872, a writ of error or supersedeas is always a proper method of bringing a case from the circuit court to supreme court of appeals, even though a writ of *certiorari* would have been the proper mode according to the rules of the common law. *Dryden v. Swinburn*, 15 W. Va. 234; *Fowler v. Thompson*, 23 W. Va. 106.

II. APPEALABLE JUDGMENTS, ORDERS AND DECREES.

A. FINALITY OF DECISION.—No appeal can be taken from an interlocutory, but only from a final decree, or judgment. *McCall v. Peachy*, 1 Call 56; *Core v. Strickler*, 24 W. Va. 689; *Ferneyhough v. Dickinson*, 2 Rob. 582; *Harris v. Hauser*, 26 W. Va. 595; *Grymes v. Pendleton*, 1 Call 54; *Alexander v. Coleman*, 6 Munf. 323; *Lockridge v. Lockridge*, 1 Va. Dec. 61; *State v. Hays*, 30 W. Va. 107, 3 S. E. Rep. 177; *Gibson v. Randolph*, 3 Munf. 310; *Gillespie v. Coleman*, 98 Va. 276, 36 S. E. Rep. 377.

No supersedeas will lie from the circuit superior court to an order of the county court where the same is interlocutory merely and not final. *Trevilian v. Louisa R. Co.*, 3 Gratt. 326; *Hancock v. Richmond, etc., R. Co.*, 3 Gratt. 328.

The plaintiff cannot appeal from a judgment in favor of all the defendants, except one, in a joint action of trespass, until the suit has been abated, dismissed, or decided, as to that one. *Wells v. Jackson*, 3 Munf. 458.

No appeal lay from the court of admiralty, upon an interlocutory decree. *Dawson v. Graves*, 4 Call 127.

Judgment Must Have Been Entered.—An appeal allowed before any judgment has been rendered in the cause must be dismissed, although it was due to a mistake of the clerk and although, pending the appeal the lower court corrects the error by having the judgment entered and certified to the higher court. *Tatum v. Snidow*, 2 H. & M. 542.

May Be Entered at Any Time.—It cannot be seriously questioned, that a court may in fact enter a final judgment in any stage of the cause, however erroneous or premature it may be; and that when such judgment is so entered, it may be reviewed by the appellate tribunal, as a final judgment. *Burch v. Hardwicke*, 23 Gratt. 55.

Judgment Must Appear by Record.—A writ of error will not lie where the record does not show the judgment of the trial court, but merely recites that judgment was entered. *Read's Case*, 90 Va. 168, 17 S. E. Rep. 855.

B. PARTICULAR INSTANCES.

Order Setting Aside an Award.—An order setting

aside an award founded upon a submission *in pais*, and which it is agreed shall be entered up as the judgment of the court, is a final judgment to which a writ of error will lie. *Tennant v. Divine*, 24 W. Va. 387.

Order Refusing to Enter Judgment on an Award.—

Where an award, is made in a pending suit, and it is agreed that it shall be entered as the judgment of the court, a judgment of the court refusing to enter judgment according to the award is not a final judgment from which an appeal can be taken, since the action still remains before the court for further proceedings and a final judgment may be had therein without a new action. *Manlove v. Thrift*, 5 Munf. 493.

Reversal of Judgment Below.—Where a final judgment of the lower court is reversed and the cause retained in the superior court for further proceedings, without acquiescence in such further proceedings by the appellee, such judgment of the superior court is a final judgment to which a writ of error will lie. *Crawford v. Valley R. Co.*, 25 Gratt. 467; *Brumbaugh v. Wissler*, 25 Gratt. 468; *Com. v. Lewis*, 25 Gratt. 938; *Morgan v. Ohio River R. Co.*, 30 W. Va. 17, 19 S. E. Rep. 568.

The judgment of the circuit court, reversing and setting aside the judgment of the county court quashing the original summons in the case and dismissing it, and retaining the cause in the circuit court for trial and determination is a judgment of such finality in its character, as that the court of appeals has jurisdiction to review it upon writ of error or supersedeas. *Board of Education of Union District v. Crawford*, 14 W. Va. 790.

A court having set aside an office judgment and the execution which had issued upon it after the fifteenth day of the term, and permitted the defendant to plead, the plaintiff may have a supersedeas from this order: though that part of the order setting aside the judgment is interlocutory. *Enders v. Burch*, 15 Gratt. 64.

Decree Dismissing Bill.—A decree dismissing a bill as to a defendant is, as to such defendant, a final decree. *Dick v. Robinson*, 19 W. Va. 159.

A decree dismissing a bill with costs upon the hearing is necessarily a final decree within the meaning of the statute limiting appeals and the judge pronouncing it, even if so inclined, cannot, by subsequent action, impart to it a different character. At any rate a mere instruction as to taxing costs will not do so. *Pace v. Picklin*, 76 Va. 292.

Order Retaining Cause in District Court.—When, upon the reversal of a county court judgment, a cause has been retained in the district court, by consent: if, at a subsequent term, the order for detaining the cause be set aside, an appeal cannot then be taken, to the court of appeals, even by consent of parties, but the cause should be sent back to the county court for farther proceedings. *Norris v. Tomlin*, 2 Munf. 336.

In *Janey v. Blake*, 8 Leigh 88, this case was said to be badly reported and no authority for the above doctrine and it was held that where, on a supersedeas to a judgment of a county court, the circuit court reverses the judgment with costs, but omits to give such judgment as the county court ought to have given, and retains the cause, that this judgment of the circuit court is to be regarded as its final judgment in its appellate character, and supersedeas will lie thereto from the court of appeals.

Final Judgment in County Courts.—Though a judgment of a superior court of law, reversing a

judgment of a county court, and directing other pleadings in the cause, be interlocutory in its character, yet the finality of the judgment in the county court imparts its character to the judgment of the superior court, so as to authorize an appeal to the court of appeals. *Cowling v. Justices of Nansemond County*, 6 Rand. 349.

Order Touching Process.—An order declaring a summons void as an alias summons, but good as an original summons, is not appealable, under § 3454, Code 1887, as being a final judgment. *Roger v. Bertha Zinc Co.*, 1 Va. Dec. 837.

Order Sustaining Demurrer.—An order sustaining a demurrer and remanding the cause to rules with leave to the plaintiff to amend is not a final judgment to which a writ of error will lie. *White v. Chesapeake, etc., R. Co.*, 36 W. Va. 800; *Gillespie v. Coleman*, 98 Va. 276, 36 S. E. Rep. 377.

Where the court sustained defendant's demurrer to complainant's bill, but overruled a motion to dismiss, and granted leave to amend the bill, *held*, that an appeal was improvidently awarded to defendant. *Commercial Bank of Lynchburg v. Rucker*, 2 Va. Dec. 350.

A decree sustaining a demurrer, but overruling a motion to dismiss the bill, and granting leave to the plaintiff to file an amended bill is not appealable. *Commercial Bank v. Rucker*, 2 Va. Dec. 350; *London, etc., Co. v. Moore*, 98 Va. 256, 35 S. E. Rep. 722.

But a judgment sustaining a demurrer is appealable where no leave to amend is given but final judgment is entered on the demurrer. *Norris v. Lemen*, 28 W. Va. 386.

To make a judgment sustaining a demurrer final, there must be a judgment of dismissal. *Gillespie v. Coleman*, 98 Va. 276, 36 S. E. Rep. 377.

Order Directing an Issue.—A decree directing an issue to be tried at the bar of the court is not an appealable decree. *Moore v. Lipscombe*, 83 Va. 544.

Order Granting New Trial.—Prior to the act of Feb. 20, 1868, no supersedeas lay to the judgment of circuit court setting aside a judgment at the same time at which it was rendered, and awarding a new trial, such judgment being interlocutory merely, the cause being still pending and undetermined. *Pumphry v. Brown*, 3 W. Va. 9.

Order Granting a New Trial.—When in any civil suit there is an order made granting a new trial, a writ of error will lie from such order, either before or after the new trial has been had, and without regard to the finding on such new trial. *Gwynn v. Schwartz*, 33 W. Va. 487, 9 S. E. Rep. 880; *Lambert v. Mfg. Co.*, 43 W. Va. 813, 26 S. E. Rep. 431; *Code W. Va. (1899) ch. 135, § 1, par. 9.*

Order Refusing New Trial.—An order overruling a motion to set aside a verdict of a jury and refusing to grant a new trial is not such an order or judgment as will authorize a writ of error from the court of appeals. *Damron v. Ferguson*, 32 W. Va. 33, 9 S. E. Rep. 39.

Order Remanding Cause for Further Proceedings.—A writ of error does not lie from the court of appeals from an order of the circuit court reversing the judgment of an inferior court in a criminal case, and remanding the same for further proceedings. *State v. Bluefield Drug Co.*, 41 W. Va. 638, 24 S. E. Rep. 649.

Order of Nonsuit.—By suffering a nonsuit, plaintiff ends his present suit without prejudice to his right to bring another; and it is not a final judgment, but the opposite. *Mallory v. Taylor*, 90 Va. 248, 18 S. E. Rep. 438.

Order Refusing Petition for Rehearing.—The refusal

of the lower court to allow a petition for a rehearing is a proper subject of appeal. *Ambrose v. Keller*, 22 Gratt. 769.

Order Refusing to Allow Bill of Review to Be Filed.—The refusal of the lower court to allow a bill of review to be filed is a proper subject of appeal. *Ambrose v. Keller*, 22 Gratt. 769.

Refusal to Remove Cause.—Mandamus and not appeal is the proper remedy when the county court refuses to remove a cause to the United States courts, an appeal not lying till the final decision of the cause. *Brown v. Crippin*, 4 H. & M. 178.

Order Setting Aside Decree Confirming Sale.—An order setting aside a decree confirming a sale before the end of the term, is interlocutory and non-appealable. *Bank v. Jarvis*, 26 W. Va. 785.

Under the decision in *Childs v. Hurd*, 26 W. Va. 580, the purchaser cannot appeal from the decree setting aside sale before resale made and confirmed.

Order Directing Surveyor to Make Report.—Where in a suit for specific performance of a contract for the sale of land, a decree holds the plaintiff entitled to recover and directs a surveyor to lay off the land and make a report, if an appeal is taken before the report is made, it will be dismissed or improvidently allowed. *Higginbotham v. Brown*, 23 Gratt. 323.

A decree directing the surveyor to make partition of a tract of land, and to make report, is not final, and cannot be appealed from. *Young v. Skipwith*, 2 Wash. 300.

Order Appointing Commissioner to Assess Damages.—The order of a court appointing commissioners to assess a just compensation for land condemned by a city is not a final judgment, decree or order in reference to which the party aggrieved may petition for a writ of error or supersedeas, under § 3454, Code Va. 1887. *Ludlow v. Norfolk*, 87 Va. 319, 12 S. E. Rep. 612; *Postal Tel. Cable Co. v. Norfolk, etc., R. Co.*, 87 Va. 340, 12 S. E. Rep. 618; *Wheeling B. & T. Ry. Co. v. Wheeling, S. & I. Co.*, 41 W. Va. 747, 24 S. E. Rep. 651.

Decree for an Account.—Errors in the details of a decree for an account are not a proper subject for appeal and correction in the appellate court; but they may be corrected by exceptions to the commissioner's report. *Humphrey v. Foster*, 13 Gratt. 653; *Rust v. Rust*, 17 W. Va. 912.

Order Quashing Commissioner's Report.—An order quashing the report of commissioners appointed to assess damages is an interlocutory order to which a writ of supersedeas will not lie. *Trevilian v. Louisa R. Co.*, 3 Gratt. 326.

Decree Prematurely Entered before Commissioner's Report Disposed of.—Pending a commissioner's report undisposed of, a decree prematurely entered, which does not finally adjudicate the controversies between the parties to the cause, is interlocutory, and not appealable. *Smith v. Evans*, 42 W. Va. 352, 25 S. E. Rep. 247.

Decree Refusing Relief until Further Legislation.—A decree which declines to grant the relief prayed until the legislature enacts a further law on the subject is not a final decree, nor does it adjudicate the principles of the cause. From it no appeal lies. If a decision is desired the proper remedy is by mandamus to compel the trial court to hear and determine the cause. *Supervisors v. Alexandria*, 35 Va. 400, 28 S. E. Rep. 883.

C. INTERLOCUTORY DECREES.

Generally.—As to what is an interlocutory decree, see monographic note on "Decrees" appended to *Erans v. Spurgin*, 11 Gratt. 615.

Suspension of Decree.—Under § 4, ch. 25 of the

Act of 1827-8, an appeal will not be granted from an interlocutory decree. The proper procedure in such case is to apply to the chancery court from whose decree an appeal is desired, or the judge thereof in vacation, to suspend the decree until final decree is made, which will be done, where the decree requires the payment of money or the changing the possession and title of property, provided the party will give bond with good security to take an appeal from the final decree and pay all costs, damages, etc. *Graves v. Graves*, 1 Leigh 34.

Exceptions.—The statute, § 2, ch. 178, Code 1873, the language of which is identical with § 3454 of the Code of 1887, provides that any person, who is a party to any case in chancery wherein there is a decree or order dissolving an injunction, or requiring money to be paid, or the possession or title of property to be changed, or adjudicating the principles of the cause, or to any civil case wherein there is a final judgment, decree, or order, may present a petition, if the case be in chancery, for an appeal from the decree or order. *Lancaster v. Lancaster*, 86 Va. 201, 9 S. E. Rep. 988; *Elder v. Harris*, 75 Va. 68.

No appeal will lie where no final decree has been entered, nor any decree, "adjudicating the principles in the case, or dissolving or refusing to dissolve an injunction, or requiring money to be paid or real estate to be sold, or requiring the possession or title of property to be changed." *Harris v. Hauser*, 26 W. Va. 596; Code W. Va. (1899) ch. 135, § 1; *Kanawha Lodge v. Swann*, 37 W. Va. 176, 16 S. E. Rep. 462; *Stout v. Philippi Mfg., etc., Co.*, 41 W. Va. 339, 23 S. E. Rep. 571.

Purely Statutory.—The jurisdiction of the court of appeals in relation to appeals from interlocutory decrees is purely statutory. *Lancaster v. Lancaster*, 86 Va. 201, 9 S. E. Rep. 988; *Elder v. Harris*, 75 Va. 68.

Law Governing.—Where an order is not appealable when the appeal is taken, it is immaterial that afterwards it is made appealable, by statute, the appeal must be dismissed. *Robrecht v. Wharton*, 29 W. Va. 746, 2 S. E. Rep. 798.

In Chancery Only.—Only in a case in chancery is a party authorized to appeal from a decree or order which is not final, and then only from such decree or order as is above described. Unless the decree or order, not being final, falls within this description in one or the other of the specifications, the appellate court would have no jurisdiction of the appeal, because the appellate court has no jurisdiction to review an interlocutory decree or order in chancery, except what is given by statute; and jurisdiction is given only in the cases described. *Elder v. Harris*, 75 Va. 68; *Pack v. Chesapeake, etc., R. Co.*, 5 W. Va. 118.

Discretionary Merely.—If an appeal from an interlocutory order or decree is allowed, and the court of appeals is of opinion that it should have been proceeded in further before the appeal was allowed, it will be dismissed as improvidently awarded. *Hughes v. Johnston*, 12 Gratt. 479.

Where a cause is heard upon the report of a commissioner, which has not been returned for the legal period, the decree being merely interlocutory, the error should be corrected by application to the court below; and it is not ground for an appeal unless, upon application, the court below refuses to correct it; the court saying: "The right of appeal from an interlocutory order or decree was not given for the correction of such

an error as this; but is limited to 'a decree or order dissolving an injunction or requiring money to be paid, or the possession or title of property to be changed, or adjudicating the principles of the cause;' and was intended to test the merits of the decree or order. If that be right upon the merits, and the only apparent error in the proceedings consists in the fact that the decree or order was prematurely made, the petition for an appeal therefrom may be rejected upon the ground that it is most proper that the case 'should be proceeded in further in the court below, before an appeal is allowed therein.' In other words, the petitioner should have the error corrected in the court below if he can." *Armstrong v. Pitts*, 18 Gratt. 235.

Decree Requiring Money to Be Paid.—A trustee has a right of appeal from a decree ordering him to pay trust funds into court as such a decree "requires money to be paid." *Grinnan v. Long*, 22 W. Va. 683.

A decree overruling some exceptions to a commissioner's report and confirming others and then ascertaining the indebtedness of parties and "decreeing money to be paid" is appealable. *Hooper v. Hooper*, 29 W. Va. 276, 1 S. E. Rep. 280.

Decree "Requiring the Title or Possession of Property to Be Changed."

Decree Ordering the Sale of Land.—A decree ordering the sale of land is an appealable decree, under ch. 185, § 1, subd. 7, of the Code; and no error in such decree can be reviewed unless a petition for an appeal is presented within two years after such decree was rendered. *Rader v. Adamson*, 37 W. Va. 582, 16 S. E. Rep. 808; *Buster v. Hollaud*, 27 W. Va. 510, 523.

A decree for the sale of land in a partition suit, though interlocutory, is appealable under Code, § 3454, as it requires change of title and possession, especially where it settles the principles of the cause. *Stevens v. McCormick*, 90 Va. 735, 19 S. E. Rep. 742.

A decree ascertaining and fixing the amounts and priorities of liens on real estate, and providing for sale thereof by special commissioner, unless such liens are paid by a future day, mentioned in the decree, is appealable, and can only be corrected on appeal or bill of review filed within the time prescribed by statute. *Lehman v. Hinton*, 44 W. Va. 1, 29 S. E. Rep. 984.

Decree Appointing a Receiver.—Under Code, § 3454, an appeal lies to a decree appointing a receiver, whereby a change in possession or control of the property is required, though made in vacation. *Shannon v. Hanks*, 38 Va. 338, 13 S. E. Rep. 437; *Ruffner v. Mairs*, 33 W. Va. 655, 11 S. E. Rep. 5.

An appeal lies from an order of a circuit court, appointing a receiver in a suit to subject land to judgment liens, since it requires the possession of the land to be changed, whether it adjudicates the principles of the cause or not. *Hutton v. Lockridge*, 27 W. Va. 423; *Grantham v. Lucas*, 15 W. Va. 423; *Wagner v. Coen*, 41 W. Va. 351, 25 S. E. Rep. 735.

An order or decree refusing to appoint such receiver is not appealable. *Robrecht v. Robrecht*, 46 W. Va. 738, 34 S. E. Rep. 801.

Decree Setting Aside a Conveyance as Fraudulent.—A decree setting aside a conveyance as fraudulent is appealable, since it requires the "possession or title of property to be changed." *Linsey v. McGannon*, 9 W. Va. 154.

Must Actually Change the Possession or Title.—But an injunction, restraining the defendant from us-

ing, cultivating or further trespassing on certain premises or from interfering with the plaintiff in his cultivation of the premises, does not "change the possession of the property" from the defendant to the plaintiff, but merely stops the defendant where he is, and hence is not appealable on that ground. *Robrecht v. Wharton*, 29 W. Va. 746, 2 S. E. Rep. 793.

Applies to Personal Property.—In *Harris v. Hauser*, 26 W. Va. 596, *GREEN, J.*, said he was by no means satisfied that the words "possession or title of property to be changed" did not apply to real estate alone.

But in *Ruffner v. Mairs*, 33 W. Va. 655, 11 S. E. Rep. 5, it was held that the clause of § 1, ch. 185, Code W. Va., conferring appellate jurisdiction on the court of appeals from a decree or order directing "the possession or title of property to be changed" referred to personal as well as real property.

Property Must Have Been in Possession of Appellant.

—Where the property has never been in the possession of the appellant, he cannot appeal from an order changing the possession of such property. *Harris v. Hauser*, 26 W. Va. 595.

Decree Adjudicating the Principles of a Cause.

Generally.—By Acts of 1882, ch. 157, § 1, an appeal will lie in any case in chancery where there is a decree or order "adjudicating the principles of the cause." In such case it is immaterial whether or not such is technically a final decree or order. *Steenrod v. Railroad*, 26 W. Va. 133; *Hoy v. Hughes*, 27 W. Va. 778; *Hill v. Als*, 27 W. Va. 215; *Stout v. Philippi Mfg. Co.*, 41 W. Va. 330, 23 S. E. Rep. 571; *Core v. Strickler*, 24 W. Va. 693; *Alexander v. Byrd*, 35 Va. 690, 8 S. E. Rep. 577.

A decree which adjudicates all the principles of a cause and settles the rights of the parties, leaving nothing further to be done but to execute it, is such a decree as will support an appeal from a decree which grants a rehearing of such decree. *Deaton v. Mitchell*, 45 W. Va. 670, 31 S. E. Rep. 908.

Thus where a demurrer to a bill is overruled by an interlocutory order, which settles the principles of the cause, the demurrant may appeal from such order alone, but not until after a decree has been entered carrying into effect the principles thus adjudicated by such order overruling the demurrer. The reason for denying an appeal from such order without waiting for the final decree is, to prevent the inconvenience and expense of successive appeals in the same cause. The same court has the power, before the final decree, to correct any error it may have committed and thus remove the cause for an appeal, or it may commit other and additional errors in the subsequent orders and decrees entered in the cause which the party prejudiced thereby may desire to have reviewed. It is, therefore, proper and right that the law denying appeals from interlocutory orders, even though such orders may settle the principles of the cause, until after those principles have been enforced by final decree, should be strictly adhered to and observed as a rule of convenience as well as a matter of safety and justice to the parties litigant. *Steenrod v. Railroad Co.*, 26 W. Va. 133; *Laidley v. Kline*, 21 W. Va. 21.

An appeal will lie to the court of appeals from a decree adjudicating the principles of a cause, although the same may not be a final decree (§ 3454, Code Va.), and an appeal also lies from a final decree. So that a party may appeal at once from a decree settling the principles in a cause against

him, or he may, at his option, await the final decree in the cause and then appeal. *Harper v. Vaughan*, 37 Va. 426, 12 S. E. Rep. 785.

There is no limitation upon the time wherein an appeal will lie from an interlocutory decree settling the principles of the cause, such limitation running only as against the final decree, the statute providing under the law now in force that "no petition shall be presented for an appeal from any final decree which shall have been rendered more than one year before the said petition is presented." § 3455, Code Va.; *Jameson v. Jameson*, 86 Va. 51, 9 S. E. Rep. 480.

"If after the final decree the party prejudiced by such interlocutory order has no complaint except such as resulted directly from such order, he may appeal from such order, although he is not in a condition to appeal from the final decree which carries into effect the principles adjudicated by such order. But if he complains not only of the error committed in such order, but also of errors in the subsequent decree, independent of those resulting merely from giving effect to such erroneous order, then he cannot appeal from such order unless he is also in a condition to appeal from the final decree; because to allow him to do so would be to permit him to appeal a cause in which the court would have jurisdiction to pass upon only a part of the errors of which the appellant complains. The effect of this would be either to deprive the appellant of the right to have a part of the errors complained of reviewed, or to compel the appellate court to pass upon the errors in the interlocutory order and remand the cause in order that the appellant might put himself in a position to appeal from the final decree and then entertain a second appeal for the review of the said decree. Such a practice could not be sustained upon any principle of law, reason, justice, or expediency and has never been, so far as I can discover, by any court." *Steenrod v. Railroad Co.*, 25 W. Va. 133.

Definitions.—It is difficult, if not impossible, to define exactly what is meant by adjudicating the principles of the cause in such a way as to fit every case; but it must mean that the rules or methods by which the rights of the parties are to be finally worked out have been so far determined that it is only necessary to apply these rules or methods to the facts of the case in order to ascertain the relative rights of the parties with regard to the subject-matter of the suit. *Lancaster v. Lancaster*, 86 Va. 201, 9 S. E. Rep. 988; *Wood v. Harmison*, 41 W. Va. 376, 23 S. E. Rep. 500.

"Apart from any decision construing this provision it seems to be apparent, that the object of the legislature was to allow appeals only in cases in which there was a decree or order adjudicating all the principles of the cause. Before this provision was adopted, appeals could be taken from final decrees only. This being then in derogation of the general principle, it must be construed strictly and not extended beyond the apparent purpose for which it was made; and especially so, since any other interpretation would produce great delay and expense in the final disposition of causes by allowing appeals from the successive adjudications of the points decided by the lower court without waiting for the adjudication of all of them, so that one appeal might end the cause. The policy of the law always has been to have as few appeals in the same cause as possible; and the innovation made by this and some other provisions of the statute was

evidently not intended to abrogate this policy, but its obvious purpose was only to permit appeals in certain cases, in which, it was supposed, the controversy might be sooner ended by allowing appeals before a final adjudication in the court below. It seems to me clear, therefore, that this provision was intended to permit appeals only in cases where the decree or order appealed from had fully adjudicated all the principles presented by the pleadings or otherwise in the cause." *Hill v. Als*, 27 W. Va. 218; *Shirey v. Musgrave*, 29 W. Va. 131, 11 S. E. Rep. 914; *Hinchman v. Morris*, 29 W. Va. 673, 2 S. E. Rep. 863; *Fowler v. Lewis*, 36 W. Va. 112, 14 S. E. Rep. 447; *Wood v. Harmison*, 41 W. Va. 376, 23 S. E. Rep. 500.

"The provision of the statute authorizing appeals to this court in chancery causes, when there is a decree adjudicating the principles of the case, authorizes such appeal only when the decree appealed from adjudicates all questions raised in the cause by pleadings or otherwise; and therefore if a number of questions are stated in the bill, which the court is called upon to settle, and but one of the questions is determined by the decree, and all the other questions arising in the cause are especially reserved on the face of the decree, till after a certain person is made a party defendant in the cause, such decree cannot be appealed from." *Shirey v. Musgrave*, 29 W. Va. 131, 11 S. E. Rep. 914.

A fortiori where the only question in the cause has not been decided and the lower court has expressly reserved it for its further consideration. *Kelly v. Lively*, 23 W. Va. 1.

Presumption.—Where it does not appear that there was any question before the lower court not adjudicated, the court of appeals will presume that all the principles of the cause were adjudicated and will not of its own motion award a writ of *certiorari* to bring up the record to inquire if this is so. *Hinchman v. Morris*, 29 W. Va. 673, 2 S. E. Rep. 863.

Examples.—In a suit to set aside a deed and subject the subject to a debt, a decree determining whether the property is subject to the debt and ascertaining the amount of the debt, is an appealable decree under § 1, ch. 167, Acts 1882 W. Va., as a decree "adjudicating the principles of a cause." *Hoy v. Hughes*, 27 W. Va. 773.

Whether a decree requiring the possession of personal property to be changed by the appointment of a receiver, is appealable or not, under § 1, ch. 185, Code W. Va., if that is the only relief prayed for in the bill, such a decree adjudicates the principle of the cause and is appealable on that ground. *Wagner v. Coen*, 41 W. Va. 351, 23 S. E. Rep. 735.

A decree stating the findings of the court on the matters in controversy, setting aside a former survey, decree, and deed as fraudulent and appointing commissioners to make a new survey, is a decree "adjudicating the principles of the cause," and is appealable. *Lloyd v. Kyle*, 26 W. Va. 534.

A decree overruling an exception and adjudging a debt valid and not barred by the statute of limitations nor by laches, and that, there being nothing in the hands of the intestate's personal representative, the intestate's realty is liable in the hands of his heirs, and ascertaining them and their respective liability, is a decree adjudicating the principles of the cause, from which an appeal will lie. *Alexander v. Byrd*, 85 Va. 690, 8 S. E. Rep. 577.

A decree deciding that a deed is not fraudulent *per se*, thus overruling one of the grounds upon which relief is prayed for in the bill, is a decree,

"adjudicating the principles of the cause" to a certain extent and is appealable. *Norris v. Lake*, 89 Va. 513, 16 S. E. Rep. 663.

Where certain tracts of land are attached by creditors as the individual property of the defendant, and a partner of defendant, who was not a party to the original suit, files his petition claiming that these tracts are the property of the partnership, an interlocutory decree holding the tracts to be the individual property of defendant, adjudicates the principles of the cause between the creditors and the petitioner and is appealable by the petitioner. *Hopkins v. Prichard* (W. Va.), 41 S. E. Rep. 847.

A decree overruling certain exceptions to a commissioner's report, and confirming the report as to the questions involved in these exceptions, is a decree settling the principles of the cause as to these questions, from which the party excepting may appeal, although the report is recommitted to the commissioner as to other matters involved in other exceptions. *Garrett v. Bradford*, 28 Gratt. 609.

In *Walden v. Beverley*, 20 Gratt. 147, which was an appeal from an interlocutory order, directing issues to be tried by a jury, the question of jurisdiction was not raised, nor expressly passed on by the court. But the court held that upon the case made by the record, all the material allegations of the bill were positively denied by the answer, and were not supported by two witnesses, or one witness and corroborating circumstances; that consequently the plaintiff had failed to make out his case, and his bill ought to have been dismissed; that it was error to direct issues to be tried by a jury to enable him to make out his case by new testimony; and that the circuit court, by directing the issues to be tried by a jury, must have held either that the plaintiff had not failed to make out his case by the proofs, or that if he had, his bill should not be dismissed, but that an issue should be directed to enable him by new and additional testimony to maintain the allegations of his bill; and that upon either ground the decision was erroneous, and settled the principles of the case adversely to the defendant and erroneously, as upon the face of the record he was entitled to the dismissal of the plaintiff's bill. *Elder v. Harris*, 75 Va. 68.

But where the only principles involved in the case, are raised by the exceptions to the commissioner's report, and the court directs an issue as to one of those very exceptions and expressly declines to decide the other exceptions until this issue is decided, such an order does not "adjudicate the principles of the cause," and is not appealable. *Elder v. Harris*, 75 Va. 68.

A decree sustaining some exceptions to a commissioner's report and overruling others and not noticing others, does not adjudicate the principles of the cause and cannot be appealed from, and an appeal, if granted, will be dismissed as prematurely awarded, with costs to the appellee. *Laidley v. Kline*, 21 W. Va. 21.

Decree Directing an Issue Out of Chancery.—An appeal will lie from an order directing an issue out of chancery if it "adjudicates the principles of the cause." *Elder v. Harris*, 75 Va. 68.

A decree directing an issue out of chancery which decides that the statute of limitations and laches are not sufficient defences to the plaintiff's demand, "adjudicates the principles of the cause" and is appealable, e. g., where the record shows that such defences are valid, but the lower court, by direct-

ing other issues decided to the contrary. *Reed v. Cline*, 9 Gratt. 136; *Elder v. Harris*, 75 Va. 68.

Refusal to Dissolve an Injunction Order.—The refusal of the court to dissolve an injunction order appointing a receiver, "adjudicates the principles of the cause," and is appealable. *Bristow v. Home Bldg. Co.*, 91 Va. 18, 22, 20 S. E. Rep. 946, 947. See monographic note on "Injunctions" appended to *Clayton v. Anthony*, 15 Gratt. 518.

Order Referring a Cause to a Commissioner.—An order referring a cause to a commissioner to take an account of liens and their priorities and the real estate subject to them, and whether the rents and profits will satisfy them in a reasonable time, is not an order "adjudicating the principles of the cause," and is not appealable. *Buehler v. Chevront*, 15 W. Va. 479; *Kahawha Lodge v. Swann*, 37 W. Va. 176, 16 S. E. Rep. 462.

Order Recommittng a Cause.—A decree which sustains certain exceptions to a commissioner's report, and recommits the cause to the same or another commissioner, is not an appealable decree since it does not "adjudicate the principles of the cause." *Hooper v. Hooper*, 29 W. Va. 376, 1 S. E. Rep. 280.

Decree Overruling Demurrer.—A decree overruling a demurrer is not a decree "adjudicating the principles of the cause," and no appeal lies from it. *Lancaster v. Lancaster*, 86 Va. 201, 9 S. E. Rep. 968; *Buehler v. Chevront*, 15 W. Va. 479.

Though an order overruling a demurrer does settle the principles of a cause, it cannot be appealed from, until after those principles have been enforced by a final decree, as the court below before the final decree might correct any error or might commit additional errors. *Laidley v. Kline*, 21 W. Va. 21; *Watson v. Wiggington*, 28 W. Va. 533. See, however, *Vance v. Snyder*, 6 W. Va. 24, where the court seemed to incline to the other opinion.

Injunction Cases.—For principles governing appeals from injunction orders, see monographic note on "Injunctions" appended to *Clayton v. Anthony*, 15 Gratt. 518.

Jurisdictional Amount Must Be Involved.—No appeal lies from a decree dissolving an injunction where the subject involved is pecuniary, and is of less amount than \$500. The right of appeal given by section 3454 of the Code is limited by section 3455. *Shoemaker v. Bowman*, 98 Va. 688, 37 S. E. Rep. 278.

When Appeal Must Be Taken.—Although the right is given to appeal from certain interlocutory decrees, the party aggrieved is not bound to appeal from them at once, but may do so at any time within a year after a final decree has been rendered in the cause, provided all the other requisites for an appeal exist. *Southern R. Co. v. Glenn*, 98 Va. 306, 36 S. E. Rep. 395.

Rights of Appellee.—Where an appeal is taken from an interlocutory decree of a county court to the court of chancery, and that court affirms the decree, and an appeal is taken to the court of appeals, the decree of the court of chancery will be considered as interlocutory, so that the appellee has a right to call it up within the 60 days prescribed by the statute. *Fretwell v. Wayt*, 1 Rand. 415.

D. CHARACTER OF PROCEEDINGS.

1. GENERALLY.

Proceedings Must Be Judicial.—Under the constitution of West Virginia, the supreme court of appeals has no power to review by writ of error or appeal the decisions or orders of inferior tribunals, officers or boards, as to matters which are simply administrative, executive or legislative and not strictly judi-

dial in their nature, except where such power is expressly conferred by the constitution. Railroad Co. v. Board of Public Works, 28 W. Va. 264.

As the jurisdiction of the supreme court of appeals, whether original or appellate, is, by the letter, true spirit and intention of the constitution, wholly judicial, the legislature could not confer jurisdiction of any other cast or quality upon that court, and even if it were, by explicit enactment, to confer power on it to entertain a writ of error or appeal, or other form of process to review a decision of the county court in a matter of the correction of an assessment of value for taxation, the act would be void, as contrary to art. 8, § 3, of the constitution. Mackin v. Taylor County Court, 38 W. Va. 338, 18 S. E. Rep. 632.

And such a proceeding, going up to the circuit court on *appeal* is no more a *judicial* proceeding than it was in the county court. Mackin v. County Court, 38 W. Va. 338, 18 S. E. Rep. 632.

The fact that a ministerial act is performed by a court does not change the nature of the act and make it judicial. Pittsburg, etc., R. Co. v. Board of Public Works, 28 W. Va. 264; Mackin v. County Court, 38 W. Va. 338, 18 S. E. Rep. 632.

Upon an appeal from the judgment of an inferior court, errors in the execution or replevy bond, issued, or taken, after the judgment, will not be noticed. They are merely ministerial acts, and must be corrected in the same court, upon motion; and if, on such motion, that court give an erroneous opinion, the party injured may then appeal, and have it corrected. Leftwich v. Stovall, 1 Wash. 308.

So a mere executive act, such as an official appointment, cannot be reversed in an appellate court. Dew v. Judges, 3 H. & M. 1.

May Be Ex Parte.—No just inference can be drawn that the action of the county court in ascertaining, declaring and entering of record, the result of a vote on the relocation of a county seat, is not reviewable by the circuit court, because the proceeding is in its origin an *ex parte* proceeding, and no provisions are made in the statute whereby persons may contest the truth of the returns or separate certificates before the county court. Any one interested in the question would have a right, as in many other matters, originally *ex parte*, to appear before the county court, and contest what is proposed to be done and by the appropriate appellate proceedings have the action of the county court reviewed by the circuit court. Poteet v. County Com. of Cabell Co., 30 W. Va. 58, 3 S. E. Rep. 97.

Although the order of allowance of an executor's account by a county court is only *ex parte*, an appeal will lie from such order to the district court, where the appellee has appeared and contested the allowance, and averred himself to be interested, as devisee in the estate in question, under the act giving a right of appeal to "all who may be injured or aggrieved by the sentence or judgment of a county court in any suit or contest whatsoever." Triplett v. Jameson, 2 Munf. 942.

2 TAX VALUATION.—There is no power of review of a tax valuation unless the legislature has provided for it. Hence if one aggrieved is given the right to apply to the county court and then to appeal to the circuit court, the right of appeal stops there if the right of appeal to the court of appeals is not expressly given, which it is not. Mackin v. County Court, 38 W. Va. 338, 18 S. E. Rep. 632.

Nor will the court of appeals have jurisdiction of

cases touching the assessment of taxes, under § 8, art. 8, giving that court appellate jurisdiction in civil cases "where the amount in controversy is of greater value than \$100" since that applies only to judicial controversies, not where the matter is merely administrative. Mackin v. County Court, 38 W. Va. 338, 18 S. E. Rep. 632.

The supreme court of appeals of West Virginia has no jurisdiction to review by writ of error or otherwise, a decision of the circuit court correcting an order of the board of public works assessing the value of railroad property for taxation; such action being merely administrative and not judicial. Railroad Co. v. Board of Public Works, 28 W. Va. 264.

In Low v. County Court, 27 W. Va. 785, there was a dictum to the effect that an appeal would lie, under § 94, ch. 161, Acts 1882, from a judgment of the county court refusing to correct an assessment when it is claimed that the party assessed with the taxes is not chargeable therewith; but this was expressly repudiated in Railroad Co. v. Board of Public Works, 28 W. Va. 264.

No appeal lies from the judgment of a county court rendered under § 7, ch. 32, Acts 1882, refusing to correct the assessed valuation of real estate. Such judgment if reviewable at all, can only be reviewed by *certiorari*. Low v. County Court, 27 W. Va. 785.

But see Bank v. County Court, 36 W. Va. 341, 15 S. E. Rep. 78, where it was held that the court of appeals had jurisdiction of a writ of error to the judgment of the circuit court affirming the judgment of the county court dismissing a petition to correct an alleged erroneous assessment under § 94, ch. 29, Code W. Va. the amount of controversy exceeding \$100. This case was decided prior to that of Mackin v. County Court, 38 W. Va. 338, 18 S. E. Rep. 632, but was not mentioned by the court in its opinion in that case.

3. MANDAMUS CASES.—Acts 1881-2, ch. 7, §§ 3, 4, expressly confer the right of appeal to the court of appeals from all judgments in all proceedings by mandamus rendered in the inferior courts. Taylor v. Williams, 78 Va. 422.

Refusal to Award Rule.—Where the circuit court refuses to award a rule on a petition praying a mandamus, the proper remedy is not by writ of error, but direct application to the court of appeals for such rule. Martin v. Board of Education, 42 W. Va. 514, 26 S. E. Rep. 348.

4. CERTIORARI CASES.—A final decision on a writ of *certiorari* is reviewable on writ of error from the court of appeals according to the rules of law and practice in other cases. Arnold v. Lewis County Court, 38 W. Va. 142, 18 S. E. Rep. 476.

The authority of the court of appeals to review a *certiorari* case, where the case has been heard, both parties being before the court below, is unquestionable, though the writ be a discretionary writ. In any case it is settled beyond dispute by the amendment to the constitution of West Virginia, art. 8, § 3, saying: "The court of appeals shall have appellate jurisdiction in cases of *quo warranto*, *habeas corpus*, *mandamus* and *certiorari*. W. Va. Code, p. 23." Welch v. County Court, 29 W. Va. 63, 1 S. E. Rep. 337.

5. CONDEMNATION PROCEEDINGS.—Where the statute on condemnation proceedings does not declare, that the judgment shall be final, the judgment of the inferior court must stand as all other judgments, and the aggrieved party is entitled to the

benefit of the general law regulating writs of error and *supersedeas*. B. & O. R. Co. v. P. W. & Ky. R. Co., 17 W. Va. 812.

The circuit court has no jurisdiction to award a *supersedeas* to the judgment of the county court in a proceeding by the board of supervisors to condemn land for public purposes, when it is not manifest that they are transcending their authority and the interposition of the court is necessary to prevent injury that cannot be adequately compensated in damages. Board of Supervisors of Culpeper Co. v. Gorrell, 20 Gratt. 484, 521.

C. HABEAS CORPUS CASES.

West Virginia.—While under § 1, ch. 135 of the Code, as amended by ch. 137 of Acts of 1882, a writ of error will lie from the supreme court of appeals to the judgment of a circuit judge remanding a prisoner brought before him on a writ of *habeas corpus*, such judgment, under § 12, ch. 111, cannot be superseded. *Ex parte Mooney*, 26 W. Va. 32.

Virginia.—The court of appeals has no jurisdiction to grant a writ of error to a judgment upon an application for a writ of *habeas corpus*. *Bell v. Com.*, 7 Gratt. 201; *Jones v. Timberlake*, 6 Rand. 678.

7. **DISBARMENT PROCEEDINGS.**—The supreme court of appeals has jurisdiction of a writ of error to the circuit court on disbarment of an attorney as for a contempt. *State v. Shumate*, 48 W. Va. 359, 37 S. E. Rep. 618.

8. **CONTEMPT PROCEEDINGS.**—A contempt of court is in the nature of a criminal proceeding. Hence the judgment in such a proceeding can be reviewed only by writ of error and not always in that way, never by appeal. *Baltimore, etc., R. Co. v. Wheeling*, 13 Gratt. 40. See monographic note on "Contempts" appended to *Wells v. Com.*, 21 Gratt. 500.

Proceedings for contempt cannot be reviewed in the court of appeals on application for a writ of *habeas corpus*. *Cromwell v. Com.*, 95 Va. 254, 28 S. E. Rep. 1023.

9. **AWARD OF ARBITRATORS.**—There cannot be an appeal to the court of appeals, from the award of an arbitrator, unless it be made the judgment or decree of the court from which it is taken; and the mere copying of the award in the proceedings of the court, though they be signed by the judge, does not make it the judgment or decree of the court. *Crane v. Crane*, 21 Gratt. 579. See monographic note on "Arbitration and Award" appended to *Bassett v. Cunningham*, 9 Gratt. 684.

10. **DECISION ON MOTION TO QUASH OR ISSUE EXECUTION.**—An appeal will lie from the decision of a court on a motion to quash an execution or order an execution to issue, it being so far considered a pending cause, as to entitle the parties in the original action to appeal. *Com. v. Hewitt*, 2 H. & M. 181; *Lowther v. Davis*, 38 W. Va. 132, 16 S. E. Rep. 20.

An appeal will lie from an order or decree overruling a motion to quash an execution, although the matter in controversy consists wholly of costs, since such an appeal is not from the decree in the principal cause, but as independent of it as if it were a decree in an independent suit to subject realty to costs in a former suit. *Taney v. Woodmansee*, 23 W. Va. 709.

Issuing Execution against a Person Not a Party.—If the clerk of an inferior court misconceive a judgment, and issue execution against any person not properly a party thereto, the remedy is not by *supersedeas* or writ of error, but by motion to quash the execution; and if such motion be overruled, an appeal may be taken to the court of appeals or ap-

plication may be made for a writ of error or *supersedeas* to the order overruling such motion. *Moss v. Moss*, 4 H. & M. 293.

11. **REFUSAL TO ORDER SURVEYOR'S REPORT TO BE RECORDED.**—If the county court in passing upon any question under the act, Code, ch. 37, § 15, render a judgment with costs overruling a motion to record the surveyor's report of the land sold for taxes, upon appeal to the circuit court, that court should simply reverse their judgment, but should not proceed to order that the report of the surveyor should be recorded; the error of the county court in refusing to order the report to be recorded can only be corrected by mandamus and not by writ of error or *supersedeas*. *Delaney v. Goddin*, 12 Gratt. 264.

12. **ORDER OF REMOVAL TO UNITED STATES COURTS.**—An order of a circuit court removing a case at law to the circuit court of the United States is reviewable by the supreme court of appeals of West Virginia on writ of error. *Henen v. Baltimore, etc., R. Co.*, 17 W. Va. 881.

13. **CONTESTED ELECTION CASES.**—No writ of error or *supersedeas* will lie to the judgment of the county court in contested election cases. *Dryden v. Swinburne*, 20 W. Va. 89, 104.

14. **ORDER APPOINTING OR DISPLACING GUARDIAN.**—Under the statutes, 1 Rev. Code, ch. 64, § 2, ch. 66, §§ 10, 51, no appeal lies from an order of the county court appointing or displacing a guardian, to the superior court of chancery, or from the court of chancery to the court of appeals. *Dupuy v. Hardaway*, 4 Leigh 584.

15. **BASTARDY PROCEEDINGS.**—The superior courts of law have jurisdiction to grant writs of *supersedeas* to orders of the county or corporation courts, binding persons accused of being the fathers of bastard children to support such children; and the court of appeals in like manner, has jurisdiction to correct errors in the decisions of superior courts of law on the same subject. *Mann v. Com.*, 6 Munf. 453.

16. **DECISION OF CIRCUIT COURT ON CLAIM DISALLOWED BY AUDITOR.**—Where a claim against the state for services rendered, as shorthand reporter, in a criminal case, has been allowed by the circuit court in which the case was tried, and been certified to the auditor for payment, by whom a portion of the claim is allowed, and the residue refused, and the holder of the claim applies by petition, under § 1 of ch. 37 of the Code, to the circuit court to have the claim audited, and adjusted, a writ of error will not lie to the court of appeals from the action of the circuit court on said petition. *Robinson v. La Follette*, 46 W. Va. 565, 23 S. E. Rep. 288.

17. **REFUSAL OF LEAVE TO SUE IN FORMA PAUPERIS.**—An appeal will lie from an order of a superior court refusing to grant leave to a person held in slavery, to sue *in forma pauperis*. *Sam v. Blake-more*, 4 Rand. 466.

18. **EX PARTE ALLOWANCES TO ATTORNEY.**—An *ex parte* order making allowances to an attorney for legal services out of funds in the control of the court is nonappealable. If erroneous, the proper remedy to correct it is by motion in the lower court. *Board of Education of Beverly Dist. v. Ward*, 50 W. Va. 443, 40 S. E. Rep. 344.

19. **EX PARTE VACATION ORDER.**—An *ex parte* vacation order made by a judge of the circuit court is nonappealable. *Clark v. Bryan*, 48 W. Va. 271, 37 S. E. Rep. 543.

20. **PROHIBITION PROCEEDINGS.**—A judgment

granting a peremptory writ of prohibition with costs is such a final judgment that a writ of error will be awarded to it. *Burch v. Hardwicke*, 23 Gratt. 51.

21. CRIMINAL CASES.

Motion to Abate Milldam as a Nuisance.—A motion to abate a milldam as a nuisance, is a criminal prosecution, hence a writ of error lies from the general court to the order of the circuit superior court affirming the order of the county court. *White v. King*, 5 Leigh 726.

Judgment against Slaves and Free Negroes.—No writ of error lay to the judgment of a justice's court sitting as a court of oyer and terminer, condemning a slave to death. *Peter v. Com.*, 2 Va. Cas. 330.

The same was true of the judgment of a county or corporation sitting as a court of oyer and terminer for the trial of a free negro or mulatto under the act of 1832-3, ch. 22, § 11. *Anderson's Case*, 5 Leigh 740.

E. MATTERS OF DISCRETION.

Generally.—When a matter is to be decided by an inferior court, though it be called a subject of discretion, as the awarding of a new trial, or the granting of a continuance, amendment of pleadings, and many other matters, and the discretion is so exercised as to prejudice the substantial rights of a party, it may be reviewed at his instance by an appellate court, and corrected by such court, when the inferior court has not exercised a sound judicial discretion, in accordance with established rules and principles, but has clearly violated such rules and principles.

It was anciently held that, whatever vested in the discretion of the court could not be reviewed. This was applied to amendments, or the refusal to amend pleadings, or the records in any part; to the continuance of, or the refusal to continue common-law suits to another term; to the granting of, or the refusal to grant new trials; and to a great variety of questions arising while the case was being tried, and which were regarded as questions of practice under the control of the court below, and not subject to review. But in most of the courts this doctrine has passed through, and is now passing through, a gradual change, and in many of the states a very great change, while in other states it has either not been modified, or has been but slightly modified.

Formerly these questions were doubtless matters of pure discretion, and then properly not the subjects of review; but they are no longer so, as the rules and principles governing them, with a few exceptions have become so settled and fixed that these subjects are really no longer matters of mere discretion, though still called as heretofore matters of discretion: the decision of the court in such cases being now really not the exercise of a discretion proper, but rather the application by the court below to the case before it of well-known rules and principles of law; and if it errs in the performance of this judicial duty, its errors should be corrected by the appellate court, just as any other error of law committed by it is corrected. But when the subject, upon which the inferior court has acted, is one within its absolute or pure discretion, its action cannot be reviewed. *Welch v. County Court*, 29 W. Va. 68, 1 S. E. Rep. 337.

Removal of Cause to Another Circuit.—When a judge of a circuit court is so situated as to render it improper, in his judgment, for him to preside at the trial of a cause, the statute makes it lawful for him

to remove the cause to another circuit. In such case, however, the propriety of removing or refusing to remove depends upon the discretion of the judge, and an appellate court cannot revise his decision. *Boswell v. Flockheart*, 8 Leigh 364.

Continuances.—A motion for a continuance is addressed to the sound discretion of the court, under all the circumstances of the case; and although an appellate court will supervise the action of an inferior court on such a motion, it will not reverse a judgment on that ground, unless such action was plainly erroneous. *Hewitt v. Com.*, 17 Gratt. 627; *Myers v. Trice*, 86 Va. 635, 11 S. E. Rep. 428; *Harman v. Howe*, 27 Gratt. 676; *Welch v. Com.*, 90 Va. 318, 18 S. E. Rep. 273; *Walton v. Com.*, 32 Gratt. 855; *Rousell v. Com.*, 28 Gratt. 930; *Phillips v. Com.*, 90 Va. 401, 18 S. E. Rep. 841; *Harris v. Harris*, 2 Leigh 584; *Bland & Giles County Judge Case*, 33 Gratt. 443; *State v. Betsall*, 11 W. Va. 708, 727; *Davis v. Walker*, 7 W. Va. 447; *Keese v. Bank*, 77 Va. 129; *Marmet v. Archibald*, 37 W. Va. 778, 17 S. E. Rep. 299. See monographic note on "Continuances" appended to *Harman v. Howe*, 27 Gratt. 676; *McAlexander v. Hairston*, 10 Leigh 486; *Gwatkin v. Com.*, 10 Leigh 687; *Deford v. Hayes*, 6 Munf. 390.

The same rule applies to the granting of continuances by commissioners in chancery of proceedings before them.

A commissioner properly has much latitude of discretion in granting continuances of proceedings before him, and the court whose order he is executing will not overrule his action in that respect, unless it be plainly erroneous. Still less will an appellate court reverse a decree for that cause. *Fant v. Miller*, 17 Gratt. 187.

Change of Venue.—The appellate court can review the action of the trial court in refusing or granting a change of venue. *Ott v. McHenry*, 2 W. Va. 73.

Allowance of Special Jury.—Under Code Va. § 3158, providing that a court "may allow a special jury," the allowance of a special jury is not a matter of right, but rests in the sound discretion of the court. *Atlantic & D. R. Co. v. Peake*, 87 Va. 130, 13 S. E. Rep. 348.

Challenging of Jurors.—The decision of a court allowing a challenge on the part of the commonwealth, or disallowing a challenge on the part of the accused, whether such challenge be a principal challenge or a challenge to the favor, is matter of exception on the part of the accused; which it is his right to have reviewed in the appellate court. *Montague v. Commonwealth*, 10 Gratt. 767.

Introduction of Evidence.—The matter of the introduction of the evidence as to the order and time thereof, is largely in the discretion of the trial court, and will not be interfered with by the appellate court, where no injustice has been done. *Lewis v. Alkire*, 32 W. Va. 504, 9 S. E. Rep. 890.

Whether a plaintiff shall be permitted to introduce further evidence after the defendant's evidence is introduced is a matter within the discretion of the court trying the cause; and its exercise will rarely, if ever, be controlled by an appellate court. *Brooks v. Wilcox*, 11 Gratt. 411; *Kerr v. Lunsford*, 31 W. Va. 659, 8 S. E. Rep. 493; *Bowyer v. Knapp*, 15 W. Va. 278.

The admission of evidence after the cause has been closed is a matter within the discretion of the trial court, and its action will not be reviewed unless it works surprise or injustice to the other party. *Bank v. Lockwood*, 13 W. Va. 392, 433; *George v. Plicher*, 28 Gratt. 299.

Where a case is heard by the court without a jury, an appellate court will not reverse the judgment, though the court below may have erred in requiring the plaintiff to introduce his evidence first. In such a case, it is a matter of perfect indifference in what order the evidence is heard. *Wright v. Rambo*, 21 Gratt. 158.

Examination of Witnesses.—The subject of the examination of witnesses lies chiefly in the discretion of the trial court, and its exercise will rarely if ever be controlled by an appellate court. *Brooks v. Wilcox*, 11 Gratt. 411; *Scott v. Shelor*, 28 Gratt. 891.

Unless it was palpably improper to grant leave for the second examination of a witness, an appellate court will not, for this cause, reverse the decree; as the circuit court ought to possess much latitude of discretion in the decision of such questions. *Pant v. Miller*, 17 Gratt. 187. For the principles governing the appellate court in reviewing the action of the trial court in the examination of witnesses, see monographic note on "Evidence."

Conduct of Counsel.—Counsel necessarily have great latitude in the argument of a case, and it is, of course, within the discretion of the court to restrain them; but with this discretion the appellate court will not interfere, unless it clearly appears from the record that the rights of the prisoner were prejudiced by such line of argument. *State v. Allen*, 45 W. Va. 65, 30 S. E. Rep. 209.

The extent to which counsel may read to the jury, from law books, sound law, relevant to the case on trial, is left largely to the discretion of the trial judge, subject to review in case of abuse of discretion. *Harrow v. Ohio River Co.*, 38 W. Va. 711, 18 S. E. Rep. 925.

Submitting Instruction after Jury Directed to Retire.—It is the legal right of counsel on the trial to submit instructions to the jury, and have them passed upon by the court; but where instructions are submitted by the counsel after the jury has been directed to retire, and the court refuses to consider them because offered too late, the court of appeals will not reverse the judgment of the trial court, unless it affirmatively appears that the said court manifestly abused the large discretion vested in it in respect to its action in such matters. *Tully v. Despard*, 31 W. Va. 370, 6 S. E. Rep. 927.

Setting Aside Nonsuit.—The appellate court can review the action of the trial court in refusing to set aside a nonsuit and can order the cause to be reinstated and remanded to the lower court. *M. & F. Bank v. Mathews*, 3 W. Va. 26.

Withdrawal of Demurrer to Evidence.—After the taking of the testimony in the case, the defendant demurred to the evidence, and the plaintiffs joined therein, and immediately after such joinder the defendant asked leave to withdraw his said demurrer to which the plaintiffs objected; but the court overruled the objection, and allowed the demurrer to be withdrawn. *Hell*, that the court of appeals allows to the courts below a wide latitude of discretion in all such matters of practice arising during the trial of the case below, and, in general, will not review such discretionary action, unless the same has been exercised in a manner plainly arbitrary, or otherwise obviously improper. *Burns v. Morrison*, 36 W. Va. 423, 15 S. E. Rep. 62.

Dismissal of Jury.—What constitutes a reasonable time during which the jury should be kept together, lies within the discretion of the trial court, and its action will not be reviewed except in a clear case of

abuse of such discretion. *Buntin v. Danville*, 22 Va. 200, 212, 24 S. E. Rep. 830.

New Trial.

Generally.—The appellate court can review the action of the lower court in granting or refusing a new trial, where a bill of exception is filed and if the lower court erred may reverse its judgment. *Power v. Finple*, 4 Call 411; *Slaughter v. Tutt*, 13 Leigh 147; *Keys v. McFatridge*, 6 Munf. 18; *Com. v. Wormley*, 8 Gratt. 712; *Ball's Case*, 8 Leigh 726; *Hill's Case*, 2 Gratt. 594; *Brown v. Speyers*, 20 Gratt. 296; *Walton v. Com.*, 22 Gratt. 855; *Hoover v. State*, 1 W. Va. 335.

Or affirm it if no error is perceived. *State v. Bettsall*, 11 W. Va. 703, 727; *Davis v. Walker*, 7 W. Va. 447; *Tefft v. Marsh*, 1 W. Va. 38; *Sweeney v. Baker*, 13 W. Va. 168.

An appellate court ought not to grant a new trial where it has been refused in the court below, except in cases of gross and palpable deviation from the evidence. *Brugh v. Shanks*, 5 Leigh 598. See note on "New Trials."

Quashal of Indictment.—In general it rests in the sound discretion of the court whether it will quash an indictment. Nevertheless, if the fact for which the defendant has been examined by an examining court cannot be ascertained from the record of that court; but can only be ascertained by testimony dehors the record it is the duty of the superior court to quash the indictment. In such case, testimony dehors the record of the examining court cannot be looked into. *Com. v. John McCaul*, 1 Va. Cas. 271.

Amendment of Bill.—Under § 12, ch. 125, Code of W. Va., allowing the plaintiff to amend his bill at any time after the appearance of the defendant if substantial justice will be promoted thereby, it is the province of the court below to decide when a proper case presents itself and his discretion is not to be reviewed unless abused. *Western M. & M. Co. v. Virginia, etc., Coal Co.*, 10 W. Va. 250, 256.

Directing Issues Out of Chancery.—The courts of chancery have a legal discretion on the propriety of directing issues: their action in regard thereto may be reviewed by an appellate tribunal. *Reed v. Cline*, 9 Gratt. 137; *Beverley v. Walden*, 20 Gratt. 147; *Stannard v. Graves*, 2 Call 369; *Fishburne v. Ferguson*, 84 Va. 87, 4 S. E. Rep. 575. See monographic note on "Issue Out of Chancery" appended to *Lavell v. Gold*, 25 Gratt. 473.

New Trial of Issues.—A decree of a circuit court granting or refusing a new trial on an issue out of chancery, may be reviewed in the supreme court of appeals. *Tompkins v. Stephens*, 10 W. Va. 156.

Submitting Questions to Jury for Special Finding.—As to when questions shall be submitted to the jury for special findings, the trial court has discretion not to allow them to be submitted at a stage so unreasonable as to be manifestly unfair to the other side, but its action in submitting or not submitting them, is subject to review. § 5, ch. 131, Code W. Va.; *Peninsular, etc., Co. v. Franklin Ins. Co.*, 35 W. Va. 666, 14 S. E. Rep. 237.

Removal of Executors.—There must, of necessity, be vested in the court a very large discretion; and while it is a legal discretion, to be exercised in a proper case, an appellate court ought not to interfere, except in a case where manifest injustice has been done, or where it is plain that a proper case has not been made for the exercise of the powers which the law has specially conferred on the court from which the fiduciary derives his authority. *Reynolds v. Zink*, 27 Gratt. 29.

Appointment of Receivers.—To appoint, or refuse to appoint receivers, is a discretionary power, which will not be interfered with on appeal, except in cases where the discretion has been manifestly abused. *Wagner v. Coen*, 41 W. Va. 351, 23 S. E. Rep. 725.

Appointment and Removal of Commissioner.—The circuit court has absolute control over its commissioners, with the power to appoint and remove at its discretion; and unless such discretion is plainly abused, to the prejudice of the parties to the litigation, the court of appeals cannot interfere therewith. *Arbogast v. McGraw*, 47 W. Va. 263, 34 S. E. Rep. 726.

Overruling Motion to Dissolve Injunction.—The exercise of a sound discretion without abuse by a circuit judge in overruling a motion in vacation to dissolve an injunction is not reviewable. *McEl-downey v. Lowther*, 49 W. Va. 348, 38 S. E. Rep. 644. See monographic note on "Injunctions" appended to *Clayton v. Anthony*, 15 Gratt. 518.

Exceptions to Answers.—The mode in which an exception to an answer shall point out the omission excepted to, is a matter of practice discretionary with the court, and not a subject of appeal. *Craig v. Sebrell*, 9 Gratt. 131.

Granting of Appellate Process.—Where a court refuses to grant a writ of error, or a mandamus, or a writ of prohibition, or a writ of *certiorari*, or other proper writ to remedy the wrong complained of, and the person asking such writ has no other remedy, though it is a discretionary writ, the appellate court will review, by the appropriate writ, the order refusing to grant such writ, though, when such order was made, no one was before the court but the party complaining, and though the other party never had been heard in the court below; for, if such an order cannot be reviewed by an appellate court, there is a total failure in the law to furnish any remedy for a wrong,—and because such order entered of record refusing to award such writ, when the plaintiff has the right to have it awarded, and has no other redress for the wrong, though not technically a final judgment, is, so far as the plaintiff is concerned, in its operation and effect, a final judgment against him, just as much as it would have been had the writ been awarded, and, on the hearing of the case, had been decided against him; and no injustice or wrong is done to the defendant, as, in such a case, if the inferior court refusing to grant such writ is reversed, the order of the appellate court will be only that the writ shall be issued, and he will have his hearing after it is issued, before the inferior court, and he has his hearing before the appellate court on the question of the propriety of issuing such writ, when the writ prayed for in the court below is a discretionary writ, and not a writ of right. *Welch v. County Court*, 29 W. Va. 63, 1 S. E. Rep. 337.

Granting Retail Liquor License.—The county court, under the act of June 29th, 1870, Sess. Acts 1869-70, ch. 74, has a discretion to grant or refuse a license to retail ardent spirits, and its judgment is final, and cannot be reviewed by the circuit court by a writ of supersedeas, all proceedings upon such writ are *coram non iudice* and void, including the judgment and execution in the higher court, and a writ of prohibition will be awarded by the supreme court to the judge of the circuit court, superseding the supersedeas and all proceedings thereon. *French v. Noel*, 22 Gratt. 454; *Ex parte Yeager*, 11 Gratt. 655.

But in *Leigton v. Maury*, 76 Va. 865, it was held

that, under the Acts 1879-80, p. 148, changing the wording of the statute from "may" to "shall" and giving an appeal to the circuit court, the court has a sound judicial discretion in determining whether the applicant is a "fit" person and the place "suitable and convenient," and if satisfied on these points it is its duty to issue the license and this discretion is reviewable, both in the circuit court and the court of appeals.

But in *Allstock v. Page*, 77 Va. 386, it was held that the change of the word "shall" back to "may" in the Act of March 6, 1882, was intended to restore the law as laid down in *French v. Noel*, 22 Gratt. 454, and to leave it discretionary with the county court to grant or refuse such licenses; though such discretion must be a sound legal discretion, a discretion to be exercised upon a full and complete survey of all the circumstances of each particular case, regard being had to the interest and policy of the state as manifested in the statute, as well as to the interests of the applicant and to the interests of the community in which the business is to be carried on, since a right of appeal to the circuit court is given to the applicant.

In *Ex parte Lester*, 77 Va. 668, it was held under the same statute that the whole subject was not remitted to the unlimited discretion of the county court; but that, an immediate appeal being allowed to the circuit court, it is still mandatory on the county court to issue the license, if on hearing the testimony, it is satisfied that the applicant fulfills the requirements of the statute.

Judicial Sales.

Ordering Sale.—The discretion vested in the court ordering the sale is always subject to review in the appellate court. It is not an arbitrary discretion, but a judicial discretion, which must be exercised reasonably and justly; and any party who may think himself aggrieved by the decree against him may apply for an appeal to the court of appeals. *Todd v. Gallego, etc., Co.*, 84 Va. 586, 5 S. E. Rep. 876.

Reasonable Time.—In enforcing the lien of a judgment against land it lies within the discretion of the trial court to decide what is a "reasonable time" within which the rents and profits should discharge the lien, but this is not an arbitrary but a sound, legal discretion, subject to review in the appellate court, but the debtor must have asked that the property be rented in the lower court. *Rose v. Brown*, 11 W. Va. 122; *Hill v. Morehead*, 20 W. Va. 429.

Quantity to Be Sold.—Whether it be necessary to sell the whole tract or only a part lies in the discretion of the lower court, and its decision will not be reversed unless plainly erroneous. *Johnson v. Wagner*, 76 Va. 587.

Sequestrating Income Instead of Directing Sale.—Where a trust fund has been created the annual interest or income from which is directed to be paid to an execution debtor, it is not error for a court of equity to sequester such interest or income, and direct its payment to the execution creditors instead of directing a sale of the interest of the debtor. This does exact justice to all concerned. Courts of equity have a discretion in such cases which will not be reviewed or reversed except for error appearing on the face of the record. *Frank v. People's Bank*, 95 Va. 500, 28 S. E. Rep. 874.

Confirmation of Sale.—A motion to confirm or set aside a sale made under its decree, is one addressed to the legal discretion of the court, to be governed by the circumstances of the particular case; and if improperly exercised it will in a proper case be cor-

rected by appeal, at the instance of the injured party. *Childs v. Hurd*, 25 W. Va. 530; *Marling v. Robrecht*, 13 W. Va. 440, 474.

Opening Biddings.—In discussing the principles applicable to the opening of biddings before confirmation, JUDGE ANDERSON, speaking for the court in *Roudabush v. Miller*, 32 Gratt. 464, 465, said that "in a proper case, where it would be just to all the parties concerned, this court may be understood as having sanctioned a practice in the circuit courts, in the exercise of a sound discretion, of setting aside a sale made by commissioners under a decree, and reopening the bidding upon the offer of an advanced bid of a sufficient amount deposited or well secured; and to that extent the former English practice has been allowed in this state. But it has never been held imperative upon the courts to set aside the sale and reopen the bids. It is a question addressed to the sound discretion of the courts, subject to the review of the appellate tribunal, and the propriety of its exercise depends upon the circumstances of each case, and can only be rightfully exercised when it can be done with a due regard to the rights and interests of all concerned—the purchaser as well as others." *Berlin v. Melhorn*, 75 Va. 639.

No person can demand a resale of property after the former sale has been confirmed, upon the mere offer of an upset bid; hence he cannot complain in an appellate court of the terms on which such resale is granted, if granted at all. *Yost v. Porter*, 80 Va. 855.

F. JUDGMENTS BY CONFESSION.—A confession of judgment amounts to a release of all previous errors in the proceedings. *Cooke v. Pope*, 3 Munf. 167. See monographic note on "Judgments by Confession" appended to *Richardson v. Jones*, 12 Gratt. 53.

Where a writ of error is only taken to an order of the lower court amending a judgment by confession for judicial error, the appellate court can only render such judgment as the lower court should have rendered and dismiss the motion to amend; it cannot consider any errors in the original judgment. *Stringer v. Anderson*, 23 W. Va. 482.

Relinquishment of Plea.—Where the defendant relinquishes his plea and agrees to the plaintiff's damages, there is a judgment by confession, amounting to a release of errors and defendant cannot appeal even by consent of plaintiff. *Cooke v. Pope*, 3 Munf. 167.

Confession of Judgment on Forthcoming Bond.—A confession of judgment on a forthcoming bond operates a release of error in the original judgment. *Edmonds v. Green*, 1 Rand. 44. See monographic note on "Judgments by Confession" appended to *Richardson v. Jones*, 12 Gratt. 53.

G. JUDGMENTS AND DECREES BY DEFAULT.
Decrees Rendered on Bill Taken for Confessed.—Under § 5, ch. 134 of the Code of West Virginia the appellate court is forbidden to allow or entertain any appeal from decrees rendered on bills taken for confessed, unless an application has been first made to the court making such decree to correct the errors complained of and such motion has been overruled in whole or in part. *Steenrod v. Railroad*, 25 W. Va. 133; *Saunders v. Griggs*, 81 Va. 506; *Dickinson v. Lewis*, 7 W. Va. 673; *Baker v. Western M. & M. Co.*, 6 W. Va. 196; *Hartley v. Roffe*, 12 W. Va. 401, 419; *Hill v. Bowyer*, 18 Gratt. 369, 377; *Rowland v. Rowland*, 11 W. Va. 262, 274; *Forest v. Stephens*, 21 W. Va. 316; *McKinney v. Hammett*, 26 W. Va. 623; *Gates v. Cragg*,

11 W. Va. 300; *Hunter v. Kennedy*, 20 W. Va. 343; *Bock v. Bock*, 24 W. Va. 586; *Hix v. Hix*, 25 W. Va. 481; *Beatty v. Veon*, 18 W. Va. 291; *Ferrell v. Camden*, 49 W. Va. 252, 33 S. E. Rep. 581; *Cann v. Cann*, 45 W. Va. 563, 31 S. E. Rep. 923.

The court of appeals has no jurisdiction of an appeal from a decree by default until relief has been sought under § 3451 of the Code, by motion to the court in which the decree was rendered. When the time allowed by this section has expired, the decree becomes final and irreversible. *Smith v. Powell*, 98 Va. 431, 36 S. E. Rep. 532.

A party who has allowed a decree to be rendered against him as an absent defendant, cannot appeal from the decree: his only remedy is to have the cause reheard. *Platt v. Howland*, 10 Leigh 507; *Lenows v. Lenow*, 8 Gratt. 349; *Barbee v. Pannill*, 6 Gratt. 442; *Meadows v. Justice*, 6 W. Va. 198; *Newman v. Mollohan*, 10 W. Va. 488, 504; *Higginbotham v. Haselden*, 8 W. Va. 17; *Handy v. Scott*, 26 W. Va. 710.

A decree confirming a sale of real estate will not be reversed for an error in the decree ordering the sale, where no steps have been taken in the court below, under § 5, ch. 134, before the confirmation to reverse said decree. *Dick v. Robinson*, 19 W. Va. 150.

In a foreign attachment, an absent debtor who has not appeared in the court below cannot appeal, his only remedy is by petition to the lower court for a rehearing. *Vance v. Snyder*, 6 W. Va. 24.

But where the parties have submitted the case on its merits and a decision in the appellate court will terminate a protracted controversy, the appellate court may pass upon the question presented by the record although no proper motion was made in the court below. *Coffman v. Sangston*, 21 Gratt. 265.

Or where the parties have expressly waived such objection. *Com. v. Levy*, 23 Gratt. 21, 31.

Reason of Rule.—The reason of the rule which denies the right of a nonresident to appeal until he has submitted his defence to the inferior court is founded upon the legal principle that the court of appeals is a court of exclusively appellate jurisdiction, confined to the review of the questions of law and fact which have been presented to and passed upon by the inferior court. *Haymond v. Camden*, 22 W. Va. 180.

What Constitutes Such a Decree.—As to what constitutes a decree by confession, see monographic note on "Decrees" appended to *Evans v. Spurgh*, 11 Gratt. 615.

Where a decree has been rendered in a cause upon a demurrer to the bill, an answer, a supplemental and amended answer, and replications thereto, upon depositions taken, and the report of a commissioner, which has been excepted to, the exceptions acted upon, and the principles of the cause adjudicated, such decree cannot be reversed upon motion under chapter 134 of the Code. *Rader v. Adamson*, 37 W. Va. 582, 16 S. E. Rep. 308.

Informal Answer.—Where the informal answer of one defendant has been filed by leave of court in a suit against an administrator and other defendants for a settlement of his account and the sale of land for the payment of debts, and the court has given it the effect of an answer not replied to, and has based its decrees on it, and has decreed against the defendants, such decree is not a decree by default as to him, and he is entitled to have it reversed. *White v. Kennedy*, 23 W. Va. 221.

When Demurrer Alone is Filed.—"If a defendant in a bill files no plea or answer but files a demurrer:

simply on the ground that the plaintiff on the facts stated in the bill is entitled to no relief against him, and the court below overrules such demurrer and awards a rule against him to answer the bill at a specified time, and he fails to do so, and a decree is rendered against him, and makes no motion to have it reversed or corrected in the court below, and he appeals from such decree, solely on the ground that the court rendered any sort of a decree against him, this court will, though he did not make such motion, entertain his appeal, because such appeal though in form an appeal from the last decree is in substance and in reality an appeal from the decree overruling his demurrer and deciding that the plaintiff was entitled to relief on the statements in the bill against him, and is therefore not to be regarded as a decree on a bill taken for confessed. But if the appellant in such case does not confine his appeal to the error committed by the court in overruling his demurrer simply carried out in the last decree but insists, that there are in addition thereto other and independent errors in the last decree against him, which should be reversed, even though the appellate court hold that the demurrer was properly overruled, the court of appeals will not entertain such appeal, because, so far as these additional and independent errors are concerned, this last decree is to be regarded as a decree on a bill taken for confessed and cannot be reversed by this court, till a motion to correct it has been made in the court below." *Watson v. Wigginton*, 28 W. Va. 533; *Stewart v. Stewart*, 27 W. Va. 167.

Where Exceptions to Report of Sale Are Filed.—So where defendant has filed exceptions to the report of sale, he may have the decree overruling his exceptions reviewed in the appellate court without any motion in the court below. If he does not complain of errors in the decree of sale which was rendered on a bill taken for confessed as to him. *Stewart v. Stewart*, 27 W. Va. 167; *Beaty v. Veon*, 18 W. Va. 291.

Judgments by Default.—Likewise in case of judgment by default, under §§ 5, 6, ch. 181, Code of Va. and § 5, ch. 134, Code W. Va., application must first be made to the court in which the judgment was rendered to correct any error for which the judgment might be reversed by an appellate court and such application must be refused before an appellate court can entertain an appeal, writ of error, or supersedeas. *Goolsby v. Strother*, 21 Gratt. 107; *Davis v. Com.*, 16 Gratt. 134; *Smith v. Knight*, 14 W. Va. 749; *Adamson v. Pearce*, 20 W. Va. 59; *Capehart v. Cunningham*, 12 W. Va. 750; *Goolsby v. St. John*, 25 Gratt. 146; *Watson v. Wigginton*, 28 W. Va. 533, 545.

The above section is as applicable to judgments which are a nullity as to other judgments by default. *State v. Slack*, 28 W. Va. 373.

Section 5, ch. 134, applies as well to judgments by default for fines in misdemeanor cases as in civil cases. *State v. Slack*, 28 W. Va. 372.

Not Applicable to Judgments by Confession.—But the first clause of § 5, ch. 134, Code W. Va., has no application to a judgment by confession, errors in such judgments, if judicial, and so not amendable under the second clause of same section can only be corrected by writ of error to the appellate court. *Stringer v. Anderson*, 23 W. Va. 482; *Richardson v. Jones*, 12 Gratt. 53.

Petition for Rehearing.—In *Coffman v. Sangston*, 21 Gratt. 263, *STAPINS, J.*, said that the notice in that case, not having been served upon either of the par-

ties-plaintiff, but upon the counsel in the cause and not specifying the errors complained of, nor in any manner disclosing the character of the decree defendant desired, the lower court might properly have refused to entertain the application upon the ground that the notice was not served on the proper parties, or was too vague and indefinite, and the appellate court might dismiss the appeal on the ground that there was no proper motion. But they did not dismiss it in that case on the ground that the parties had submitted the case upon the merits, and a decision would terminate a protracted controversy.

Assignment of Errors.—In *Gunn v. Turner*, 21 Gratt. 382, it was held that the failure to serve process on all the defendants could not be considered in the appellate court because it had not been assigned as error in the motion to the lower court to amend the judgment although such a motion had been made, but in *Saunders v. Griggs*, 81 Va. 506, it was explained that the ground of decision was that it was not made to appear affirmatively in the record that process had not been served, not because this error had not been specifically assigned in the motion to amend.

In *Laldley v. Bright*, 17 W. Va. 770, 801, *GREEN, P.*, while acknowledging that it was unnecessary to the decision of the case, said that he was not satisfied that it was necessary to specify error in the notice of such a motion.

Formal Petition Not Necessary.—When decrees have been rendered against a nonresident defendant upon publication, who did not appear, though he does not file a formal petition for a rehearing, if he files his answer containing substantially what a petition should have stated in the court below without objection, asking that said decree be set aside, this is sufficient, and the appeal will not be dismissed as improvidently granted. It is too late for the appellee to object in the court of appeals for the first time that the appellant was permitted to file his answer without giving security as the law requires. To make such an objection then is to admit and invoke the jurisdiction of that court for the correction of an alleged error in the court below, and this cannot be done on a motion to dismiss for want of jurisdiction. *Haymond v. Camden*, 22 W. Va. 180.

Bill Instead of Petition.—Although a bill is filed to correct the decree by confession instead of a motion being made as provided by statute, and the appeal is from the decree on this bill and not from the original decree, yet, if the bill embraces other grounds which give the court jurisdiction, so that no inconvenience or additional expense results from embracing in it such allegation of error as might have been made the ground of a motion under the statute, and the record in the original case is made a part of the bill, the appellate court may correct any error in the original decree, and a reversal of this decree will have the same effect as a reversal of the original decree. *Hill v. Bowyer*, 18 Gratt. 364, 377.

Where a nonresident defendant, against whom a decree has been rendered upon publication has filed what he styles a "bill of review" but which has all the elements required for a petition for a rehearing by the statute, he may appeal from the decree refusing to entertain his application for a rehearing and correction of alleged errors, and he may have a review not only of such decree, but also of the decrees entered in the cause before his ap-

pearance and sought to be reheard and corrected by his petition. *Martin v. Smith*, 25 W. Va. 579.

Bill of Review.—It is not proper to treat a bill of review filed to correct errors of law which is barred by the statute of limitations as a notice to correct errors under § 5, ch. 181 of the Code Va. 1860, especially when the decrees sought to be reviewed were not rendered on a bill taken for confessed as to one of the plaintiffs in the bill of review. *Amliss v. McGinnis*, 12 W. Va. 371, 399.

Limitation on Motion or Petition.—By analogy to the limitation upon the right of appeal from final decrees, the proceeding by motion to correct errors in a final judgment by default or decree on a bill taken for confessed is limited to five years. *Kendrick v. Whitney*, 28 Gratt. 646.

The proceeding by motion under § 5, ch. 181, Code Va. 1860, to correct even an interlocutory decree is barred after five years, but such motion may, after five years has elapsed be treated as a petition for a rehearing. *Kendrick v. Whitney*, 28 Gratt. 646.

Where Codefendant Appeals.—In *Lenows v. Lenow*, 8 Gratt. 353, it was held that though the absent defendant had no right by reason of the statute to appeal, not having sought his rehearing in the court below, yet a codefendant, who had appeared, could nevertheless appeal before such rehearing had been sought, from a joint decree against him and the nonresident defendant, who had not been served with process or appeared. And that such appeal necessarily brings under review the propriety of the whole decree, and devolves upon the court the duty of correcting and reversing it, if erroneous, in favor of both the nonresident defendant, who had not appeared, and the defendant who had. The same principle was followed in the case of *The Coal River Navigation Co. v. Webb*, 3 W. Va. 488; *Watson v. Wigginton*, 28 W. Va. 533; *White v. Kennedy*, 23 W. Va. 221.

Where a bill is taken for confessed, as to one of two joint defendants and both appeal, the appeal will not be dismissed as to the former under §§ 3451-2, where the appeal of the other defendant necessarily brings up the question in which the first defendant is interested; she being interested in it also. *Flynn v. Jackson*, 98 Va. 341, 25 S. E. Rep. 1.

The principles thus decided are obviously equally applicable to a judgment by default, when process has been served and in which also a rehearing must be sought in the court below, as provided for in the sixth section of chapter one hundred and thirty-four of the Code of West Virginia, before an appeal can be taken. It must follow that in such case, if there be a joint judgment against two, one by default and the other upon issue tried, that the party against whom the judgment was rendered, after the trial of the issue, has a right at once to take his appeal; and in hearing this appeal, the court of appeals must necessarily take under consideration the whole judgment as to both parties, and, if erroneous, reverse it as to both. And it necessarily follows that if not erroneous, it must affirm it as to both.

The sixth section of chapter one hundred and thirty-four of the Code, which requires a party to apply to the court below for the correction of certain errors, before applying to the appellate court, cannot be regarded as in conflict with the right of the appellate court thus to proceed, when once in rightful possession of a case, and with jurisdiction

over the parties. *Newman v. Mollohan*, 10 W. Va. 488.

Absent Defendant May Still Petition for Rehearing before Affirmance.—In a suit in which there is an absent defendant, there is a decree against the home defendant, from which he appeals. Pending the appeal the absent defendant may file his petition in the court below to be permitted to appear and file his answer in the cause, and may have the decree reheard and set aside, if it is erroneous as to him. *James River and Kanawha Co. v. Littlejohn*, 18 Gratt. 53.

If upon such rehearing the decree, or so much of it as is the subject of appeal, is wholly set aside, the appeal will generally be dismissed. But if an appeal is taken from the decree on the rehearing, before the dismissal of the first appeal, the appellate court may refuse to dismiss it. *James River and Kanawha Co. v. Littlejohn*, 18 Gratt. 53.

In *Newman v. Mollohan*, 10 W. Va. 488, 504, it was said that on the authority of the above case that it might be that before the appellate court has decided the case, such petition or other proceeding for the correction of errors might be instituted in the court below and the appellate court would suspend proceedings till the court below had decided whether any correction should be made.

But Not after.—But after the decree has been affirmed, it cannot be again reviewed in whole or in part by the circuit court under the fifth section of chapter one hundred and thirty-four of the Code of West Virginia. *Newman v. Mollohan*, 10 W. Va. 488.

May Appeal from Denial of Petition.—But where the defendant has made the motion required by § 5, ch. 184, Code W. Va., and it has been overruled, he has the right to appeal. *Midkiff v. Lusher*, 27 W. Va. 439; *Laidley v. Bright*, 17 W. Va. 779, 791; *Ambler v. Leach*, 15 W. Va. 677.

A writ of supersedeas will lie to the judgment overruling such motion. *Higginbotham v. Haselden*, 3 W. Va. 268; *Saunders v. Griggs*, 81 Va. 506.

Where a petition to rehear a decree rendered against an absent defendant is denied, the appeal should be from the order denying the petition, not from the original decree. *Grinnan v. Edwards*, 5 W. Va. 111.

H. VOID DECREES.—A writ of error or appeal will lie to or from a judgment, decree or order of a court, although the same may be void for want of jurisdiction in the court by which it was rendered, or for other cause appearing upon the record. *Crane v. Crane*, 21 Gratt. 579.

Although a decree is void because rendered against one who was not a party or for other cause, yet he can have such decree reversed on appeal. *McCoy v. Allen*, 16 W. Va. 724; *Cook v. Dorsey*, 38 W. Va. 196, 18 S. E. Rep. 468; *Monroe v. Bartlett*, 6 W. Va. 441.

I. CONSENT DECREE.—An appeal will not lie from a consent decree. *Manion v. Fahy*, 11 W. Va. 482; *Hinton v. Bland*, 81 Va. 588; *Weekly v. Hardesty*, 48 W. Va. 39, 35 S. E. Rep. 880.

Presumption of Assent.—A party may be concluded by his acquiescence in a decree affecting his rights made in the progress of the cause, under which he takes a part of the fund affected by it, and makes no objection to it until after the final decree in the cause made twenty-two years after it. *Burton v. Brown*, 22 Gratt. 1.

III. WHO MAY APPEAL.

A. PARTIES ONLY CAN APPEAL.—A person who is not a party to the proceeding in which the judgment of the court below complained of was rendered cannot obtain a supersedeas to such judgment. *Supervisors of Culpeper Co. v. Gorrell*, 20 Gratt. 484, 519; *Ex parte Lester*, 77 Va. 668; *County Court v. Boreman*, 24 W. Va. 87, 11 S. E. Rep. 747.

One not a formal party cannot appeal, though affected as a *pendente lite* purchaser. *Stout v. Philippi Mfg., etc., Co.*, 41 W. Va. 320, 23 S. E. Rep. 571.

A reversioner or remainderman may in some cases. *Wingfield v. Crenshaw*, 3 H. & M. 245.

Persons filing a petition to set aside a decree in a suit to which they are not parties, have no right to appeal from the decree in such suit on the dismissal of their petition, although the costs of the petition are decreed against them. *Campbell v. Bowen*, 1 Rob. 241.

No one but a party can appeal but when an entry on the docket reads, "H. Free appeared and filed bond with Frank Burt as security, and asks that an appeal be granted to the Circuit Court of Marion County. Bond approved and appeal granted. J. F. Christy, Justice," and the appeal bond recites the appeal as asked for by Bert Free, it will be presumed that H. Free, not being a party himself was applying for the appeal as agent of a party. *York v. Free*, 38 W. Va. 336, 18 S. E. Rep. 492.

Interest Not Sufficient.—Even though the record show that he has an interest in the subject-matter of controversy. *Renick v. Ludington*, 20 W. Va. 511, 187; *Board of Supervisors v. Gorrell*, 20 Gratt. 484.

A supersedeas, to a judgment of a county court granting leave to erect a mill, will not lie in behalf of a person, who may be interested, but whose name does not appear, as a party, in the record of the county court. *Wingfield v. Crenshaw*, 3 H. & M. 245.

"*Holcomb v. Purcell, etc.*, decided by this court in 1892, is a strong case upon this head. In that case the court held that a principal obligor in a forthcoming bond, against whom the judgment in the original suit was rendered, but against whom no judgment was rendered on the forthcoming bond, was not entitled to appeal from a judgment against a surety in the forthcoming bond. Upon the face of the record it must have appeared that the principal obligor was collaterally interested, since the surety would be entitled to recover of him the amount of the judgment whenever the surety should discharge the same; but not being immediately a party to the judgment, the court dismissed the appeal." *Board of Supervisors v. Gorrell*, 20 Gratt. 484.

Such person should make himself a party to the contest before the final decision in the county court, and then it is competent for him to carry the case to a superior tribunal. *Wingfield v. Crenshaw*, 3 H. & M. 245.

In a contest about a will, a person who was not a party in the county court may, by becoming interested after an appeal to the district court, be admitted a party there, and carry up the cause to the court of appeals; but, on reversing the judgment of the district court, and affirming that of the county court, such party can only recover the costs in the district court. *Cogbill v. Cogbill*, 2 H. & M. 467.

Must Be a Proper Party.—The commissioner of school lands is neither a necessary nor proper party to a chancery suit brought in the name of the state of West Virginia, under § 6, ch. 24, Acts 1893,

to sell lands for delinquent taxes and therefore he is not entitled to appeal from the decree of the circuit court in such suit. *Lawson v. Hart*, 40 W. Va. 52, 20 S. E. Rep. 819.

In a proceeding to condemn land for public purposes, any indirect interest persons may have in the subject as citizens, taxpayers, and landholders of the county, is not sufficient to make them proper parties. They do not become parties by merely offering to become so, when that offer is rejected. If they become parties to anything, it is merely to the order of rejection; and not to the order confirming the report of the commissioners. And their supersedeas, if they are entitled to any, will only be to the said order of rejection, and not to the order of confirmation. They are not entitled to a supersedeas to the former order, for they are not aggrieved thereby. The order of the county court, made after the rendition of the judgment, suspending it for thirty days to allow the exceptants to apply for an appeal and supersedeas, does not make them parties to the proceeding in the county court. To give it that effect would be to make the court do, indirectly, what it had just before expressly refused to do. *Board of Supervisors v. Gorrell*, 20 Gratt. 484; *Ex parte Lester*, 77 Va. 668.

Under the statute of March 6, 1832, touching the granting of liquor licenses, a right of appeal to the circuit court is given to the applicant alone, and in his case only to the circuit court, hence those opposing the granting of the license cannot appeal to the circuit court having no interest in the matter such as would entitle them to have themselves made parties. If they do appeal and obtain a writ of error or supersedeas, a writ of prohibition will be awarded to the applicant by the supreme court, commanding them to proceed no further on such writ of error or supersedeas. *Allstock v. Page*, 77 Va. 386; *Ex parte Lester*, 77 Va. 668.

The proceedings for the sale of forfeited lands for the benefit of the school fund under the statute of W. Va., ch. 134, Acts 1872-3, are not judicial, but administrative in their character nor are they technically proceedings either *in rem* against the land, or *in personam* against the former owner; such lands are the absolute property of the state and she alone has any interest in the proceedings for their sale; the effect of the fifth section of article 13 of our Constitution, giving to the former owner of such lands the surplus proceeds of the sale over the taxes, etc., is a gratuity and his claim thereto is confined to such proceeds, and no lien upon or interest in the land or the proceedings for its sale is conferred by said provision upon such former owner; and having no interest in, or lien upon the land, he is not entitled to be a party to the proceedings for the sale; and consequently has no right to appeal to the court of appeals. *McClure v. Maitland*, 24 W. Va. 561; *Auvil v. Jaeger*, 24 W. Va. 583.

B. WHO ARE PARTIES.

Personal Representative of Deceased Party.—The personal representative may obtain a writ of error upon showing that his intestate has died since the judgment; although the plaintiff has not revived the suit. The court saying: "It is true, that it is a general rule, that no person can bring a writ of error, who is not a party or a privy to the record; but the right to bring the writ of error in case of the death of the party, against whom the judgment was rendered, will be in the personal representative without a revival of the judgment, because the personal representative

stands in the shoes of the deceased and has the same rights, as his intestate had, with reference to the judgment." *Phares v. Saunders*, 18 W. Va. 336.

An administrator is entitled to prosecute an appeal from an adverse decree against his decedent in a suit to set aside a fraudulent conveyance of land necessary to pay debts of the estate. *O'Connor v. O'Connor*, 45 W. Va. 354, 32 S. E. Rep. 276.

An appeal can be taken by a personal representative as of right, in like manner, as other suitors, under chapter 136, Code of West Virginia. And a petition to the court of appeals or a judge thereof, by a personal representative is not necessary, unless he would be relieved from giving the undertaking required by that chapter. *Hutchinson v. Landcraft*, 4 W. Va. 812.

Purchaser at a Judicial Sale.—Although a purchaser at a judicial sale cannot appeal from the decree directing the sale nor from any other order or decree of the court made in the cause prior to his bid; yet a bidder at such sale, who has made a cash payment, becomes thereby so far a "party to the controversy" under § 1, ch. 17, Acts 1872-3, as to entitle him to take an appeal from a decree setting aside such sale. *Kable v. Mitchell*, 9 W. Va. 492; *Roberts v. Roberts*, 13 Gratt. 630.

The purchaser of property at a judicial sale, who has complied with the terms thereof, becomes a party to the suit from the time of his purchase, and acquires an inchoate right, which entitles him to a hearing upon the question whether the sale should be set aside, and if the court err by setting aside the sale improperly, the purchaser will in a proper case, have the right to appeal to a higher tribunal. *Childs v. Hurd*, 25 W. Va. 530.

So he may appeal from a decree confirming the sale. *Talley v. Starke*, 6 Gratt. 330, 349.

A purchaser can only appeal from a decree erroneously affirming or disaffirming the sale, at which she purchased; errors in the subsequent proceedings are matters in which she has no concern and from which she has no right to appeal. *Bank v. Ewing*, 21 W. Va. 208.

Where a person who bid at a judicial sale of land and refused to comply with the terms of the sale, at a resale, attempted to bid through an agent, in disregard of the terms of sale, it was held that, such person had no standing to appeal from a decree confirming the sale to another person. *Hildreth v. Turner*, 89 Va. 858, 17 S. E. Rep. 471.

Where a sale of property has been made under a decree of a court of equity, and before the same has been confirmed, the court has set the same aside and ordered the property to be reoffered for sale, the purchaser at such first sale cannot appeal from the decree setting the same aside, before such resale has been made and confirmed. *Childs v. Hurd*, 25 W. Va. 530.

County Court Not a Party in Proceeding for Reassessment of Land.—A county court is not a party to an appeal taken, under § 7, ch. 36, Acts 1891, for reassessment of lands, by a landowner, from the decision of a county court refusing to reduce the valuation of his land made by a commissioner under said act, and cannot maintain a writ of error from the court of appeals to the decision of a circuit court upon such appeal. *Mackin v. Taylor County Court*, 38 W. Va. 338, 18 S. E. Rep. 632.

Receiver.—A receiver or commissioner, is but an officer of the court and he has no right to intermeddle in questions affecting the rights of the parties or the disposition of the property or funds in his

hands. His holding is the holding of the court for him, from whom the possession is taken, and he has no more right to interfere in the litigation or ask for a revision of a decree or order affecting the rights or claims of the parties than an entire stranger to the cause. But where his own accounts or his personal rights are affected he must necessarily have the same means of redress that any other party so affected would have. *Ruhl v. Ruhl*, 24 W. Va. 279.

Where a court makes a void decree by which it directs its receiver to pay over funds in his hands and, because he fails to obey such void decree, attaches and imprisons him for an indefinite time, the receiver is entitled to have such order of imprisonment reviewed. If the decree was void he was not bound to obey it, and he certainly could not be punished for refusing to do what he was under no legal obligation to do. *Ruhl v. Ruhl*, 24 W. Va. 279.

Other Party May Appeal.—The fact that a receiver appointed by a court cannot appeal from the judgment of that court, will not prevent the other party or parties to the action from appealing. *Melendy v. Barbour*, 78 Va. 544, 555.

Amicus Curiae.—An *amicus curiae* cannot appeal. *Dunlop v. Com.*, 2 Call 284; *Board of Supervisors of Culpeper Co. v. Gorrell*, 20 Gratt. 484, 521.

Attorney in Fact.—A person appearing as attorney in fact for certain creditors of the intestate, and opposing the grant of administration, may appeal, though not interested, in any other respect, in the subject of controversy. *Bohn v. Sheppard*, 4 Munf. 403.

Appointee of Court.—*GREEN, J.*, in *Colman v. Oil Co.*, 25 W. Va. 148, 178, said that there was only one case in which a United States court could appoint any one to prosecute a writ of error in the appellate state court, that was under the bankrupt act when the plaintiff in error was a bankrupt and there was a judgment in the inferior court against him, which the assignee or court thinks should be reversed.

Councilmen of a City.—The councilmen of a city in their corporate capacity alone can apply for a writ of error to a mandamus ordering them to make a levy of taxes. *Osborne v. Kammer*, 96 Va. 223, 31 S. E. Rep. 19.

Creditor.—No creditor can prosecute a writ of error in the name of his debtor, or prevent the debtor from dismissing his writ of error when he pleases, even though the court has advanced funds from the hands of a receiver to enable the appellant to print the record in order to obtain his writ of error. *Colman v. Oil Co.*, 25 W. Va. 148, 175.

C. MUST BE AGGRIEVED.—A person must not only be a party to the proceeding in the court below, but he must also be aggrieved by the judgment rendered therein, to entitle him to obtain a supersedeas to such judgment. *Board of Supervisors of Culpeper Co. v. Gorrell*, 20 Gratt. 484, 519; *Ex parte Lester*, 77 Va. 563; *McKinney v. Kirk*, 9 W. Va. 28; *Edmunds v. Scott*, 78 Va. 720; *Little v. Bowen*, 76 Va. 724; *Handy v. Scott*, 26 W. Va. 710; *Hollingsworth v. Brooks*, 7 W. Va. 559; *Clark v. Johnston*, 15 W. Va. 804; *Miller v. Rose*, 21 W. Va. 291; *County Court v. Armstrong*, 34 W. Va. 326, 12 S. E. Rep. 488.

Where a bill is dismissed on demurrer, any party aggrieved by the decree may appeal though he be a defendant in form. *Atkinson v. McCormick*, 76 Va. 791.

An appeal or supersedeas to a judgment ought not to be granted to any person not appearing to

be interested in the matter in controversy. Sayre v. Grymes, 1 H. & M. 404.

And the appellant's interest must appear by the record. Colman v. Oil Co., 25 W. Va. 148, 174.

Where an order does not affect the right or the remedy of the appellant, he cannot appeal, e. g. an order dismissing a petition for a summons against the commonwealth and making the auditor defendant instead. Parsons v. Com., 80 Va. 163.

Interest Must Be Immediate.—An appellate court will not reverse a decree, though erroneous, at the instance of a party not interested in the property involved in the suit. It is not sufficient that he may be interested in the question litigated, or that by the determination of the question litigated, he may be a party in interest to some other suit, growing out of the decision of that question. Elcan v. Lancasterian School, 2 P. & H. 58.

Personal Representative.—A personal representative cannot appeal from a decree of sale of testator's lands, not being interested therein. Edmunds v. Scott, 78 Va. 720.

Where, on a bill for specific performance, the administrator of deceased party to contract answers and the heirs suffer default, where no personal judgment is rendered the administrator is not affected by the decree, and has no right of appeal. Ferrell v. Camden, 49 W. Va. 253, 38 S. E. Rep. 581.

An administrator has a sufficient interest, as the representative of his testator's personal estate to appeal from an improper decree of sale of land, though the infant heirs have not appealed, where the personal estate is liable to make up any inadequacy of the proceeds. Cocke v. Gilpin, 1 Rob. 30, 42.

It is well settled that where an executor, as such appeals from a decree which does not aggrieve the estate, the question cannot be considered whether he is aggrieved as an individual. Swann v. Housman, 90 Va. 816, 20 S. E. Rep. 830.

Surety.—A surety has a right to appeal not only from a decree ordering the sale of his principal's real estate, but from all prior decrees upon the correctness of which the correctness of said decree depends. Camden v. Haymond, 9 W. Va. 681; Stearnod v. Railroad Co., 25 W. Va. 133.

Bankrupt.—Pending a suit by judgment creditors against their debtor and others, to set aside a deed of trust or subject the surplus to payment of their debts, the debtor is declared a bankrupt on his own petition, and in the suit he claims his exemption and homestead out of the surplus of the purchase money of the land, after satisfying the debt secured by the deed of trust. The circuit court dismisses the debtor's application, and makes a decree distributing the fund. The bankrupt has such an interest in the case as entitles him to take an appeal. Barger v. Buckland, 28 Gratt. 850.

Deed of Trust Creditors.—Where, in a suit by the grantor in a deed of trust and of the cestuis against the trustee and others, a reference is made by the court to ascertain and report the amount of the trust debts, each trust creditor, who is a party has a right to appear before the commissioner and contest the claims of other creditors and is entitled to appeal from the decision of the commissioners. Peamster v. Withrow, 9 W. Va. 206, 323; Temple v. Wright, 94 Va. 338, 26 S. E. Rep. 844.

Former Owner of Forfeited Lands.—In proceedings by the commissioner of school lands, under ch. 134, Acts 1872-73, for the sale of forfeited lands for the benefit of the school fund, the former owner of such lands, or other persons claiming title thereto,

having no rights to be affected, and no interest in the proceedings, are not entitled to be made parties in the circuit court; and, if they be inadvertently made parties in that court, that will not give any of them the right to appeal to the court of appeals. McClure v. Manperture, 29 W. Va. 633, 2 S. E. Rep. 761.

Fraudulent Grantor.—Upon a bill to subject land in the hands of alleged fraudulent grantees to the lien of a judgment, the grantor cannot appeal from a decree adjudging them fraudulent, since he is not interested in the matter. Price v. Thrash, 30 Gratt. 515.

Forfeiture of Appellant's Interest.—The fact that after the judgment and before the writ of error was granted, the interest of the defendants in land, which is the subject of an action of ejectment, had been divested by forfeiture and vested in the state and enured to the benefit of the plaintiff is, no ground for an order of dismissal, but only for an affirmance of the decree or judgment, because no error to the prejudices of the appellant appears. Bradley v. Ewart, 18 W. Va. 598.

Effect of Assignment of Interest.

Right of Assignor.—When the sole plaintiff in a suit parts with his interest in whole or in part *pendente lite*, he may still apply for and prosecute an appeal from a decree in such suit, especially where the defendant had obtained a rule against the plaintiff and the alleged assignee to show cause why an order should not be entered that the said assignee file a supplemental bill in the nature of a bill of revivor or that the suit be dismissed, and such rule has been discharged on account of the laches of the defendant in making his objections to the further proceeding of the cause. Zane v. Fink, 18 W. Va. 693, 739.

Right of Assignee.—Where land subject to a mechanic's lien is conveyed to a third party, such assignee has a right to prosecute an appeal in the name of his assignor from a decree holding the land subject to the lien. Hendricks v. Fields, 26 Gratt. 447.

The assignees, *pendente lite*, of the assets of a bank, have a right to prosecute an appeal in the name of the bank, even though the corporate rights of the bank have ceased by dissolution. Hall v. Bank of Virginia, 14 W. Va. 584, 604.

Where co-demandants bring a writ of right and recover against the tenants, but fearing a reversal on appeal, one demandant buys the claim of the tenants and obtains a supersedeas to the judgment in the name of his vendors, the supersedeas will not be dismissed on the motion of his co-demandant. Genin v. Ingersoll, 2 W. Va. 558.

Appeal by Successful Party.—A writ of error may be brought by the plaintiff to reverse his own judgment, if erroneous or given for a less sum than he has a right to demand in order to enable him to bring another action. Ballard v. Whitlock, 18 Gratt. 235.

D. THE COMMONWEALTH.

In Criminal Cases.

Generally.—No appeal lies in criminal cases, or prosecutions by indictments on behalf of the commonwealth. Com. v. Highland Crowe, 1 Va. Cas. 125; Com. v. Harrison, 2 Va. Cas. 202.

No appeal or writ of supersedeas is grantable in any case wherein the commonwealth is plaintiff upon a penal statute, which is considered in the nature of a criminal prosecution. *Vide* Temple's Case, 1 Va. Cas. 168; Com. v. Wawter, 1 Va. Cas. 127.

In Revenue Cases.—A writ of error lies, for the state, from the circuit court to a judgment of the county court, if the case be for the violation of a law relating to the revenue. *State v. Kyle*, 8 W. Va. 711.

A writ of error lies for the state, from the supreme court of appeals to a judgment of the circuit court, if the case be for the violation of a law relating to the revenue. *State v. Allen*, 8 W. Va. 680.

Since the adoption of the constitutional amendment of 1880 there is no doubt, that in revenue cases the state has equal right with the defendant to exceptions in the court below and review on writ of error. *State v. Thompson*, 26 W. Va. 149.

In a prosecution for selling ardent spirits by retail to be drunk at the place where sold, without having first obtained a license to keep an ordinary, a writ of error lies for the commonwealth from the judgment of an inferior court. *Com. v. Scott*, 10 Gratt. 749; *Com. v. Coe*, 9 Leigh 620.

On an indictment for a violation of the condition of a bond given by the applicant for a liquor license conditioned not to allow any person to drink to intoxication on the premises, etc., a writ of error lies on the part of the state, on the ground that is for a violation of the law relating to the revenue. *State v. Church*, 4 W. Va. 745.

The state has a right to a writ of error in an action by it on a bond given under § 22, ch. 32, Code 1891, to obtain license to sell liquors, if regarded as a criminal case, as it concerns the revenue. But in law it is a civil action, with right of appeal in the state. *State v. Nutter*, 44 W. Va. 385, 30 S. E. Rep. 67.

Constitutionality.—The statute, § 3, ch. 160, Code 1868, which authorizes a writ of error for the state to a judgment of the circuit court, from the supreme court of appeals, if the case be for the violation of a law relating to the revenue, is not repugnant to the constitution. *State v. Fitzpatrick*, 8 W. Va. 707; *State v. Allen*, 8 W. Va. 680; *State v. Cooper*, 26 W. Va. 338.

Section 3, art. 8, of the Constitution, does not limit the appellate power of the supreme court of appeals, in criminal cases, merely to cases where there has been a conviction of felony or misdemeanor. The legislature may confer on said court appellate power in cases of misdemeanor for violation of law relating to revenue where there has been no conviction. *State v. Allen*, 8 W. Va. 680.

On Petition for Proceeds of Sale of Forfeited Vessels.—Where vessels have been forfeited to the commonwealth for violation of the oyster laws and sold under order of court, and the proceeds remain, under the court's control and parties entitled to the proceeds petition therefor, the proceedings are civil not criminal and the commonwealth is entitled to an appeal from a judgment in favor of the petitioner under Code 1873, ch. 178, § 3, if the amount in controversy exceeds the jurisdictional sum. *Com. v. Minter*, 79 Va. 5.

E. JOINT APPEALS.—Different creditors, parties to a suit attacking a conveyance as fraudulent, may unite in an appeal from a decree holding it valid to their prejudice. *Frank v. Zeigler*, 46 W. Va. 614, 33 S. E. Rep. 761.

All parties against whom a decree is pronounced, interested in the main question decided, may unite in an appeal, though their interests are separate, or affected differently by the decree. *Frank v. Zeigler*, 46 W. Va. 614, 33 S. E. Rep. 761.

F. ESTOPPEL TO APPEAL.—The mere statement of an appellant to an appellee that he did not intend to or would not appeal, does not prevent an appeal, unless there was a consideration for the statement, or the appellee has acted on it to his prejudice. *Southern R. Co. v. Glenn*, 96 Va. 309, 36 S. E. Rep. 395.

Where a decree is entered for a less sum than the party claims, receiving payment of the sum so decreed is not a waiver of errors, nor does it estop him from appealing from the decree as to sums not allowed. *Southern R. Co. v. Glenn*, 96 Va. 309, 36 S. E. Rep. 395.

IV. TRANSFER OF CAUSE.

A. GENERALLY.—Writs of error or supersedeas and appeals, allowed by the court of appeals or a judge thereof in vacation, are prayed for by petition, in which the errors complained of are assigned or set forth; and process is issued and served upon the adverse party, and a hearing is had after appearance by counsel, or in case of default, without appellate pleadings unless of some extrinsic matter in bar. *Reid v. Strider*, 7 Gratt. 76.

The time and manner of proceeding in order to give the court of appeals cognizance of a cause, is as essential as the nature, or amount of the matter in controversy. *Clarke v. Conn*, 1 Munf. 160.

B. STAY OF PROCEEDINGS.—Under the statute, ch. 178, § 11, Code Va. 1873, the court or judge to whom the petition for appeal is presented may stay the proceedings "in part," as well as "in whole." *Cralle v. Cralle*, 81 Va. 778.

C. NOTICE OF APPEAL.—In *Dunbar v. Dunbar*, 5 W. Va. 567, the court intimated that, where the noting of the fact that an undertaking for an appeal has been filed with the clerk is resisted by the appellee, the object of such noting was accomplished, it being merely to give notice of the appeal to the opposite party.

Notice ought to be given of an intention to take up an appeal at the first term of the court of appeals in a chancery case. *Lee v. Frame*, 1 H. & M. 21.

Statute Not Retroactive.—Section 3457, Code 1887, requiring notice to be given of the intention to appeal, under penalty of dismissal of the appeal, has no application to appeals from decrees rendered prior to said act. *Blanton v. Carroll*, 86 Va. 539, 10 S. E. Rep. 329.

Merely Directory.—The provisions of § 3457 of the Code requiring a party intending to apply for a writ of error or appeal to give notice to the opposite party or his counsel of his intention to apply for a transcript of the record, and forbidding the clerk to make out and deliver such transcript until it appears that such notice has been given, which fact the clerk is required to certify with the record, are directory only, and a lack of the required certificate to that effect does not avoid the transcript, but it is a plain violation of official duty for the clerk to make out and deliver a transcript until it appears that notice has been given as required by law. *Norfolk, etc., R. Co. v. Dunnaway*, 98 Va. 29, 34 S. E. Rep. 698; *Mears v. Dexter*, 86 Va. 838, 11 S. E. Rep. 538.

D. PETITION FOR APPEAL.—The petitioner for an appeal, supersedeas or writ of error should state distinctly in his petition what relief or assistance he desires, and as to what judgment, decree or order of the court he asks for an appeal, supersedeas or writ of error, as the case may be. The failure to do so must in the very nature of things not unfrequently lead to mistakes or serious difficulty and

confusion in the granting of appeals, supersedeas or writs of error; and this case is a fair illustration of the fact. *Beard v. Arbuckle*, 13 W. Va. 782; *Steenrod v. Railroad Co.*, 25 W. Va. 133.

When a petition for an appeal is presented to the court of appeals, it is examined by one of the members of the court, and, if he thinks the appeal should be granted, an order is made by the court granting such appeal, the other members of the court not examining the record. But if the judge, who examines the record, thinks that the appeal should not be granted, he hands the record to each of the other judges of the court in succession; and if any one of them is of opinion, that the appeal should be granted, an order of the court is made granting the appeal. If all the judges are of opinion, that the appeal asked ought not to be granted, an order is entered refusing to grant the appeal; and if each of the members of the court thinks, that the decree complained of is plainly right, the court may state in the order refusing to grant the appeal, that this refusal is because the order complained of is plainly right.

Whenever this is done, by section 11 of chapter 7 of Acts of 1872-3 and by section 11 of chapter 157 of Acts of 1882, the court of appeals is prohibited from ever entertaining a petition for an appeal therein afterwards. *Moore v. Johnson*, 24 W. Va. 549.

Assignment of Error.—A petition for an appeal is in the nature of a pleading, and should state clearly and distinctly all the errors relied on for a reversal of the decree. Otherwise the appeal, if granted, should be dismissed. But a motion to dismiss for this cause will not be granted after the lapse of more than three years when the right of appeal has become barred by limitation. *Orr v. Pennington*, 95 Va. 208, 24 S. E. Rep. 928.

Yet it is the well known practice for appellate courts not to confine themselves to the errors specified in the petition, but to reverse the decree complained of for any substantial error disclosed by the record, whether mentioned in the petition or not. *Saunders v. Griggs*, 81 Va. 506.

The following is not such an assignment of error as is required by § 3464, Va. Code: "Your petitioner avers that there was manifest error in dismissing said bill, and rendering said judgment for costs against your petitioner; and he therefore prays an appeal from the said decree and that a supersedeas be awarded." *Orr v. Pennington*, 95 Va. 208, 24 S. E. Rep. 928.

Grounds of Objection Must Be Stated.—The court of appeals will not consider assignments of error for which no grounds of objection are stated, either in the petition for the writ of error or in the brief of counsel. *Atlantic & D. R. Co. v. Reiger*, 95 Va. 418, 25 S. E. Rep. 590.

E. APPELLATE PROCESS.

1. WHEN OBTAINABLE.

From Courts of Law.—An appeal can be allowed from a judgment at law, only by the court pronouncing the judgment, and during the term of the court at which the judgment was pronounced. The same court, at a subsequent term, or the judge thereof, in vacation, cannot, under any circumstances, allow an appeal; nor can an appeal be allowed in such case, by an appellate court, or a judge thereof, under any circumstances. The judgment can be brought before an appellate court, only by a writ of error, or a supersedeas, awarded by the appellate court, or a judge thereof. *Morris v. Deshazo*, 4 Rand. 460.

Where the judge of a circuit court, in vacation, allowed a writ of error to a judgment of a county court; but the writ of error was dismissed at the next term of the circuit court as improvidently allowed, since the judge in vacation had no authority to allow it; then, a writ of error was prayed in term time, and denied, it was held the writ of error allowed by the judge in vacation was properly dismissed; but as the judgment of the county court was erroneous, it was error in the circuit court not to allow the writ prayed in term time. *Amis v. Koger*, 7 Leigh 221.

In Criminal Cases.—A writ of error cannot be granted by a judge, in vacation, to a defendant, against whom there has been a judgment in behalf of the commonwealth, for a misdemeanor. *Jones v. Com.*, 2 Va. Cas. 224.

From Courts of Chancery.—An appeal from a court of common law cannot be allowed, with condition to give bond and security, after the term at which the judgment was obtained; but a court of chancery has power to grant an appeal, if bond and security be given within a reasonable and limited time, in the next vacation after the term at which the decree was rendered. *Morris v. Deshazo*, 4 Rand. 460.

The chancellor may grant an appeal from his own decree during the term, with an allowance of time to the appellant to give security after the expiration of the term. *Stealy v. Jackson*, 1 Rand. 413.

Prior to the act of 1807, the court of appeals had power to grant appeals from, or writs of supersedeas to the decrees of the several superior courts of chancery, at any time within three years after the same were pronounced; and, since the said act, any judge of the court of appeals, out of court, has the same power. *Tomlinson v. Dillard*, 3 H. & M. 199.

The power of the superior courts of chancery to grant appeals from interlocutory decrees, in certain cases, is not limited to the terms at which such decrees were rendered; but may be exercised at any subsequent term. *Wright v. Dawney*, 3 H. & M. 250.

But the judges of the several superior courts of chancery cannot grant appeals from interlocutory decrees in vacation; but in court only. *Fairfax v. Muse*, 2 H. & M. 557; *Goodwin v. Miller*, 2 Munf. 43; *Dawney v. Wright*, 2 H. & M. 12.

In Criminal Cases.—A writ of error in a criminal cause may be awarded by the court of appeals during the term, returnable to a day in the same term; and the cause may be heard at the same term. *Lazier's Case*, 10 Gratt. 708.

A judge in vacation may not award a writ of error in a criminal case. *Baker v. Com.*, 2 Va. Cas. 353.

Allowance Must Be Entered on Record.—Where a judgment has been rendered in a court of law, and the record omits to state that an appeal was allowed, no evidence can be received at a subsequent term, that the appeal had been, in fact, allowed, but that the clerk had neglected to enter it on the record. *Burch v. White*, 3 Rand. 104.

2. SERVICE OF WRIT.—A writ of supersedeas, to a judgment obtained in the name of the governor, for the benefit of a relator, ought to be served on such relator, and not on the governor. *Newell v. Wood*, 1 Munf. 555.

A party to the record in the lower court can appear and defend in the higher court and should be served with process upon an appeal, writ of error or supersedeas, but he renders himself liable for costs and may recover costs, as in other cases. *Leigton v. Maury*, 76 Va. 865.

F. THE RECORD.

1. PRINTING OF THE RECORD.

Direction of Judge.—Where, under § 3459 of the Code, a question as to what parts of the record shall be copied, is referred to the judge by whom the appeal is allowed, and he directs a complete record to be made out in one case to serve as the record in several similar cases, but directs also that each case show the names of the parties litigant, amounts and dates and the record only contains the names in the other cases, the court cannot consider them, and the appeal must be dismissed as to them. *Litchford v. Day*, 87 Va. 71, 12 S. E. Rep. 107.

2. RECORD AT LAW.

a What Constitutes Ordinarily.—"The record is made up of the writ (for the purpose of amending by if necessary); the whole pleadings between the parties; papers of which profert is made or oyer demanded, and such as have been specially submitted to the consideration of the court by a bill of exceptions, a demurrer to evidence, or a special verdict, or are inseparably connected with some paper or evidence so referred to. These, with the several proceedings at the rules or in court, until the rendition of the judgment, constitute the record in common-law suits, and no others." *Roanoke Land & Imp. Co. v. Karn*, 80 Va. 589.

Where there is error in the declaration, pleadings, or judgment, committed against the protest or over the demurrer or other objection, of a party, the same may be reviewed and corrected in the court of appeals, although no motion has been made for a new trial in the court below, and no exception was reserved by bills of exceptions or otherwise. *Spence v. Robinson*, 35 W. Va. 313, 13 S. E. Rep. 1004.

Nothing else that transpired during the trial in the court below will be considered a part of the record in the appellate court, unless made so by a bill of exceptions or order of the court; and the mere statement on the record that certain pleas were rejected and that parties excepted to various rulings of the court, is not sufficient. *Lawrence's Case*, 86 Va. 573, 10 S. E. Rep. 840. See monographic note on "Bills of Exception" appended to *Stoneman v. Com.*, 25 Gratt. 387.

The case must be heard and considered in the court of appeals upon the errors apparent upon the face of the record. If no exceptions are taken to any supposed errors of the court which tries the case, these acts are not in the record, and cannot appear in the transcript thereof, and the party aggrieved remains as at common law, without relief. *Johnson v. Norton Land & Imp. Co.*, 90 Va. 287, 18 S. E. Rep. 36.

In Caveat Cases.—In a case of caveat all the facts agreed by the parties, or found by the jury, or, if a jury is dispensed with, ascertained by the court, necessarily become and should be made a part of the record of the cause. *Hamilton v. McNeil*, 18 Gratt. 389.

Execution.—An execution of the same court used as evidence upon the trial of a cause, will be regarded by the court of appeals as part of the record without a *certiorari*. *Preston v. Auditor*, 1 Call 471.

Upon a motion to dissolve an injunction awarded on a bill filed to enjoin the sale of personal property under executions levied thereon, the court of necessity must consider the executions, and, where, upon the evidence, it appears that they were considered, they are properly copied into the record of

the cause. *Ford v. Watts*, 95 Va. 192, 28 S. E. Rep. 179.

Writ and Inquisition.—Upon a motion to quash a writ and inquisition founded on a judgment at law, which motion is sustained, the writ and inquisition are a part of the record, although no bill of exceptions is taken; and they will be so treated by an appellate court. *Wallop v. Scarburgh*, 5 Gratt. 1.

Affidavit and Order of Attachment.—Wherever the validity of an attachment is involved, or the jurisdiction questioned, the affidavit and order of attachment are parts of the record, though not mentioned in declaration or bill. *Miller v. White*, 46 W. Va. 67, 33 S. E. Rep. 332.

Forthcoming Bonds and Declarations of Assurance.—In a motion on a forthcoming bond, the bond is a part of the record without being spread upon it by bill of exceptions, and the bond certified by the clerk is taken to be that on which judgment was given, so the declaration, filed in a motion by the Mutual Assurance Society, and referred to in the motion which is spread on the record, is a part of the record. *Skipwith v. Mut. Ass'n Soc.*, 10 Leigh 502.

Venire Facias.—If there is an error on the face of the writ of *venire facias*, and the prisoner moves to quash it, though he does not specify the error, it may be taken advantage of in the appellate court. *Wash v. Com.*, 16 Gratt. 530.

Warrants.—A superior court has a right to look into the warrant summoning the magistrates of the examining court, which is part of the record; but not into the warrant of commitment, which is not a part of the record. *Com. v. John M'Caul*, 1 Va. Cas. 271.

Caption of Indictment.—The caption of an indictment is a part of the record, though no part of the indictment, and may be looked to in order to ascertain whether the inferior court had jurisdiction. *Robinson v. Com.*, 88 Va. 900, 14 S. E. Rep. 627.

Notice of Motion.—Notice of a motion must be made a part of the record by bill of exceptions. *Beale v. Wilson*, 4 Munf. 380.

Affidavit in Support of Motion.—An affidavit filed in support of a motion for a continuance which was overruled, is not a part of the record, unless it be made so by a bill of exceptions. *Garland v. Bugg*, 1 H. & M. 374.

Pleadings—Rejection.—If a rejected plea is by order of the court made a part of the record, and the order book shows that its rejection was excepted to, the supreme court of appeals will review the action of the court in rejecting such plea, though no formal bill of exceptions was taken to the rejection of such plea. *Sweeney v. Baker*, 18 W. Va. 158.

Allowance.—A party may take advantage in the appellate court of an error committed by the trial court in permitting a plea to be filed where the record shows that such party objected to the filing of such plea in the trial court, and he need not in such case take a bill of exceptions or except to the action of the court overruling his objection. *Bank v. Kimberlands*, 16 W. Va. 557; *Perry v. Horn*, 22 W. Va. 381.

This rule is equally applicable to the filing of a replication. *Bank v. Showacre*, 26 W. Va. 50.

Evidence.—To make available in the appellate court an objection taken during the trial to the admission of evidence, the point must be made, and properly saved by some bill of exception. It is not enough merely to note the objection and exception in the certificate of evidence. *State v. Harr*, 38 W.

Va. 58, 17 S. E. Rep. 794; *Poling v. Ohio River R. Co.*, 38 W. Va. 645, 18 S. E. Rep. 782.

Instructions.—An instruction to be reviewed in the appellate court, must be made a part of the record by bill of exceptions. *Ferguson v. Wills*, 88 Va. 136, 18 S. E. Rep. 392.

Error based on the giving or refusal of instructions ought to be shown by bill of exceptions giving the instructions and enough of the evidence to show whether they were proper; but where the record otherwise identifies the instruction, and shows an exception, and the whole evidence appears, that will suffice, without such bill of exceptions. *Hughes v. Frum*, 41 W. Va. 445, 23 S. E. Rep. 804.

Dissatisfaction of Court with Verdict.—If the court, before which the issues are tried, is dissatisfied with the verdict, this dissatisfaction must be certified on the record by the court; or if refused, it should be put on the record by a bill of exceptions; it is not to be supplied by affidavit, especially of counsel in the cause. *Stannard v. Graves*, 2 Call 260.

Entries in Private Memorandum Book of Retired Judge or Clerk.—Entries in the private memorandum book of a judge no longer in office and entries on the docket of a clerk no longer in office are not parts of the record. *Ruffner v. Hill*, 21 W. Va. 152.

Certificates of Clerk.—Nothing, not made part of the record by bill of exceptions or by order of the court, can be regarded as such by the appellate court. The clerk cannot add to or detract from the record and his certificate that a deposition or other paper copied by him was evidence whereon the judgment was founded, does not make them part of the record. *Roanoke Land & Imp. Co. v. Karn & Hickson*, 80 Va. 589; *Watson v. Com.*, 85 Va. 367, 9 S. E. Rep. 418.

As the clerk can add nothing to the record, agreed facts copied by him into the record and certified as the facts, whereon the judgment rested, cannot be considered in the court of appeals and the case cannot be reviewed in the absence of a bill of exceptions to the supposed errors of the trial court. *Johnson v. Norton Land & Imp. Co.*, 90 Va. 267, 18 S. E. Rep. 36.

Order of Court.—Where the order of the lower court sets out that a bond was executed in conformity with a former order and acknowledged and certified, such bond is a part of the record. *Beery v. Homan*, 8 Gratt. 48.

After when the bond is not mentioned in the order of court. *Justices v. Williamson*, 12 Leigh 93.

Papers Merely Copied into the Record.—Papers inserted in the record by the clerk, cannot be considered as part of the record, unless they are made so by the party wishing to avail himself of them. *Cunningham v. Mitchell*, 4 Rand. 189.

Facts copied into the transcript by the clerk but not made a part of the record by bill of exceptions or otherwise, are not a part of the record. *Wright v. Wood*, 88 Va. 1037, 14 S. E. Rep. 914.

Bill of Exceptions.—Unless that which purports to be a bill of exceptions and copied into the record as such, is, by some order or memorandum of the trial court entered on the order book, made a part of the record, the court of appeals cannot regard it or treat it as a part of the record in the case, but will wholly disregard it. *Bank v. Showacre*, 26 W. Va. 53; *Pegram v. Stortz*, 31 W. Va. 220, 6 S. E. Rep. 486; *Winters v. Null*, 31 W. Va. 450, 7 S. E. Rep. 443.

Where a bill of exceptions or any document in the record on appeal is not a part thereof, the fact may

be shown in the supreme court. *Wells v. Smith*, 49 W. Va. 78, 38 S. E. Rep. 547.

Deposition.—Nor is a deposition a part of the record in the absence of a bill of exceptions, though copied in the transcript and certified by the trial court and clerk. *Johnson v. Norton Land & Imp. Co.*, 90 Va. 267, 18 S. E. Rep. 36.

The fact that depositions taken prior to the decision of the court to be read at the trial are found among the papers of the cause and copied into the record by the clerk, is not sufficient to authorize the court of appeals to consider such depositions as having been given in evidence before the court below at the hearing of the case, where they are not certified and made a part of the record by bill of exceptions or otherwise. *Ramsburg v. Erb*, 16 W. Va. 777.

Instructions.—Instructions copied into the record, when there is no bill of exceptions or order of the court referring to them, will not be regarded as any part of the record. *Winters v. Null*, 31 W. Va. 450, 7 S. E. Rep. 443; *Trump v. Coal Co.*, 46 W. Va. 238, 32 S. E. Rep. 1035.

Certificate of Overruling of Demurrer.—Where there is copied by the clerk in the record a certificate, signed by the judge, stating, that a demurrer to a declaration had been filed and overruled by the court, but that the clerk had not entered the filing of the demurrer on the record, this memorandum is no part of the record. *Sweeney v. Baker*, 13 W. Va. 158.

Amended Declaration.—Where an amended declaration, in an action of ejectment, whereby a new party plaintiff is introduced, is copied into the record by the clerk, but no order of the court had been entered permitting it to be filed, nor any order in any manner recognizing it as filed, such amended declaration is no part of the record, though it was placed among the papers of the case in the court below, and indorsed by the clerk as filed on a particular day. *Williams v. Ewart*, 29 W. Va. 650, 2 S. E. Rep. 881.

3. RECORD IN CHANCERY.

Generally.—Papers upon which a cause was not heard in the trial court constitute no part of the record of the cause, and cannot be considered in the appellate court. *Florance v. Morien*, 98 Va. 26, 34 S. E. Rep. 890.

Reference in Decree Sufficient.—Where a plea or answer is referred to in a decree or order in chancery as having come under the cognizance of the court, either for the purpose of filing or rejecting it, it thereby becomes a part of the record, and no further action, by way of exception or otherwise, is necessary upon the part of the defendant to enable him to prosecute an appeal upon the rejection of his plea or answer. *Barrett v. McAllister*, 35 W. Va. 103, 12 S. E. Rep. 1106.

Although an answer was not regularly filed yet if the final decree recite it as one of the papers upon which the cause was heard, it is a part of the record. *Rosset v. Greer*, 3 W. Va. 1.

If the caption of the decree names, as defendants to the cause, certain persons whose answers are filed, and the decree states that the cause was heard upon the bill, answers and exhibits, it may be inferred that the answers of those persons were noticed by the court. *Pickett v. Chilton*, 5 Munf. 467.

The clerk's stating in the transcript of the record that certain answers, which are filed, and copied in such transcript, were not noticed by the court, is

F. THE RECORD.

1. PRINTING OF THE RECORD.

Direction of Judge.—Where, under § 8450 of the Code, a question as to what parts of the record shall be copied, is referred to the judge by whom the appeal is allowed, and he directs a complete record to be made out in one case to serve as the record in several similar cases, but directs also that each case show the names of the parties litigant, amounts and dates and the record only contains the names in the other cases, the court cannot consider them, and the appeal must be dismissed as to them. *Litchford v. Day*, 87 Va. 71, 12 S. E. Rep. 107.

2. RECORD AT LAW.

a. What Constitutes Ordinarily.—"The record is made up of the writ (for the purpose of amending by if necessary): the whole pleadings between the parties; papers of which profert is made oroyer demanded, and such as have been specially submitted to the consideration of the court by a bill of exceptions, a demurrer to evidence, or a special verdict, or are inseparably connected with some paper or evidence so referred to. These, with the several proceedings at the rules or in court, until the rendition of the judgment, constitute the record in common-law suits, and no others." *Roanoke Land & Imp. Co. v. Karn*, 80 Va. 589.

Where there is error in the declaration, pleadings, or judgment, committed against the protest or over the demurrer or other objection, of a party, the same may be reviewed and corrected in the court of appeals, although no motion has been made for a new trial in the court below, and no exception was reserved by bills of exceptions or otherwise. *Spence v. Robinson*, 35 W. Va. 313, 13 S. E. Rep. 1004.

Nothing else that transpired during the trial in the court below will be considered a part of the record in the appellate court, unless made so by a bill of exceptions or order of the court; and the mere statement on the record that certain pleas were rejected and that parties excepted to various rulings of the court, is not sufficient. *Lawrence's Case*, 86 Va. 573, 10 S. E. Rep. 840. See monographic note on "Bills of Exception" appended to *Stoneman v. Com.*, 25 Gratt. 387.

The case must be heard and considered in the court of appeals upon the errors apparent upon the face of the record. If no exceptions are taken to any supposed errors of the court which tries the case, these acts are not in the record, and cannot appear in the transcript thereof, and the party aggrieved remains as at common law, without relief. *Johnson v. Norton Land & Imp. Co.*, 90 Va. 267, 18 S. E. Rep. 86.

In Caveat Cases.—In a case of caveat all the facts agreed by the parties, or found by the jury, or, if a jury is dispensed with, ascertained by the court, necessarily become and should be made a part of the record of the cause. *Hamilton v. McNeill*, 13 Gratt. 389.

Execution.—An execution of the same court used as evidence upon the trial of a cause, will be regarded by the court of appeals as part of the record without a *certiorari*. *Preston v. Auditor*, 1 Call 471.

Upon a motion to dissolve an injunction awarded on a bill filed to enjoin the sale of personal property under executions levied thereon, the court of necessity must consider the executions, and, where, upon the evidence, it appears that they were considered, they are properly copied into the record of

the cause. *Ford v. Watts*, 95 Va. 192, 28 S. E. Rep. 179.

Writ and Inquisition.—Upon a motion to quash a writ and inquisition founded on a judgment at law, which motion is sustained, the writ and inquisition are a part of the record, although no bill of exceptions is taken; and they will be so treated by an appellate court. *Wallop v. Scarbrugh*, 5 Gratt. 1.

Affidavit and Order of Attachment.—Wherever the validity of an attachment is involved, or the jurisdiction questioned, the affidavit and order of attachment are parts of the record, though not mentioned in declaration or bill. *Miller v. White*, 46 W. Va. 67, 23 S. E. Rep. 332.

Forthcoming Bonds and Declarations of Assurance.—In a motion on a forthcoming bond, the bond is a part of the record without being spread upon it by bill of exceptions, and the bond certified by the clerk is taken to be that on which judgment was given, so the declaration, filed in a motion by the Mutual Assurance Society, and referred to in the motion which is spread on the record, is a part of the record. *Skipwith v. Mut. Ass'n Soc.*, 10 Leigh 502.

Venire Facias.—If there is an error on the face of the writ of *venire facias*, and the prisoner moves to quash it, though he does not specify the error, it may be taken advantage of in the appellate court. *Wash v. Com.*, 16 Gratt. 530.

Warrants.—A superior court has a right to look into the warrant summoning the magistrates of the examining court, which is part of the record; but not into the warrant of commitment, which is not a part of the record. *Com. v. John McCaul*, 1 Va. Cas. 271.

Caption of Indictment.—The caption of an indictment is a part of the record, though no part of the indictment, and may be looked to in order to ascertain whether the inferior court had jurisdiction. *Robinson v. Com.*, 88 Va. 900, 14 S. E. Rep. 627.

Notice of Motion.—Notice of a motion must be made a part of the record by bill of exceptions. *Beale v. Wilson*, 4 Munf. 380.

Affidavit in Support of Motion.—An affidavit filed in support of a motion for a continuance which was overruled, is not a part of the record, unless it be made so by a bill of exceptions. *Garland v. Bugg*, 1 H. & M. 374.

Pleadings—Rejection.—If a rejected plea is by order of the court made a part of the record, and the order book shows that its rejection was excepted to, the supreme court of appeals will review the action of the court in rejecting such plea, though no formal bill of exceptions was taken to the rejection of such plea. *Sweeney v. Baker*, 13 W. Va. 158.

Allowance.—A party may take advantage in the appellate court of an error committed by the trial court in permitting a plea to be filed where the record shows that such party objected to the filing of such plea in the trial court, and he need not in such case take a bill of exceptions or except to the action of the court overruling his objection. *Bank v. Kimberlands*, 16 W. Va. 557; *Perry v. Horn*, 22 W. Va. 381.

This rule is equally applicable to the filing of a replication. *Bank v. Showacre*, 26 W. Va. 50.

Evidence.—To make available in the appellate court an objection taken during the trial to the admission of evidence, the point must be made, and properly saved by some bill of exception. It is not enough merely to note the objection and exception in the certificate of evidence. *State v. Harr*, 38 W.

Va. 53, 17 S. E. Rep. 794; *Poling v. Ohio River R. Co.*, 38 W. Va. 645, 18 S. E. Rep. 732.

Instructions.—An instruction to be reviewed in the appellate court, must be made a part of the record by bill of exceptions. *Ferguson v. Wills*, 38 Va. 136, 13 S. E. Rep. 393.

Error based on the giving or refusal of instructions ought to be shown by bill of exceptions giving the instructions and enough of the evidence to show whether they were proper; but where the record otherwise identifies the instruction, and shows an exception, and the whole evidence appears, that will suffice, without such bill of exceptions. *Hughes v. Frum*, 41 W. Va. 445, 23 S. E. Rep. 604.

Dissatisfaction of Court with Verdict.—If the court, before which the issues are tried, is dissatisfied with the verdict, this dissatisfaction must be certified on the record by the court; or if refused, it should be put on the record by a bill of exceptions; it is not to be supplied by affidavit, especially of counsel in the cause. *Stannard v. Graves*, 2 Call 309.

Entries in Private Memorandum Book of Retired Judge or Clerk.—Entries in the private memorandum book of a judge no longer in office and entries on the docket of a clerk no longer in office are not parts of the record. *Ruffner v. Hill*, 21 W. Va. 152.

b. Certificate of Clerk.—Nothing, not made part of the record by bill of exceptions or by order of the court, can be regarded as such by the appellate court. The clerk cannot add to or detract from the record and his certificate that a deposition or other paper copied by him was evidence whereon the judgment was founded, does not make them part of the record. *Roanoke Land & Imp. Co. v. Karn & Hickson*, 80 Va. 539; *Watson v. Com.*, 85 Va. 567, 9 S. E. Rep. 418.

As the clerk can add nothing to the record, agreed facts copied by him into the record and certified as the facts, whereon the judgment rested, cannot be considered in the court of appeals and the case cannot be reviewed in the absence of a bill of exceptions to the supposed errors of the trial court. *Johnson v. Norton Land & Imp. Co.*, 90 Va. 267, 18 S. E. Rep. 36.

c. Order of Court.—Where the order of the lower court sets out that a bond was executed in conformity with a former order and acknowledged and certified, such bond is a part of the record. *Beery v. Homan*, 8 Gratt. 43.

Aliter when the bond is not mentioned in the order of court. *Justices v. Williamson*, 12 Leigh 93.

d. Papers Merely Copied into the Record.—Papers inserted in the record by the clerk, cannot be considered as part of the record, unless they are made so by the party wishing to avail himself of them. *Cunningham v. Mitchell*, 4 Rand. 139.

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Although an answer was not regularly filed yet if the final decree recite it as one of the papers upon which the cause was heard, it is a part of the record. *Rosset v. Greer*, 3 W. Va. 1.

If the caption of the decree names, as defendants to the cause, certain persons whose answers are filed, and the decree states that the cause was heard upon the bill, answers and exhibits, it may be inferred that the answers of those persons were noticed by the court. *Pickett v. Chilton*, 5 Munf. 437.

The clerk's stating in the transcript of the record that certain answers, which are filed, and copied in such transcript, were not noticed by the court, is

the omission is caused by the failure or neglect of the appellant to accompany his petition for an appeal with a transcript sufficiently full to show affirmatively the facts which present the grounds of error on which he relies in his petition. *Fisher v. McNulty*, 30 W. Va. 186, 3 S. E. Rep. 693; *Hinchman v. Morris*, 29 W. Va. 678, 2 S. E. Rep. 863.

V. EFFECT OF APPEAL.

A. LAW GOVERNING.—The effect of an appeal is governed by the law of the state where the appeal is allowed. *Evans v. Taylor*, 28 W. Va. 184.

B. TECHNICAL APPEAL.—Where an undertaking for appeal has been duly filed with the clerk of the circuit court, in accordance with § 1, ch. 135, Code W. Va., and notice given to the appellee, the appeal is pending in the appellate court, and all further proceedings in the circuit court are stayed, and that whether the decree or order was legally appealable or not, as the circuit court had no jurisdiction to determine that question. *Dunbar v. Dunbar*, 5 W. Va. 567.

Until the appeal bond is given, the appellee may proceed to enforce the judgment or decree of the court below. *Williamson v. Gayle*, 4 Gratt. 180.

Errors for the want of necessary parties cannot be corrected in the lower court by an amended and supplemental bill and bill in the nature of a bill of review, after an appeal is allowed and while it is pending in the appellate court. *Almond v. Rothgeb*, 1 Va. Dec. 138.

Although, perhaps, an appeal in a chancery cause does not here, any more than in England, stop the proceedings under the decree from which the appeal is taken, yet there can be no manner of doubt but that the effect of an appeal, when fully perfected by the execution of the proper supersedeas bond, is to deprive the subordinate court of all power over the parties and subject-matter of controversy, until the cause is remanded back for its further action; and the only orders, therefore, which that court can rightfully make are such as are needful for the preservation of the *res* and rights of the parties pending the appeal. *Cralle v. Cralle*, 81 Va. 773; *Crawford v. Fickey*, 41 W. Va. 544, 33 S. E. Rep. 662.

Commissioners proceeding to execute a decree after an appeal to the court of appeals has been taken, and the process has been served upon them, are guilty of a contempt of the appellate court; and their acts are null and void as to the rights of the parties to the appeal. *M'Laughlin v. Janney*, 6 Gratt. 609.

Where, after appeal allowed, commissioners sell lands decreed to be sold (sale never confirmed—decree afterwards annulled), and the so-called purchasers take possession, appropriate the profits, and claim to be treated as receivers and allowed the commissions paid in cash and compensation for expenses and services in managing the lands. *Held*, they are mere intruders, with no claim to compensation in any way, but are accountable for a fair rental. *Strayer v. Long*, 83 Va. 715, 3 S. E. Rep. 373.

Where appellees take possession of property belonging to the appellant's intestate, pending the suit, the appellate court will compel them to give bond in a penalty of twice the value of the property, with sufficient security, conditioned to indemnify the appellant and have the property forthcoming, or to deliver it to the appellant. *Wright v. Wright*, 4 H. & M. 453.

The court of appeals will not award an attachment against a sheriff for proceeding to carry into

effect an execution under a decree, from which an appeal has been granted by the judge who pronounced it, although he had notice of the appeal, if such proceeding took place before the record was brought up. *Cheshire v. Atkinson*, 1 H. & M. 209.

May Make Orders for Preservation of Property.—After a decree for the sale of real estate to satisfy creditors having liens thereon, and an appeal from that decree by the debtor, the court below in which the suit was pending, may appoint a receiver to take possession of the property and rent it out, and collect the rents, until the further order of the court, etc. *Moran v. Johnston*, 26 Gratt. 106; *Bristow v. Home Bldg. Co.*, 91 Va. 18, 30, 20 S. E. Rep. 946, 947. Or may simply order them to be rented out. *Edmunds v. Scott*, 78 Va. 720, 730.

A fortiori is this true where the appeal is from an *interlocutory* decree, and hence, the cause has not been removed from the docket of the lower court. In such case, not even a formal petition praying the restoration of the cause to the docket is necessary. *Adkins v. Edwards*, 83 Va. 316, 2 S. E. Rep. 439.

But the lower court has no authority to make a decree allowing temporary maintenances and counsel fees. *Cralle v. Cralle*, 81 Va. 773.

Lower Court Cannot Dismiss Appeal.—Where security for an appeal is given within the required time, after the lapse of the period allowed for an appeal, the case is in the appellate court and the lower court has no longer any control over it and cannot disallow the appeal because the appellant does not give other security, the appellate court is the judge of the sufficiency of the security in that case. *Anderson v. Anderson*, 2 Call 198.

On a Dissolved Injunction.—A dissolved injunction is revived by an appeal taken by the plaintiff in the court of chancery; and it is improper in the appellee to take out an execution, so long as the appeal is pending. *Turner v. Scott*, 5 Rand. 332.

On Contempt Proceedings.—Where a receiver has been appointed by the court of appeals and the circuit judge has declined to enforce the order, and the court of appeals has issued a mandamus to compel its enforcement, and "contempt proceedings" have been instituted against said circuit judge, *held*, an appeal from the order appointing such receiver stays all proceedings under such order, and said mandamus and "contempt proceedings" should be dismissed. *Va., etc., Co. v. Wilder*, 88 Va. 942, 14 S. E. Rep. 806.

On Supersedeas in Same Cause.—Where the judgment of a county court has been twice reversed by the superior court, and the first judgment of reversal has been acquiesced in till after the second judgment of the superior court reversing the second judgment of the county, and an appeal has been taken from such second judgment, a supersedeas taken then from the *first* judgment of the superior court will be quashed, since it is necessary to bring up the whole proceedings and the appeal does that. *Jones v. Raine*, 4 Rand. 396.

Estoppel.—The court is of opinion that, although an appeal once allowed cannot be regularly dismissed from the appellate court, but in the mode prescribed by the statute, yet that the party obtaining it may, by his express consent, or by acts indicating such consent, estop himself from objecting the pendency thereof, and may by such acts, or consent, with the concurrence of the adverse party, restore the jurisdiction of the court below. *Fairfax v. Muse*, 4 Munf. 129; *Williamson v. Gayle*, 4 Gratt. 180. Where it appears, that the appellant

moved in the court below to amend an order, for the sale of land, by adding two other commissioners to those therein named, that he never prosecuted his appeal taken from the order aforesaid, even up to the present time, and stood by and permitted the sale to take place without objection, and even encouraged others to purchase, by bidding for the land himself; these and other acts, which equally tended to lull the vigilance of the appellee, and prevent him from dismissing the said appeal for want of prosecution, and manifested a dereliction of that appeal on the part of the appellant, ought in equity to estop and preclude him from relying on the pendency thereof. *Fairfax v. Muse*, 4 Munf. 129.

C. WRIT OF ERROR.

In Civil Cases.—A writ of error is so far a supersedeas to the judgment that an execution cannot regularly be issued on it and if issued, will be quashed, but an action of debt may nevertheless be brought upon it and unless for some cause deemed adequate by the court, the proceedings be suspended, the plaintiff will be entitled to his judgment. On the judgment so obtained an execution will not generally be permitted until the writ of error is determined but the rule is not uniform, but depends upon circumstances. *Newcomb v. Drummond*, 4 Leigh 57.

Where Record Is Destroyed.—In *Newcomb v. Drummond*, 4 Leigh 57, an appeal was taken from a judgment but before the appeal was or could be prosecuted the office of the clerk of the court and with it the record of the judgment were destroyed by fire, and therefore the appeal was never prosecuted. An action of debt being brought on the judgment, the record of which was so destroyed, it was held, that the plaintiff was entitled to recover notwithstanding the appeal and the circumstances that prevented the prosecution thereof.

Writ of Error of Foreign Court.—Where an action is brought in Virginia on a judgment of a Texas court while a writ of error to such judgment is pending in the higher court of Texas, the same effect will be given to such writ of error as is given to it in Texas, but in the absence of proof to the contrary the law of Texas will be presumed to be the same as that of Virginia, i. e. the bond being only given for costs the writ of error has not the effect of a supersedeas, but the court may order that no execution issue, provided defendant give bond and security in a penalty at least double the amount of the judgment, with condition to perform the judgment and also to pay all damages, costs and fees which might be awarded against or incurred by the defendant, in case the writ of error thus pending in the supreme court of Texas should be determined against him. *Ins. Co. v. Ray*, 75 Va. 821.

In Criminal Cases.—A writ of error in a criminal case, does not of itself have the effect of a supersedeas; in each case, the court will direct by an endorsement that it shall have that effect, if it is proper. *Conner v. Com.*, 2 Va. Cas. 30; *State v. Conners*, 20 W. Va. 1, 10.

In West Virginia, a writ of error to a judgment in a criminal case operates as a stay of proceedings in the case until the decision of the supreme court of appeals, when the writ issues from that court. Acts 1872-3, ch. 174, § 6; Acts 1882, ch. 128, § 2.

The court saying: "The writ of error does not in fact supersede the judgment of conviction in a felony case, but under our law only operates a stay of proceedings in the case, after the writ issues, etc.,

until the decision of the supreme court of appeals. Therefore if a judgment of conviction of a felony, be rendered by a circuit court upon the verdict of a jury finding the prisoner guilty of a felony and fixing his term of imprisonment in the penitentiary be not executed before the writ of error issues, the prisoner is not taken to the penitentiary by the sheriff or other officer, until after the judgment of conviction is affirmed by the supreme court of appeals, etc. If the judgment of conviction is reversed, and a new trial is awarded, then ordinarily the prisoner is again tried for the offence, of which he is indicted, though in some cases for legal cause he is acquitted and discharged of the offence after reversal of the judgment without another trial. But if the prisoner has been delivered in the penitentiary, before the writ of error issues, etc., he remains there to abide the decision and action of the supreme court of appeals upon the writ of error in the case." *State v. Conners*, 20 W. Va. 1.

D. SUPERSEDEAS.

When It Is the Only Process.—Where supersedeas is the only process, it will merely remove the record to the appellate court for review, if the judgment is executed; if not executed, it will also stay the proceedings. *White v. Jones*, 1 Wash. 116.

When Merely Auxiliary.—When merely auxiliary, a supersedeas can have no effect after the decree or judgment is carried into execution, since it can only stay the proceedings in the state in which they are; yet the suit goes on in the superior court by the other process; and if the judgment be reversed a writ of restitution issues to restore the party to that of which he has been dispossessed by the execution. *Morris v. Garland*, 78 Va. 215, 220; *White v. Jones*, 1 Wash. 116.

A supersedeas to a decree for the payment of money does not vacate, or annul conditionally, the decree, but only stays further proceedings thereon, and leaves matters in the condition in which they were when the supersedeas took effect, until the appellate court can hear the case and pass upon the questions involved in the appeal. *Martin v. South Salem Land Co.*, 94 Va. 28, 26 S. E. Rep. 591.

So that where execution on a judgment is suspended in order to give time to obtain a supersedeas, but no supersedeas is allowed during the period of suspension and after its expiration an execution is sued out, and possession of the property delivered, no writ of restitution can be granted until the cause is decided. *Kreglo v. Fulk*, 8 W. Va. 74.

On Cause Remanded for a New Trial.—A writ of supersedeas to the judgment of the superior court reversing the judgment of the county court and sending the case back for a new trial, if obtained before the second trial in the county court will stop proceedings there, until the decision in the court of appeals upon the supersedeas. *Jones v. Raine*, 4 Rand. 386.

On Forthcoming Bond.—If a supersedeas to a judgment, execution being levied, and a forthcoming bond taken, be issued before the day of sale, and thereupon the property be not forthcoming, the penalty of the bond is saved, and no motion lies upon it. *Rucker v. Harrison*, 6 Munf. 181.

In *Spencer v. Pilcher*, 8 Leigh 565, the court said that a supersedeas to the original judgment was no bar to an action on a forfeited forthcoming bond, but in that case it was held that there was no sufficient foundation for the objection, as the super-

sedes bond alone was given in evidence and not the writ.

The original judgment and the judgment on a forthcoming bond constitute one proceeding, so far as granting a supersedeas is concerned; and if the judgment on the forthcoming bond has been rendered before the supersedeas is issued and the error exists in the forthcoming bond, the petition ought to pray a supersedeas to both judgments and they should both be embraced in the supersedeas. *Laidley v. Bright*, 17 W. Va. 779, 788; *McCormick v. Bailey*, 17 W. Va. 585. A second supersedeas to the judgment on the forthcoming bond is unnecessary. *Monroe v. Webb*, 4 Munf. 73.

The effect of the supersedeas to the original judgment may even be extended to a judgment subsequently obtained on the forthcoming bond. *Bell v. Bugg*, 4 Munf. 260; *Laidley v. Bright*, 17 W. Va. 779, 788.

On Judgment on Delivery Bond.—A supersedeas to the original judgment will supersede a judgment on a delivery bond. *State v. Blair*, 29 W. Va. 474, 2 S. E. Rep. 333.

On Powers of Receiver Already Appointed.—Where a receiver has been appointed, a supersedeas does not interfere with his powers. *Bristow v. Home Bldg. Co.*, 91 Va. 18, 28, 30 S. E. Rep. 946, 947.

VI. REVIEW OF CAUSE IN APPELLATE COURT.

A. LAW APPLICABLE.—Writs of error in the court of appeals must be disposed of in accordance with the law as it existed at the time of the rendition of the judgment complained of. If, as the law then stood, there is no error in the judgment, it must be affirmed, but, if erroneous, it must be reversed, and such judgment entered as the lower court ought to have entered. *Anderson v. Hygela Hotel Co.*, 92 Va. 667, 24 S. E. Rep. 269; *Feamster v. Withrow*, 9 W. Va. 295, 315; *Life Ins. Co. v. Rutherford*, 2 Va. Dec. 707.

Subsequent acts of assembly cannot be considered. *Wilson v. Hundley*, 96 Va. 96, 30 S. E. Rep. 492.

B. RULE OF STARE DECISIS.—Adjudged cases can only be safely relied on as precedents, as to points actually in issue between the parties, and not as to such as may be deemed extrajudicial; unless indeed in relation to the latter they shall have ripened into law by various and successive decisions. *Lewis v. Thornton*, 6 Munf. 87.

Where the principles of a decree of the court of appeals seem to be opposed to its letter, the literal interpretation ought not to be relied on as a binding precedent. *Lewis v. Thornton*, 6 Munf. 87.

C. COURT EQUALLY DIVIDED.—Where the court of appeals is equally divided, the decision of the lower court should be affirmed. *Raines v. Watson*, 2 W. Va. 371; *Stuart v. Pennis*, 2 Va. Dec. 667.

A point in a cause in which the judges of the court of appeals are equally divided, stands affirmed by virtue of the act, Code, ch. 209, § 7, p. 841, Sess. Acts 1866-67, p. 937, as well where it is a ruling of the court below in the progress of the cause, as where it is the final judgment of the court in the case. *Chahoon v. Com.*, 21 Gratt. 822.

When only four judges are sitting and they are equally divided in opinion, as to a part of the decree pronounced by the court below the reversal ought not to be extended farther, than they all (or a majority) concur, that there is error, and the residue ought to be affirmed. *Com. v. Beaumarchais*, 3 Call 123.

When a decree in chancery is affirmed, the court of appeals being equally divided in opinion, it should be "without prejudice to the legal remedies of the parties." *Martin v. Welch*, 4 Munf. 60.

D. SCOPE.

1. CONFINED TO THE RECORD.—The court of appeals can only consider a case, on writ of error or appeal, on the record as made in the trial court. If this fails to disclose the errors complained of, they cannot be considered. *Barnes v. Com.*, 92 Va. 794, 23 S. E. Rep. 784; *Wright v. Wood*, 88 Va. 1037, 14 S. E. Rep. 914.

Matters not presented in the pleadings, or involved in the issues, but only inserted in the petition, or introduced into the argument, will not be considered by the appellate court. *Robinson v. Mays' Trustee*, 76 Va. 708; *Taylor v. Mallory*, 96 Va. 18, 30 S. E. Rep. 472.

Alleged errors which are outside of the pleadings and do not appear ever to have been brought to the attention of the trial court, will not be considered on error or appeal, in the court of appeals. *Union Bank v. City of Richmond*, 94 Va. 316, 26 S. E. Rep. 821.

2. MATTERS NOT ACTED UPON BY LOWER COURT.—The supreme court will not consider questions not yet acted on by the circuit court in the case. *Kesler v. Lapham*, 46 W. Va. 293, 33 S. E. Rep. 289.

Upon appeals from interlocutory decrees in chancery, only so much of the cause is before the appellate court, as the court of chancery has acted upon. *Madden v. Madden*, 2 Leigh 377.

Where an appeal is taken from a decree in a suit in which there is an attachment, but the court below did not pass upon the validity of the attachment, but sent the cause to rules to bring the legal title to the property attached before the court, the court of appeals will not pass upon the validity of the attachment. *Chapman v. Pittsburgh, etc., R. Co.*, 18 W. Va. 184.

Where a writ of error is only to a judgment refusing to vacate an attachment, the balance of the case remaining undecided in the circuit court, the supreme court will consider only matters arising upon the judgment refusing to abate the attachment. *Kesler v. Lapham*, 46 W. Va. 293, 33 S. E. Rep. 289.

3. PREVIOUS APPEALABLE DECREES.

Barred by Statute.—The court of appeals or the judge to whom the petition is presented, cannot look into or regard for the purpose of granting the appeal, any errors assigned or complained of in decrees or orders made more than five years before the petition is presented, unless such errors were committed in decrees or orders which were not appealable. The party cannot present his petition for an appeal and have the appeal allowed upon errors assigned in appealable decrees rendered more than five years before the petition is presented, although the errors thus complained of may be the foundation of, and given effect in, a subsequent decree rendered within five years from which an appeal is also prayed. If he is not entitled to an appeal from such subsequent decree for errors committed therein independently of any errors committed in such former appealable decrees and which are merely carried into effect by the subsequent decree, the appeal cannot be allowed, and if inadvertently allowed it will be dismissed. *Lloyd v. Kyle*, 36 W. Va. 584; *Fowler v. Lewis*, 36 W. Va. 112, 14 S. E. Rep. 447.

Appealable decrees, not appealed from within the

five years prescribed by statute, are irreversible and conclusive, not only as to the matters adjudicated by them but as to all proceedings in the cause prior to the entering of such decrees. *Tiernan v. Minghini*, 28 W. Va. 314.

Where an appeal is not taken within five years from the rendition of an appealable decree, on an appeal from a subsequent decree the court cannot review the barred decree where there are no errors in the decree appealed from, which are not based on errors in the former decree. *Buster v. Holland*, 27 W. Va. 510, 523.

Notice can be taken of any error, upon appeal, in any decree rendered more than five years before the appeal was allowed, except so far as such error might be considered upon a bill of review filed in the cause. *Middleton v. Selby*, 19 W. Va. 167.

No appeal can be taken after the expiration of two years from the date of the rendition of the decree, where the same has been rendered since March 27, 1862; nor can such a decree be reviewed by the court of appeals, though an appeal should be taken from a subsequent decree based on it. *Shirey v. Musgrave*, 20 W. Va. 181, 11 S. E. Rep. 914; *Stout v. Philippi Mfg., etc.*, Co., 41 W. Va. 339, 23 S. E. Rep. 571.

And in *Hoy v. Hughes*, 27 W. Va. 778, it was held that, where an appeal was not taken from an appealable decree within the statutory period, whether final or interlocutory, if an appeal was afterwards taken from a subsequent decree, no error in the former barred decree can be considered, whether there is new error in the second decree independent of any errors in the barred decree, or not; so that the rule may now be stated, that on appeal from a subsequent decree no error can be considered in a decree rendered more than two years before under any circumstances whatever. The only errors which the court of appeals can correct are such as are not founded upon and which could not have been corrected on appeal from the barred decree.

Not Barred.—An appeal taken in time will bring up for review every previous appealable decree not barred by the statute. *Stout v. Philippi Mfg., etc.*, Co., 41 W. Va. 339, 23 S. E. Rep. 571.

4. PREVIOUS NONAPPEALABLE DECREES.—An appeal taken in time from a decree will bring up for review every former order or decree not itself appealable, no matter when entered. *Stout v. Philippi Mfg., etc.*, Co., 41 W. Va. 339, 23 S. E. Rep. 571.

As in the case of an appeal, from a final decree, not only any error in that, but any error in the former proceedings, ought to be corrected; so upon an appeal from an interlocutory order, not only error in that order, but errors in the former proceedings should be corrected. In either case, the effect of the appeal is to bring up the whole proceedings prior to the decree or order from which the appeal is taken. *Burton v. Brown*, 22 Gratt. 1; *Huston v. Cantril*, 11 Leigh 186, 173; *Effinger v. Kenney*, 79 Va. 561; *Morris v. Garland*, 78 Va. 215, 222.

It is not denied that when a party is entitled to, and obtains, an appeal from either a final decree or an appealable interlocutory decree, such appeal will bring with it for review all preceding nonappealable decrees and orders from which have arisen any of the errors complained of in the decree from which the appeal is taken, no matter how long they may have been made before the appeal was taken. *Camden v. Haymond*, 9 W. Va. 680; *Steenrod v. Railroad Co.*, 35 W. Va. 133. In all such cases, however, the party must be entitled to an appeal, and obtain

it, from a decree which was rendered not more than five years previous to the time he presents his petition. *Lloyd v. Kyle*, 26 W. Va. 534.

An appeal from any final decree by a party entitled to appeal therefrom brings with it for review all the preceding interlocutory decrees, out of which any of the errors complained of in such final decree arose. *Camden v. Haymond*, 9 W. Va. 680; *Watson v. Wigginton*, 28 W. Va. 533.

Previous interlocutory decrees may be reviewed upon appeal from an appealable decree without reference to the time elapsed between their date and that of the decree appealed from. *Haymond v. Camden*, 22 W. Va. 180.

5. CONTEMPT PROCEEDINGS.—An appeal from a decree in a suit in equity will not bring up for review an order discharging a rule to show cause why the party shall not be punished for contempt in disobeying an order of injunction made in such suit. *Alderson v. Commissioners*, 32 W. Va. 640, 9 S. E. Rep. 868.

6. JUDGMENT SUSTAINING DEMURRER TO ONE COUNT.—Where a demurrer to one count of a declaration has been sustained, and issue taken on other counts, and there has been a verdict and judgment for the plaintiff, a writ of error awarded to the defendant does not bring up the action of the trial court in sustaining the demurrer to that count, nor can that count be looked to by the appellate court in order to sustain the verdict and judgment complained of. *Metropolitan L. Ins. Co. v. Rutherford*, 95 Va. 773, 30 S. E. Rep. 383.

7. PROCEEDINGS SUBSEQUENT TO APPEAL.—This court, considering an appeal from an order granting an injunction, cannot consider any deposition in the cause taken by the appellant subsequent to the time when the order of injunction took effect. *Freshwater v. Pittsburg, etc.*, R. Co., 6 W. Va. 503.

8. JUDGMENT ON FORTHCOMING BOND.—The judgment on a forthcoming or replevy bond is not brought up to the appellate court on a writ of superseas to the original judgment. *Moss v. Moss*, 4 H. & M. 293, 303; *Laidley v. Bright*, 17 W. Va. 779, 788.

9. APPEAL FROM ORDER REFUSING TO DISSOLVE INJUNCTION.—On an appeal from an order refusing to dissolve an injunction the court will take notice of any error in the previous proceedings. *Lomax v. Picot*, 2 Rand. 247.

10. TWO CAUSES HEARD TOGETHER.

One Decree in Both Suits.—So, where two causes are heard together and one decree rendered in both suits; which passes upon the rights of the plaintiffs in both suits, an appeal from this decree, will bring up both causes, and the suit brought by the appellees is as much before the court as the other, since it would be impossible to pass upon the appellants' rights without passing upon those of the appellees. *Alexander v. Alexander*, 85 Va. 353, 7 S. E. Rep. 335.

Where two causes relating to the same matters are heard together and a decree entered which applies to a great extent to both causes, and the parties to the two causes are the same, except the plaintiffs in one cause are defendants along with others in the other cause, if the plaintiffs appeal from the decree in one case, it takes up both causes, where the parties to both causes are before the court of appeals. Hence the objection that an appeal should have been taken in both cases is groundless. *Hill v. Proctor*, 10 W. Va. 59, 73.

"This is because of the relation of the causes to each other, the identity of the questions involved,

the hearing of the causes together, and the entering of the one decree, which in many material particulars, except as to costs, adjudicates the same questions in one case as the other. If the decree had been entered in a different form, perhaps, an appeal might have been from so much of the decree as applied to one case alone in all material respects. As these causes were heard together, and final decrees sought in each by the parties, on account of their peculiar relation and the form and nature of said decree, if there be any construction of the pleadings, or otherwise which will enable this court to consider and pass upon said decree so far as it applies to both of said causes upon this appeal, such construction should be given." *Hill v. Proctor*, 10 W. Va. 59.

Separate Decrees.—But where causes are heard together merely because they seek to subject the same fund but there is no conflict between the claims and they are entirely independent of each other, the appellants may appeal from the decrees in one cause only. *Hall v. Bank of Virginia*, 14 W. Va. 584, 614.

Though the records in all the other cases are brought up by *certiorari*, the court of appeals cannot examine the other causes, where the appeal is from one of the causes only. *Hall v. Bank of Va.*, 14 W. Va. 584, 614.

Where an appeal is thus taken in one cause only, it is not error to describe in their undertaking the decrees appealed from as rendered in one of the causes, where there is no difficulty in identifying the decrees from which the appeals were taken, and the form of the undertaking at the same time shows that an appeal was taken in that cause only. *Hall v. Bank of Va.*, 14 W. Va. 584, 615.

But where two suits, one of which is a foreign attachment, in the same court, by different plaintiffs, but against the same defendants, claiming to subject the same fund, proceed together and are heard together, and the court makes a decree in each case, giving to each plaintiff a portion of the fund, and one of the plainiffs, who claims the whole fund, takes an appeal from the decree, it was held that the appeal brought up both cases, though the appellant was not a party in the other case, which was the attachment case, and the appellate court may reverse the decree in the second case. *Anderson v. De Soer*, 6 Gratt. 363.

11. APPEAL FROM DECREE REFUSING TO ALLOW BILL OF REVIEW TO BE FILED.—An appeal from the decree of the court refusing to allow a bill of review to be filed, if the decree sought to be reviewed was final, brings up for consideration the correctness of the first decree; and if the first decree was interlocutory, brings up the whole case. *Ambrouse v. Keller*, 22 Gratt. 709.

12. APPEAL FROM JUDGMENT QUASHING EXECUTION.—Where a judgment was entered by the circuit court, fining a party \$25 for contempt, an execution was issued upon this judgment, and subsequently such party moved said court to quash the execution, which the court refused to do, and the party then obtained a writ of error from the court of appeals to the order refusing to quash said execution, it was held that such writ of error did not bring before the court of appeals for review the original judgment imposing the fine. *State v. Blair*, 29 W. Va. 474, 2 S. E. Rep. 333.

E CORRECTION OF ERRORS AGAINST APPELLEE.

1. WHERE HE CROSS-ASSIGNS ERROR.—An appellee

is entitled to avail himself of his adversary's appeal to correct any error in a judgment at law or decree in chancery, prejudicial to him. The whole record is before the appellate court, and it must correct any error disclosed, even in favor of the appellee. *Boulware v. Newton*, 18 Gratt. 708; *Day v. Murdoch*, 1 Munf. 400; *Defarges v. Lipscomb*, 2 Munf. 451; *Lomax v. Picot*, 2 Rand. 247; *Burton v. Brown*, 22 Gratt. 1, 16; *Little v. Bowen*, 78 Va. 724; *Frazier v. Frazier*, 77 Va. 775; *Garrett v. Carr*, 3 Leigh 407, 418; *Gaines v. Merryman*, 95 Va. 660, 29 S. E. Rep. 733.

The court of appeals has since, to wit, on the 2d of October, 1811, established the following rule: "It is the opinion of this court, founded as well on a full consideration of the law, as on various decisions which have heretofore been had, that, in future, where a judgment or decree is reversed neither in the whole, nor in part, on the ground of error against the appellant, or plaintiff, in any appeal, writ of error, or supersedeas; yet, if error is perceived against the appellee, or defendant, the court will consider the whole record as before them, and will reverse the proceedings, either in whole, or in part, in the same manner as they would do, were the appellee or defendant also to bring the same before them, either by appeal, writ of error, or supersedeas; unless such error be waived by the appellee, or defendant, which waiver shall be considered a release of all errors as to him." *Day v. Murdoch*, 1 Munf. 400.

Under this rule an appellee may assign as error a decision adverse to his interest in the decree appealed from, although he failed to appeal when he might have done so from a former decree against him in the same suit, determining the same question. *Osborne v. Big Stone Gap Colliery Co.*, 94 Va. 58, 30 S. E. Rep. 446.

And even though another party has appealed and his appeal has been dismissed for failure to mature it, still such party may assign error in the decree on the appeal of another party if they stand on the same ground. *Nicholson v. Gloucester Charity School*, 98 Va. 101, 24 S. E. Rep. 899.

Rule 10 Supreme Court of West Virginia.—"In any appeal or writ of error, if error is perceived against the appellee or defendant in error the court will consider the whole record as being before it, and will reverse the proceedings, either in whole or in part, in the same manner as it would, were the appellee or defendant in error, to assign error, and bring the case before the court, unless such error be waived by the party prejudiced thereby, which waiver shall be considered as a release of all error committed against him. It is, however, advisable for the appellee or defendant in error, if he is of the opinion that there is error in the record to his prejudice, to call attention to the same by a formal counter-assignment of error, filed at the hearing of the case, or by pointing out and complaining of the same in his brief." *Atkinson v. Beckett*, 34 W. Va. 584, 12 S. E. Rep. 717; *Morgan v. Ohio, etc.*, R. Co., 39 W. Va. 17, 19 S. E. Rep. 588; *Newman v. Mollohan*, 10 W. Va. 488.

Any error to the appellee's prejudice may be corrected, though his interest be not identical with that of the appellant, but hostile, and though the writ of error may be only to a certain judgment, and the error to his prejudice be in either that or another. *Morgan v. Ohio, etc.*, R. Co., 39 W. Va. 17, 19 S. E. Rep. 668.

This rule, by which the court will look, under certain circumstances there set forth, into the

whole case, and settle the rights of parties, as well those not appealing, as those appealing, applies with still greater force to the case of a joint judgment, when the parties interested have all been summoned, and where the judgment must be affirmed as to all, or reversed as to all. *Newman v. Mollohan*, 10 W. Va. 488.

Under § 13, ch. 135, Code, requiring all parties except appellant to be summoned to appear to the appeal or writ of error, all are deemed appellees, and so bound. *Morgan v. Ohio*, etc., R. Co., 39 W. Va. 17, 19 S. E. Rep. 588.

Failure to Assign Error.—And if the appellee does not ask for such correction, he will be held to have waived the error and cannot afterwards appeal on his own behalf. *Burton v. Brown*, 23 Gratt. 1, 17; *Logan v. Dils*, 4 W. Va. 267.

So, an appellee cannot assign errors in a former decree, in which he acquiesced, upon an appeal by another party from a decree in which he had no interest, and to which he was not even a party. *Simmons v. Lyles*, 27 Gratt. 922.

2 JOINT JUDGMENTS.—A joint judgment cannot be reversed as to one defendant and affirmed as to another, but if erroneous as to one, must be reversed as to both. *Jones v. Raine*, 4 Rand. 886; *Gray v. Stuart*, 33 Gratt. 351; *Vandiver v. Roberts*, 4 W. Va. 498; *Vance Shoe Co. v. Haight*, 41 W. Va. 275, 23 S. E. Rep. 553; *Lyman v. Thompson*, 11 W. Va. 427, 444; *Arrington v. Cheatham*, 2 Rob. 492; *Newman v. Mollohan*, 10 W. Va. 488, 495.

Where the principal and sureties are sued jointly and the judgment is erroneous as to the sureties it must be reversed as to all, though the judgment would have been good against the principal, if he had been sued alone. *Munford v. Overseers*, 2 Rand. 313. See also *Cole v. Pennell*, 2 Rand. 174.

Where one of several joint defendants has taken a writ of error to a joint judgment, all the other defendants are bound by the judgment of the court of appeals and no other appeal can ever be taken by any of them. *Newman v. Mollohan*, 10 W. Va. 488, 500.

Where a bill is dismissed as to two executors and one of them appeals, if the decree is reversed it must be reversed as to both. *Garrett v. Carr*, 3 Leigh 407, 418.

Joint defendants who do not appeal are entitled to the benefit of defences which are not personal to the appellant, *e. g.* the statute of limitations, and the decree if erroneous will be reversed as to all. *Asby v. Bell*, 80 Va. 811.

Upon a bill against two joint owners of land, for the specific execution, or for the rescission of a joint contract made by them for the sale of the land, one of them answers 'he bill and sets up a defence equally applicable to both; and the bill is taken for confessed against the other. There being a decree against both for a rescission of the contract and a repayment of the purchase money, the party as to whom the bill has been taken for confessed, may appeal; and if the decree is erroneous, it will be reversed as to both. *Purcell v. McCleary*, 10 Gratt. 246.

But where a joint judgment is *void* as to one of the defendants for want of service of process the rule had no application and a bill brought to enforce such judgment should be dismissed as to him by the court of appeals, but not as to the other defendants. *Gray v. Stuart*, 33 Gratt. 351.

The law authorizing separate judgments in an action of ejectment, if one judgment is appealed

from, it may be reversed and the other left undisturbed. *Strader v. Goff*, 6 W. Va. 257.

A judgment against two defendants on the confession of one being erroneous, the court of appeals will direct the proper judgment to be entered against the one who confessed and further proceedings as to the other. *Ward v. Johnston*, 1 Munf. 45.

By Statute.—But § 26, ch. 135, Code of W. Va., authorizing the court of appeals to reverse in whole or in part, changes the common-law rule, so that where parties appealing stand on a different ground from those not appealing, a joint decree will be reversed as to them alone. *Vance Shoe Co. v. Haight*, 41 W. Va. 275, 23 S. E. Rep. 553. See also *Gray v. Stuart*, 33 Gratt. 351.

3 APPELLEES STANDING ON SAME GROUND WITH APPELLANTS.—Where the parties appealing and the parties not appealing stand upon the same ground, and their rights are involved in the same question, and equally affected by the same decree or judgment, the court of appeals will consider the whole case, and settle the rights of the parties not appealing as well as those who bring their case up by appeal. *Walker v. Page*, 21 Gratt. 686; *Vance Shoe Co. v. Haight*, 41 W. Va. 275, 23 S. E. Rep. 553; *Arrington v. Cheatham*, 2 Rob. 492; *Lyman v. Thompson*, 11 W. Va. 427, 444; *Morgan v. Ohio River R. Co.*, 39 W. Va. 17, 19 S. E. Rep. 588; *Newman v. Mollohan*, 10 W. Va. 488, 499; *Burton v. Brown*, 23 Gratt. 1.

And that though the party not appealing is unable to do so. *Lenows v. Lenow*, 8 Gratt. 349.

The appellate court having set aside the sale of certain parcels of land at the instance of purchasers, who were the appellants in the cause, and the ground of the objection to the sale being such as the infant vendors may make to all the sales, the court will set aside the whole decree confirming the sale of all the parcels, though the other purchasers are satisfied with their purchases, and are not parties to the appeal; and will send the cause back, for the court below to determine whether these last mentioned sales ought to be set aside, or confirmed with the consent of the purchasers, and for the benefit of the infant defendants. *Talley v. Starke*, 6 Gratt. 339.

4 APPELLEES STANDING ON DIFFERENT GROUND.—Where the parties in a cause stand upon distinct and unconnected grounds, where their rights are separate, and not equally affected by the same decree or judgment, then the appeal of one will not bring up for adjudication the rights or claims of the other. *Walker v. Page*, 21 Gratt. 686; *Tate v. Liggett*, 2 Leigh 84, 108; *Lewis v. Thornton*, 6 Munf. 87, 97; *Vance Shoe Co. v. Haight*, 41 W. Va. 275, 23 S. E. Rep. 553; *Arrington v. Cheatham*, 2 Rob. 492; *Morgan v. Ohio River R. Co.*, 39 W. Va. 17, 19 S. E. Rep. 588; *Newman v. Mollohan*, 10 W. Va. 488, 500; *Burton v. Brown*, 23 Gratt. 1; *Rorer v. Roanoke Nat. Bank*, 33 Va. 589, 606, 4 S. E. Rep. 820.

As, where a bill, filed against a person as administrator and guardian and against his sureties in those capacities is dismissed as to his sureties as guardian and they do not appeal, on an appeal by the administrator from a decree for resettling his accounts, the appellees cannot ask the correction of the decree dismissing the bill as to the sureties as guardian. *Blackwell v. Bragg*, 78 Va. 529.

5. RULES AS TO APPELLATE JURISDICTION APPLY.—An appellee whose claim is less than \$500, cannot assign error under Rule IX of the court of appeals. This rule was not intended to enlarge or extend the

But if there was no objection made in the court below as to the manner in which the order of publication was issued, or executed so as to bring the matter before the inferior court and have the question as to the sufficiency of the order of publication passed upon by that court, and the *deces recites* that the order of publication as to the absent defendant was "duly executed," the objection that it was not so executed will not be entertained by the appellate court. *Scott v. Ludington*, 14 W. Va. 387; *Craig v. Sebrell*, 9 Gratt. 131.

Writ of Ad Quod Damnum and Inquest.—In proceedings to change a road the defendant not having made any motion to quash the writ and inquest in the county court, but going to trial on the merits, he waived the objection to the writ and inquest; and it is too late to move to quash them or any other of the proceedings in the circuit court. *Mitchell v. Thorne*, 21 Gratt. 164.

Sheriff's Return.—An objection to a defective return of the service of process, made for the first time in the court of appeals, is too late. *S. V. R. R. Co. v. Griffith*, 76 Va. 913.

After a judgment by default a party cannot object in the appellate court to the truth of the sheriff's return. *Cunningham v. Mitchell*, 4 Rand. 189.

Attachments.—Though the service of an attachment upon garnishees, and the return thereon be irregular, yet if the garnishees appear to the action and defend it, without objecting to the irregularity, they cannot afterwards make the objection in the appellate court. *Pulliam v. Aler*, 15 Gratt. 54.

When the garnishee appeared and made no objection in the court below, it is too late to object in the appellate court that an attachment or the officer's return thereon are insufficient or that the attachment was returned at a later term than that to which it was made returnable. *Joseph v. Pyle*, 2 W. Va. 449.

An objection to an attachment proceeding on the ground that the summons was made improperly returnable may be taken for the first time on appeal. *McAllister v. Guggenheimer*, 91 Va. 317, 21 S. E. Rep. 475.

h. Sufficiency of Presentment.—Upon a rule to show cause why an information should not be filed, the defendant appears and moves the court to quash the presentment on the ground that it does not charge any offense against him: but the motion is overruled. The information is then filed, and he pleads "not guilty"; and on the trial there is a verdict and judgment against him. Upon a writ of error to the appellate court, he may object to the sufficiency of the presentment. *Bishop v. Com.*, 13 Gratt. 785.

i. Filing of Bill.—If there be a doubt as to the right to file a supplemental bill, the objection cannot be raised for the first time in the appellate court. The failure to demur, or otherwise object to the filing of the bill, and joining issue thereon, constitutes a waiver of objections thereto. *Wilson v. Wilson*, 98 Va. 546, 25 S. E. Rep. 596.

j. Bill Materially Defective.—Where a bill is materially defective, though no demurrer is put in, yet a decree based on it may be reversed on appeal. *Cook v. Dorsey*, 38 W. Va. 196, 18 S. E. Rep. 468.

k. Misnomer of Corporation.—A mere misnomer of a corporation cannot be taken advantage of for the first time in the appellate court. *Farmers' Bank v. Willis*, 7 W. Va. 51, 51.

Aliter where there is no such corporation. *Mason v. Bank*, 12 Leigh 84.

l. Want of Formal Order of Consolidation.—Where two causes of the same nature and between the same parties are tried together by consent of parties and one verdict and judgment are rendered, it cannot be objected in the appellate court that there was no formal order of consolidation. *Eagles v. Hook*, 23 Gratt. 510.

m. Trying Joint Action Separately.—Where, in an action against joint defendants, the case is first tried as to one and then revived and tried against the heir of the other, it is too late to object for the first time in the appellate court that it was error to try the cases separately. *Kenna v. Quarrier*, 3 W. Va. 310.

n. Jurors.—An objection that jurors summoned in a criminal case were not free from exception cannot be made in the appellate court, where it does not appear that the objection was made in the trial court, or that the accused was injured thereby. *Acts 1893-94, ch. 43; Barnes v. Com.*, 92 Va. 794, 23 S. E. Rep. 784.

Objection cannot be made for the first time in the appellate court that a person served on the jury without being selected by the court or summoned by the sheriff. *Short's Case*, 90 Va. 96, 17 S. E. Rep. 786.

Oath of Jury.—It cannot be assigned as error in the appellate court that the record fails to show that the jury were sworn to try the issue, but only states that they were sworn according to law, where no objection was made in the court below and the verdict of the jury was responsive to the issues, it will be presumed that the proper oath was administered, the contrary not appearing by the record. *Douglass v. Land Co.*, 12 W. Va. 502.

o. Premature Hearing of Cause.—Where a cause is prematurely set for hearing at rules, if the record shows that the defendant appeared at the hearing, the appellate court may imply, in the absence of objection, appearing on the record, that the objection was waived. *Poling v. Johnson*, 2 Rob. 255.

Two executors file a bill against the creditors of their testator, to have the assets of the estate administered in equity. The executorial account is taken, charging the executors as upon a joint administration without objection; and the exceptions thereto are passed upon by the court. Then one of the executors dies, and his death is suggested, but the cause is not revived either by or against his representative; and at the same term of the court, the cause comes on for final hearing, without objection by either party, and the court makes a decree against the surviving executor, who takes an appeal to the court of appeals. *Held*, it is too late for the appellant to object in the court of appeals, that the cause was not ready for hearing, because the representative of his co-executor was not a party. *Kee v. Kee*, 2 Gratt. 116.

p. Pleadings.

Declaration.—Where no demurrer is filed to a declaration which states a good cause of action, no errors can be assigned in the court of appeals because of its supposed defects. *Alvey v. Cahoon*, 86 Va. 173, 9 S. E. Rep. 994.

Plea of Breach of Warranty.—In action on notes for price of certain wagons where breach of warranty is pleaded under Code, § 3299, it was held too late to object in the court of appeals for the first time that the wagons were warranted as "farm wagons" and were used for other purposes. *Milburn Wagon Co. v. Nisewarner*, 90 Va. 714, 19 S. E. Rep. 846.

Want of Plea.—In an action of unlawful detainer,

the defendant appears; but, though the case is continued for years, he does not file any plea. The cause is proceeded in precisely as if there was a plea filed—the jury are sworn to try the issue joined, and the defendant makes full defence. There having been a verdict and judgment in favor of the plaintiff, the defendant cannot set up the want of the plea and issue thereon in the appellate court. *Barley v. McKinney*, 28 Gratt. 750.

Nonjoinder of issue.—In an action on the case for damages to plaintiff's land, there is a plea of not guilty, on which issue is joined, and there is a special plea, to which there is a special replication concluding to the country. To this there is no rejoinder, and the record does not say that issue was joined upon it; but the parties go to trial, and the subject of the special plea and replication are contested before the jury, which renders a verdict for the plaintiff. No objection having been taken to the want of joinder of issue in the court below, it seems that the objection cannot be taken in the appellate court. *Southside R. R. Co. v. Daniel*, 30 Gratt. 344.

Defective Plea.—Where a plea is so defective, as not to raise a substantial defence to the action, the plea is bad even under the statute of jeofails, and a replender ought to be awarded by the appellate court, though no objection was raised to the plea in the court below, and issue had been joined thereon. *State v. Seabright*, 15 W. Va. 592.

On the other hand, where the improper or defective plea raises a substantial defence to the action, and it is not objected to in the court below, and issue is thereon joined, after verdict or judgment it is too late to object, the defect being cured by the statute of jeofails. *State v. Seabright*, 15 W. Va. 592.

Failure to Join in Demurrer.—An objection for failure to join in a demurrer to an indictment cannot be made for the first time in the court of appeals. *Crump's Case*, 98 Va. 833, 23 S. E. Rep. 760.

Pleading to Merits.—Where a plea of payment has been filed without objection, it is too late to object in the appellate court that it was too late to set aside the office judgment by pleading to the merits. *Dickinson v. Dickinson*, 25 Gratt. 331.

Variance.—Objection for variance between the pleadings and the proof cannot be made for the first time in the appellate court. *Bertha Zinc Co. v. Martin*, 93 Va. 791, 22 S. E. Rep. 809; *Shenandoah, etc., R. Co. v. Moose*, 33 Va. 827, 3 S. E. Rep. 790.

Where a judgment upon a forthcoming bond is obtained against a defendant, having legal notice, and appearing by attorney, but not moving to quash the bond, nor stating by plea or bill of exceptions, any variance between it and the execution, the appellate court cannot reverse the judgment on the ground of such variance. See *Downman v. Chinn*, 2 Wash. 189; *Jones v. Hull*, 1 H. & M. 211; *Bronaugh v. Freeman*, 2 Munf. 206.

f. Affidavits.

Want of.—Whether an affidavit is necessary under 1 Rev. Code, ch. 128, § 33, to a plea that a power of attorney was not executed by the defendants, or not, this objection cannot be made for the first time in the appellate court, a general demurrer having been put in. *Wilson v. Bank*, 6 Leigh 570.

Where in debt on a bond, defendant pleads that bond was delivered as escrow upon conditions which were not performed, *et sic non est factum*; and the plea is not verified by affidavit of the party according to statute 1 Rev. Code, ch. 128, § 33, but plaintiff makes no objection for want of such affidavit, and the plea

is received by the court, issue joined upon it, trial, verdict and judgment had for defendant, it was held that the want of the affidavit to the plea was not a good ground of objection to the judgment in an appellate court. *Hicks v. Goode*, 12 Leigh 479.

When no exception or objection was taken in the court below, so far as the record shows, to the filing of an answer in chancery, because not verified by affidavit, or because the affidavit is defective, it is too late to make the objection in the appellate court. *Arnold v. Slaughter*, 36 W. Va. 589, 15 S. E. Rep. 350.

Objection to an attachment because not supported by an affidavit, or because the affidavit is defective, is ground for a motion to abate the attachment, but the objection must be made in the court below, and cannot be made for the first time in the court of appeals. *Sims v. Tyrer*, 96 Va. 5, 26 S. E. Rep. 503.

Objections to.—An affidavit taken without notice, if read without objection in the court below, will be considered as evidence in the appellate court; but it will not have the weight it might have had if regularly taken on notice. *Adams v. Hubbard*, 25 Gratt. 129.

A decree of the court below, founded on an affidavit and statement handed to the court at the time of the decree, and to which the appellants had no opportunity to except, may be objected to by them in the appellate court. *Beckwith v. Avery*, 31 Gratt. 533.

Where an affidavit is filed with a petition for rehearing a cause, and no objection is made in the court below, it cannot be objected to in the appellate court. *Purdie v. Jones*, 32 Gratt. 837.

s. Notice.—Defects in notice, or in service of notice, by subcontractor to owner under mechanic's lien law, cannot be objected to for the first time in appellate court. *S. V. R. Co. v. Miller*, 80 Va. 821.

It is too late to object in the appellate court that the notice to reverse or correct a judgment by default was insufficient, when the parties appeared and made no objection in the court below. *Dillard v. Thornton*, 29 Gratt. 392; *Ballard v. Whitlock*, 18 Gratt. 235.

So in case of notice to the person upon whose land a public landing is sought to be established. *Muire v. Falconer*, 10 Gratt. 12; or a mill, *Bernard v. Brewer*, 3 Wash. 77.

t. Admission or Exclusion of Evidence.—Objections to the introduction of evidence not made in the trial court cannot be raised or considered in the appellate court. *Campbell Co. v. Angus*, 91 Va. 433, 22 S. E. Rep. 167; *Colvert v. Millstead*, 6 Leigh 88; *Russell's Case*, 78 Va. 400; *Lamberts v. Cooper*, 29 Gratt. 61; *Smith v. Burton*, 94 Va. 158, 26 S. E. Rep. 412.

Where a party intends to review in the appellate court, the action of the trial court in rejecting or admitting evidence, he must make such ruling the subject-matter of a formal bill of exceptions, or he must in some way distinctly and specifically make such ruling a ground of his motion for a new trial. *Halstead v. Horton*, 38 W. Va. 727, 18 S. E. Rep. 963.

Though an exception is taken and entered at the time that a question asked of a witness is leading, the exceptant should bring it to the attention of the court and obtain an order for the suppression of the objectionable testimony; and if he fails to do this, the exception will not be regarded in the appellate court. *Summers v. Darne*, 31 Gratt. 791.

If parties without objection permit a contract to be proved by oral testimony, which, under some statute, could only be proved by writing, and the cause is heard and decided on such testimony, they

will be deemed to have waived the right to require a writing, and will not be allowed to insist on a different rule in the court of appeals. The case must be heard and determined upon the same evidence in both courts. *Eaves v. Vial*, 98 Va. 184, 84 S. E. Rep. 978.

Secondary evidence having been admitted in the court below without objection, it cannot be objected to in the appellate court. *Shue v. Turk*, 15 Gratt. 256; *Western Union Tel. Co. v. Powell*, 94 Va. 268, 80 S. E. Rep. 828.

Where the record of a suit by legatees against an executor and his sureties, is referred to as an exhibit with the bill of the sureties against the executor and purchasers of assets from him, and the evidence in that record is relied on in the circuit court without objection in the suit by the sureties, it is too late to object to it in the appellate court. *Jones v. Clark*, 35 Gratt. 642.

A party will not be allowed to specify one or more grounds of objection to evidence offered in the trial court, and rely upon other grounds in the appellate court. He is regarded as having waived all other objections to the evidence except those which he pointed out specifically. *Warren v. Warren*, 98 Va. 73, 24 S. E. Rep. 918.

Where a question is put, and the court refuses to allow it to be answered, and the question itself does not plainly import that the answer will prove a material fact, what was proposed and expected to be proven must appear by a bill of exceptions, else there is no error apparent; and, if the question objected to is answered, the answer must be shown, else there is no error apparent. *Sesler v. Rolfe Coal & Coke Co.* (W. Va.), 41 S. E. Rep. 316.

Reading Record in Former Suit.—The circumstance, that the "writings and evidence" in a former suit were read at the hearing of another case, without any exception taken at that time appearing on the record, is no proof that this was done by consent of parties, and does not preclude the objection from being taken in the appellate court; the defendant in his answer having objected to the admission of the verdict and other proceedings in the former suit, but offered to agree that the depositions only might be read; to which offer no assent appeared on the part of the plaintiff. *Chapmans v. Chapman*, 1 Munf. 398.

Hearing Evidence at Separate Terms.—When part of the evidence is heard at one term and the rest at another, objection cannot be made for the first time in the appellate court. *Wagon Co. v. Peterson*, 27 W. Va. 316.

u. Depositions.—Depositions must be excepted to in the lower court except for incompetency, and the grounds must be specified in the exception. *Long v. Perine*, 41 W. Va. 314, 28 S. E. Rep. 611; *Linsey v. McGannon*, 9 W. Va. 154; *Vanscoy v. Stinchcomb*, 29 W. Va. 263, 11 S. E. Rep. 927; *Dickenson v. Davis*, 2 Leigh 406; *Fant v. Miller*, 17 Gratt. 187; *Hill v. Proctor*, 10 W. Va. 59; *Pollard v. Lively*, 2 Gratt. 216.

But objections for incompetency may be made for the first time in the appellate court. *Long v. Perine*, 41 W. Va. 314, 28 S. E. Rep. 611; *Rose v. Brown*, 11 W. Va. 122; *Taylor v. McDonald* (Va.), 41 S. E. Rep. 946.

But in *Colvert v. Millstead*, 5 Leigh 88, and *Baxter v. Moore*, 5 Leigh 219, it was held that objection could not be made for the first time in the appellate court, even on the ground of incompetency. See *foot-note* to *Fant v. Miller*, 17 Gratt. 187. See *monographic note* on "Depositions" appended to *Feld v. Brown*, 24 Gratt. 74.

But if the facts appear on the record, while the depositions cannot be excluded, yet it will weaken their effect. *Dickenson v. Davis*, 2 Leigh 401.

v. Failure to Sign Bill.—An objection to a bill in chancery, made for the first time in the court of appeals for the reason that it is not signed by counsel, will not be entertained. *Jones v. Shumlin*, 45 W. Va. 729, 31 S. E. Rep. 975.

w. Setting Aside Nonsuit.—Defendant, not having taken advantage of a nonsuit entered below and thereafter set aside, was held estopped, after trial and judgment, from raising the question on appeal. *Connolly v. Bruner*, 48 W. Va. 71, 35 S. E. Rep. 927.

z. Nonproduction of Exhibits.—The appellant cannot object in the court of appeals to the nonproduction of papers made exhibits in the bill, when he did not call for them in the court below and in his answer did not deny their existence or contest their validity. *Chapman v. Pittsburg, etc.*, R. Co., 18 W. Va. 184.

y. Failure to Refer Cause to Commissioner.—It is too late to object in the appellate court that the cause should have been sent to a commissioner. *Dorr v. Dewing*, 36 W. Va. 466, 15 S. E. Rep. 98; *Hickman v. Painter*, 11 W. Va. 386.

z. Being Compelled to Join in Demurrer to Evidence.—One who objects to being compelled to join in a demurrer to evidence must make his objection thereto in the circuit court, and cannot make it for the first time in the supreme court. *Hollandsworth v. Stone*, 47 W. Va. 773, 35 S. E. Rep. 864.

aa. Commissioner's Report.—Objection to a decree for errors in the report of a commissioner, not appearing on the face of it, cannot be made in the appellate court, unless founded on exceptions to the report in the lower court. *Coffman v. Sangston*, 21 Gratt. 263; *Peters v. Neville*, 26 Gratt. 549.

Where sales-commissioner's report shows that sale was made as decree prescribed and no exception was made below, none can be made in the court of appeals. *Smith v. Henkel*, 81 Va. 524.

Where the report of an account in chancery is not excepted to by either party, and there is a decree according to the report, and on appeal taken, the report is omitted from the record, according to the statute of 1825-6, ch. 15, § 11, either party may call for the report in the court of appeals, and have it brought up; but if neither party does so, no objections can be considered, which the report would be necessary to explain or to support. *Polindexter v. Green*, 6 Leigh 504.

And the attention of the court must be called to the exception to the commissioner's report. *Hansucker v. Walker*, 76 Va. 758.

But errors apparent upon the face of a commissioner's report, will be corrected in the appellate court, though not excepted to in the court below. *Wills v. Dunn*, 5 Gratt. 384; *Dunbar v. Woodcock*, 10 Leigh 628.

Where the commissioner in his report, follows the directions of the court, the court of appeals may review such decision without any exception being taken to the commissioner's report. *Kyle v. Conrad*, 25 W. Va. 760.

One defendant files an exception to the commissioner's report, which is relied on by another defendant, but at the hearing in the court below, this exception is waived. The exception having been waived, cannot be relied upon in the appellate court. *Robertson v. Trigg*, 32 Gratt. 76. See *monographic note* on "Commissioners in Chancery" appended to *Whitehead v. Whitehead*, 23 Gratt. 376.

bb. Report of Viewers.—Upon an application to establish a public landing, if no motion has been made in the county court to quash the report of the viewers, it is too late to object to it in the appellate court. *Muire v. Falconer*, 10 Gratt. 12; *Lewis v. Washington*, 5 Gratt. 265.

cc. Instructions.—No exceptions having been taken to the instructions, neither party will be allowed to question in the court of appeals the correctness of the law laid down by the court as applicable to the evidence in the cause. *Lamberts v. Cooper*, 29 Gratt. 66; *Montague v. Allan*, 78 Va. 592.

Instructions are to be interpreted in the light of the evidence in the case, and it is not to be presumed that the jury considered other evidence not introduced in the cause. If the instruction was applicable to evidence introduced in the trial court without exception, an objection to the instruction solely on the ground that there was no relevant evidence to support it cannot be made for the first time in the appellate court. *New York, etc., R. Co. v. Thomas*, 92 Va. 606, 24 S. E. Rep. 224.

See generally, monographic note on "Instructions" appended to *Womack v. Circle*, 29 Gratt. 192.

dd. Improper Abatement of Suit on Return of Sheriff.—Although the lower court erred in abating a suit on a return of the sheriff of "not found in my bailiwick" yet, where two trials were had without objection on that ground, the objection will be deemed waived in the appellate court. *Shrewsbury v. Miller*, 10 W. Va. 114.

ee. Verdict.

Not Responsive to Issues.—A judgment will be reversed where the verdict is not responsive to the issues, even though the objection is not taken in the court below, and a *venire facias* directed. *Brown v. Hendersons*, 4 Munf. 492.

Verdict in Issue Out of Chancery.—Where an issue is directed in a chancery cause, and a verdict is found to which no exception is taken, and a decree is rendered thereon, the facts found in the verdict must be regarded in the appellate court, as the established facts of the case. *Lee v. Boak*, 11 Gratt. 132.

f. Statements in Bill.—Where, in a bill by a widow against her husband's administrator and his sureties to recover her distributive share, to which no other distributee is made a party, it is stated that her husband's brother was the only other distributee in the United States, and that he had been paid and had left the United States and his residence was unknown, this statement must be taken as true, if not controverted in the lower court and the objection that the other distributees were not made parties cannot be made in the appellate court. *Moore v. George*, 10 Leigh 228.

Plaintiffs sue as heirs at law of K. and the defendant answers, and does not question their right to sue in that character, and no question is made or suggested in the court below of their right to sue as such heirs; and throughout the proceedings it is implied, if not expressly conceded, that they are properly before the court as such heirs. It is too late to object in the appellate court, to the decree, for the want of the proof of the fact. *Buchanan v. King*, 23 Gratt. 414.

gg. Excessive Damages.—If no objection appear, by bill of exceptions taken to the overruling of a motion for a new trial, to have been made in the trial court, to the excessiveness of damages, it is too late to make such objection in the court of appeals. *Richmond, etc., R. Co. v. George*, 88 Va. 223, 18 S. E.

Rep. 429; *James River & Kanawha Co. v. Adams*, 17 Gratt. 427; *Law v. Law*, 2 Gratt. 366.

It is too late for a grantor in a fraudulent deed to urge in appellate court that a judgment is excessive in a suit to annul the deed and subject the property to such judgment. *Wray v. Davenport*, 79 Va. 19.

hh. Failure to Point Out Errors in a Settlement.—Where defendant relies upon a settlement which the evidence tends to show was coerced from the plaintiff, and was grossly erroneous, but does not ask the court to require the plaintiff to point out the errors in the settlement of which he complains, and the jury find a verdict for the plaintiff disregarding the settlement, he cannot complain of the want of such a statement of the plaintiff's objection to the settlement. *Varnier v. Core*, 20 W. Va. 472.

ii. Defects in Vendor's Title.—On a bill by vendee against vendor for specific execution, if no objection to the vendor's title be made in the court of chancery, in any form, he cannot be heard to make such objection in the court of appeals. *Brockenbrough v. Blythe*, 8 Leigh 619.

jj. Failure to Record Decree.—The objection that a decree had not been recorded in the county where the land lies not having been taken in the court below cannot be made for the first time in the appellate court. *Wynn v. Harman*, 5 Gratt. 157.

kk. Revival of Cause.—The record stating that by consent of parties the cause was revived against the persons therein named, heirs at law of the defendant who had died, and no objection having been made on this ground in the circuit court, the appellate court must presume the revival regularly entered, with the consent of the proper parties. *Buchanan v. King*, 23 Gratt. 414.

An appellant has no right to complain that a cause was not duly revived in the name of the heirs of the plaintiff, he having died pending the suit, the decree being in the name and in favor of the said heirs and they being parties to it and defending the appeal. *Mustard v. Wohlford*, 15 Gratt. 329.

Where an action of debt was brought against the maker and two indorsers of negotiable notes and there was an office judgment at rules against all the defendants and at the next rules the office judgment was confirmed as to the maker and one indorser and the death of the other was suggested and at the next term of the court there was a judgment against the maker and the first indorser and afterwards a *scire facias* is issued and served on the executrix of the other indorser to revive the action, and she appears and pleads *nil debet* and obtains a continuance and this is repeated and there are three trials and verdict in her favor, it was held, that the executrix not having made any question in the court below, as to the revival of the suit against her by *scire facias* she must be held to have waived the question and she cannot make it in the appellate court. *Slaughters v. Farland*, 31 Gratt. 134.

ll. Multifariousness.—An appellate court will not reverse a decree on the ground of multifariousness alone, where that objection was not raised in the lower court. *Hill v. Bowyer*, 18 Gratt. 364, 381.

mm. Laches.—After an account has been taken in a suit against an administrator for an account and he submits to the account and a decree rendered thereon, objection on account of laches cannot be made in the appellate court. *Wills v. Dunn*, 5 Gratt. 386.

nn. Deeds.

Rectals.—Where, on a bill by *cestuis que trustent* to sell land, the land is sold, but the purchaser fails to

pay all the purchase money, and on a rule against him to show cause why the land should not be resold to pay the balance, he objects to the title on the ground that the trustees were not made parties, and then one of the trustees styling himself the surviving trustee files a release deed, no objection having been made in the court below, the purchaser cannot object in the appellate court that it was not shown that he was the surviving trustee. *Jones v. Tatum*, 19 Gratt. 720.

Acknowledgment.—Where no point was made in the pleading that the acknowledgment of a deed is void because taken by a notary who was the agent of the grantee, such point cannot be considered by the court of appeals, as it can only decree upon the case as made by the pleadings. *Shenandoah Val. Railroad Co. v. Dunlop*, 86 Va. 346, 10 S. E. Rep. 239.

Signature and Seal of Deed of Corporation.—In a suit in equity among creditors of a corporation, one of them claims under a deed of trust, which is executed by the president and secretary in behalf of the corporation; but the deed is not in the name of the corporation, nor has it the corporate seal. No objection having been made to the deed on these grounds, in any of the pleadings or proceedings in the cause, but only in the petition for an appeal, the objection comes too late, and will not be considered in the appellate court. *Wroten v. Armat*, 81 Gratt. 223.

pp. Confirmation of Assignment of Dower.—It cannot be objected for the first time in the court of appeals that the order of confirmation of an assignment of dower does not appear from the record to have been made on the motion of an heir or devisee. *Parrish v. Parrish*, 88 Va. 529, 14 S. E. Rep. 325.

qq. Want of Revenue Stamp.—It cannot be objected for the first time in an appellate court that a title bond in a cause was not stamped with a United States revenue stamp, where no objection was made at the trial by bill of exception or certificate. *Hawkins v. Wilson*, 1 W. Va. 117.

rr. Conditions of Insurance Policy Not Printed in Type of Required Size.—An objection that the conditions of an insurance policy are not printed in type as large as long primer, as required by the statute, cannot be made for the first time in the appellate court. In the case at bar the company was allowed to rely on the conditions in the policy which rendered it void, and the record failing to disclose that the conditions were not printed in the type prescribed by the statute, the presumption was that the policy conformed to the statutory requirement. *Sulphur Mines Co. v. Phenix Ins. Co.*, 94 Va. 355, 26 S. E. Rep. 856.

ss. Material Alteration in Note.—The objection that a material alteration has been made in a note in suit cannot be made for the first time in the appellate court. *Tate v. Bank*, 96 Va. 765, 32 S. E. Rep. 476.

tt. To Promise in a Note to Pay Attorney's Fees.—Where for the first time the point is raised in the court of appeals that a promise in a note to pay, in case of a suit, five per cent. collection fees and fifty dollars attorney's fee, is an unenforceable penalty within the ruling of *Rixey v. Pearre Bros. & Co.*, 99 Va. 118, 15 S. E. Rep. 498, it was held that it was too late to raise the point. *Ronald v. Bank of Princeton*, 90 Va. 813, 20 S. E. Rep. 780.

uu. Absence of Indorsement of Appeal on Justice's Warrant.—It is too late after conviction in the county court for the accused to except to the absence of any indorsement of an appeal on the warrant by the justice. *Harrison v. Com.*, 81 Va. 491.

vv. That Assignment of Assets by Directors to Pay Individual Debts Are Void.—Objection that an assignment of assets made by the directors to pay debts for which they are individually bound, is void, under Code 1873, ch. 57, § 18, which provides that, "No member of the board shall vote on a question in which he is interested, otherwise than as a stockholder," must be made in the court below, and cannot be raised for the first time in the appellate court. *Planters Bank of Farmville v. Whittle*, 78 Va. 737.

ww. That Conveyance Is Fraudulent.—Where it was not charged in the court below that a conveyance was fraudulent, such charge cannot, for the first time, be made in the court of appeals. *Pracht v. Lange*, 81 Va. 711; *Vance v. Kirk*, 20 W. Va. 344, 1 S. E. Rep. 717.

xx. Judicial Sales.

Failure to Enquire Whether Partition Could Be Made.

—In a suit for partition, the court has no authority to order a sale of land unless it is made to appear by an enquiry before a commissioner, or otherwise, that partition cannot be made in some of the modes provided by the 2nd and 3d sections of ch. 128, of the Code. But when it did not so appear, and no such enquiry was asked in the court below, a party who prosecuted the suit and at whose instance the decree was made, will not be allowed to raise the objection for the first time in the appellate court. *Howery v. Helms*, 20 Gratt. 1.

Failure to Enquire as to Sufficiency of Rents and Profits.

—Where an interlocutory decree directs a sale of lands to satisfy a debt, in a case where it might have been proper to decree satisfaction out of the rents and profits; but this was not a point controverted in the court below, or in any way brought to the notice of the court, and, though the party had ample opportunity to apply to the court to alter the decree in that particular, he did not apply for such alteration; upon appeal to the court of appeals it was held that the decree should not be reversed for such cause, but affirmed, and the cause remanded, with direction to alter the decree, and direct satisfaction out of the rents and profits, if such alterations were asked, and if the debt could be satisfied out of the rents and profits within a reasonable time. *Manns v. Flinn*, 10 Leigh 93.

yy. Lack of Evidence.

Of Acceptance of a Promise.—It cannot be objected in the appellate court that there is no evidence that a promise has been accepted where no objection on the ground appears in the bill of exceptions to have been made below. *Colgin v. Henley*, 6 Leigh 85.

Of Execution of an Order.—A plaintiff in equity files with his bill, as the ground of his claim, an order on one of the defendants, which has not been accepted. No proof of the execution of the order is given, but its genuineness is not questioned in the court below, and it is made the basis of a decree in favor of the plaintiff. It is too late to make objection in the appellate court, to the want of proof of the order. *James River & Kanawha Co. v. Littlejohn*, 18 Gratt. 53.

Making or Endorsement of Bill of Exchange.—Where no proof of the making or indorsement of a bill of exchange, under which plaintiffs claim as equitable assignees of a legacy, is called for in the court below, objection to the want of such evidence cannot be taken in the appellate court. *Anderson v. De Soer*, 6 Gratt. 768.

Of Identity of Note Sued on.—It cannot be assigned as error for the first time upon a second appeal that the note set up in the suit is not the one mentioned

in a deed of trust, where they have been treated as the same by the court below and on the first appeal and have been so treated by all the parties as a result of the pleadings. *Atkinson v. Beckett*, 86 W. Va. 438, 15 S. E. Rep. 179.

On Demand on Sheriff.—Objection cannot be made for the first time in the appellate court that a demand had not been made upon a sheriff in a proceeding by motion against a sheriff and his sureties. *Cook v. Hays*, 9 Gratt. 142.

2. Compelling Proof of Signature without Affidavit.—When, on trial of a petition and bill of review, filed by defendants, after decree rendered in an action against an administrator and heirs to recover on certain bonds of deceased for unpaid purchase money, on the ground of the discovery of an alleged receipt for a part payment on the bonds, which plaintiffs claim was a forgery, and the genuineness of which they dispute in their answer to said petition, under oath, and the strictest proof is called for, and its genuineness treated by the petitioners throughout as disputed, and by the court, which refers the question to a master, who reports adversely to it, and neither in the exceptions to the report, nor throughout the proceedings in the court below, is it objected that the issue of genuineness was not properly raised, the defendant petitioners cannot avail themselves on appeal, of the objection that the court could not require them to prove the signature to said receipt, in the absence of the affidavit required by Code Va. 1873, ch. 167, § 39, where a substantial compliance is shown with the requirement of the statute. *Harnsberger v. Cochran*, 82 Va. 727, 1 S. E. Rep. 120.

aaa. A Party's Right to Act as Administrator.—It is too late to object in the court of appeals, that one who has been allowed by the court below to file a bill of revivor as administrator *d. b. n. c. t. a.* and in whose name the cause has proceeded, is not such administrator in fact. *List v. Pumphrey*, 8 W. Va. 672.

bbb. Allowance of Commissions.—Where an administrator fails to settle his accounts in the time required by the statute, but is nevertheless allowed a commission during the time of such failure by a commissioner, though no exception is taken thereto in the court below, it may be objected to in the appellate court. *Estill v. McClintic*, 11 W. Va. 399.

ccc. Order of Liability.—Where in a suit by a guardian to sell his ward's lands a rule was made against the purchaser to show cause why the land should not be resold, the purchase money having been paid to an unbonded commissioner and expended by the guardian without authority, and it is decreed that they pay into court the amount of their purchase or that the land be resold, it is too late to object for the first time in the court of appeals that the guardian and his sureties should have been first exhausted before proceeding against the purchaser. *Whitehead v. Bradley*, 87 Va. 676, 13 S. E. Rep. 196.

ddd. Failure to Record Finding of Indictment.—The objection that the finding of an indictment was not recorded may be made for the first time in the appellate court. *Simmons v. Com.*, 89 Va. 156, 15 S. E. Rep. 386; *Shiffet v. Com.*, 14 Gratt. 652.

eee. Lack of Authority in Administrators to Sell Land.—A bill filed by administrators for the purpose of enforcing a contract made by them for the sale of their decedent's land which fails to allege their authority to sell the land, and to which the heirs of the owner are not made parties, is bad on demurrer. But if the purchaser makes no objec-

tion to these defects, and answers, setting up a defence on the merits, he cannot make the objection for the first time in the court of appeals, especially when it appears from a deed filed as an escrow with the bill that the heirs authorized the sale, were parties to the contract of sale, and made a deed to the purchaser with covenants of general warranty to be delivered to him when all the purchase money is paid. *Matney v. Ratliff*, 96 Va. 281, 31 S. E. Rep. 512.

fff. Agent Interested on Both Sides.—An objection that an agent for the sale of land, who became a joint purchaser with defendants, was also interested on behalf of the vendor cannot be made for the first time on appeal. *Anderson v. Creston Land Co.*, 96 Va. 257, 31 S. E. Rep. 62.

H. SETTING UP CLAIMS FOR THE FIRST TIME IN APPELLATE COURT.—The administrator of an intestate is also guardian of one of the distributees. Upon the termination of the guardianship, a bill is filed against the guardian and his sureties, to recover what is due upon the guardianship account. An amended bill is afterwards filed against the administrator and his sureties, to recover what is due on the administration account. Reports are made of both accounts. But, for reasons appearing to the court, the guardianship account is recommitted; and then, by consent of parties, the administration account is also recommitted. A further report is made upon the guardianship account, and none upon the administration account. Whereupon the cause is heard as to the guardian and his sureties, upon the further report so made, and a decree is entered against them for the sum deemed by the court to be due upon the guardianship account. From this decree an appeal is taken by a party interested to get rid of or reduce the amount. In the appellate court it is urged by the appellee, that the balance stated as due on the guardian's account should be augmented, by incorporating in it the appellee's share of the balance due on the administration account. *Held*, this claim cannot be sustained, because no claim was made in the court below by the appellee, to bring into the guardianship account any charge against the guardian arising out of the administration account. *Williamson v. Howard*, 2 Rob. 30.

Right to Land Set Up by Caveator.—A right to land set up by a caveator in his petition for appeal, but not set up in the court below, cannot be considered by the appellate court. *Trotter v. Newton*, 30 Gratt. 582.

Claim to Subrogation.—A claim for subrogation being for affirmative relief, cannot be made for the first time in the appellate court. *Building Ass'n v. Reed*, 96 Va. 345, 31 S. E. Rep. 514.

I. AFFIRMANCE.

1. GENERALLY.—A decree is presumed to be right, and the party appealing must show error. It is not sufficient for the appellate court to doubt the correctness of the decision. It must be satisfied, in order to reverse, that there is error. *Shipman v. Fletcher*, 91 Va. 473, 22 S. E. Rep. 458; *Smith v. Smith*, 92 Va. 696, 24 S. E. Rep. 280; *Atlantic, etc., R. Co. v. Del. Con. Co.*, 98 Va. 503, 37 S. E. Rep. 13; *Yoke v. Shay*, 47 W. Va. 40, 34 S. E. Rep. 748; *Spurgin v. Spurgin*, 47 W. Va. 38, 34 S. E. Rep. 750; *Whipkey v. Nicholas*, 47 W. Va. 35, 34 S. E. Rep. 751; *Camden v. Dewing*, 47 W. Va. 310, 34 S. E. Rep. 911; *Hickman v. Painter*, 11 W. Va. 386; *Douglas v. Spoor*, 89 Va. 279, 15 S. E. Rep. 550; *Porter v. Christian*, 88 Va. 730, 14 S. E. Rep. 183.

Where the court below has upon the evidence determined a question of fact, the court of appeals will not overturn its decision except in cases of manifest error or misconduct. *Glaize v. Glaize*, 79 Va. 429; *Womack v. Tankersley*, 78 Va. 242; *Shaffer v. Shaffer* (W. Va.), 41 S. E. Rep. 166.

Effect on Previous Decrees.—An affirmance of a subsequent decree operates as an affirmance of all prior decrees rendered in the cause which have not been previously reversed. *Burton v. Brown*, 22 Gratt. 1.

2. WHERE EVIDENCE IS CONFLICTING.—Where the decree sought to be reversed is based upon depositions which are so conflicting, and of such a doubtful and unsatisfactory character, that different minds and different judges might reasonably disagree as to the facts proved by them, or the proper conclusion to be deduced therefrom, the appellate court will decline to reverse the decree, although the testimony may be such that the appellate court might have rendered a different decree if it had acted on the cause in the first instance. *Pritchard v. Evans*, 31 W. Va. 187, 5 S. E. Rep. 461; *Fitzgerald v. Phelps, etc., Co.*, 43 W. Va. 570, 26 S. E. Rep. 315; *Smith v. Yoke*, 27 W. Va. 689; *Chrislip v. Teter*, 43 W. Va. 356, 27 S. E. Rep. 298; *Naughton v. Taylor*, 50 W. Va. 233, 40 S. E. Rep. 352; *Bartlett v. Cleavenger*, 36 W. Va. 719, 14 S. E. Rep. 273.

But where the great preponderance of evidence is against the decree, it will be reversed. *Rather v. Rather*, 38 Va. 876, 14 S. E. Rep. 636.

The court of appeals will not reverse the action of the trial court overruling an exception to a commissioner's report where the evidence is conflicting, and the court cannot see that error has been committed. *Triplett v. Woodward*, 96 Va. 187, 35 S. E. Rep. 456.

A question of fact determined by a commissioner upon contradictory evidence, and approved by the lower court, cannot be disturbed on appeal, unless the error be palpable. *Magarity v. Succop*, 90 Va. 561, 19 S. E. Rep. 260; *Cann v. Cann*, 45 W. Va. 563, 31 S. E. Rep. 923.

In an insurance case where the case is submitted to the court, and the evidence as to the value of the property insured is conflicting, the appellate court cannot interfere with the judgment of the court below on the ground that the judgment is excessive. *Southern Mutual Ins. Co. v. Kloeber*, 31 Gratt. 739.

When a question of fact is referred to a jury, depending upon the testimony of witnesses conflicting in their statements, and is passed upon by them, and approved by the trial court, unless there be palpable error, the court of appeals must affirm, as, when conflicting statements are made, there is no safe method by which the court can decide between them, seen on paper. It cannot pass upon the credibility of witnesses, or the weight of conflicting testimony, and reverse the trial court, except when the error is palpable and obvious, and the result is without evidence to support it, or plainly against the evidence. *Barbour v. Melendy*, 88 Va. 526, 14 S. E. Rep. 326.

But where, on the undisputed fixed facts, the verdict is contrary to the evidence, the supreme court can reverse it as contrary to law. *Manss-Bruning Shoe Mfg. Co. v. Prince* (W. Va.), 41 S. E. Rep. 907.

3. DECISION SUBSTANTIALLY RIGHT.—Though the opinion of the court below appear to be confined to one point, yet if it appear upon the whole record,

that the judgment is substantially right, it must be affirmed. *Davies v. Miller*, 1 Call 127.

Wrong or Insufficient Reason for Decision.—It is not necessary to assign in a decree any reason for the decision, and, if a decree is substantially right, it should be affirmed, although the court below may have given an insufficient reason for its judgment. *Ballard v. Chewing*, 49 W. Va. 508, 30 S. E. Rep. 170.

Where the decree appealed from is right, the same will not be reversed because the circuit court was incorrect in its reasons for its conclusion. *Lee v. Patton*, 50 W. Va. 20, 40 S. E. Rep. 358; *Boyd v. Cleg-horn*, 94 Va. 780, 27 S. E. Rep. 574; *Newell v. Wood*, 1 Munf. 555; *Shrewsbury v. Miller*, 10 W. Va. 115.

This only applies where there has been a hearing on the merits, and not when the court refuses to hear at all; for the court of appeals will only consider the questions determined by the circuit court. *Clark v. Sayers*, 48 W. Va. 33, 35 S. E. Rep. 882.

Adding Explanation.—The court of appeals in affirming a decree, will add any explanation which may be necessary to make it correctly understood. *Mayo v. Purcell*, 8 Munf. 243.

4. AMENDMENT.

By Consent of Parties.—Where, after an appeal has been allowed in a cause, by consent of parties, a decree is made, modifying, in one respect, the decree appealed from, the appellate court may amend the decree appealed from in that respect and affirm it. *Peters v. Neville*, 26 Gratt. 549.

To Prevent Delay.—Where the accounts have been discussed, for a long time, in the court of chancery before and after an appeal and have become intricate from the manner of stating them, if a bill of review be applied for to the last decree of the court of chancery purporting to be made in conformity to the decree of the court of appeals, and leave to file the bill be refused, the court of appeals will correct what is erroneous in the report of the commissioner, acting under its own decree, and affirm the residue, in order to prevent further delay, although the affirmance may possibly be injurious in some instances. *Ambler v. Macon*, 4 Call 605.

For Conformity.—Where there is a judgment in the name of the plaintiff for the benefit of a third party, and plaintiff files a bill in his own name to enforce the lien of the judgment upon land, without making the latter a party, and there is no objection to this in the circuit court, and the decree is in favor of the plaintiff, this is not error; but for conformity it may be amended by the appellate court and affirmed. *Hale v. Horne*, 21 Gratt. 112.

Harmless Errors.—Where innocent errors are committed by the circuit court, not sufficient to justify the reversal of its judgment—the judgment will be amended and affirmed. *Doheny v. Atlantic Dynamite Co.*, 41 W. Va. 1, 28 S. E. Rep. 535.

Clerical Errors.—The appellate court will not reverse a judgment for a mere clerical error which might have been corrected in the court below, or by the judge, in vacation, upon motion; but will amend and affirm the judgment, if there is no other error. *Tyree v. Donnelly*, 9 Gratt. 64.

In the court below, there having been a clerical misprision in decreeing jointly against two defendants as administrators of a decedent, when the pleadings indicated that one of them was sole administrator, and the decree for costs having through oversight been entered against him, as well as against certain heirs of the deceased, *de bonis pro-*

prois, the appellate court amended the decree in these particulars. *Blessing v. Beatty*, 1 Rob. 287.

Dismissal of Bill.—Where a judge in vacation not only makes an order dissolving an injunction, as he has a right to do, Code 1860, ch. 179, § 12, but goes further and dismisses the bill, as he has no authority to do, the latter order will be expunged and the decree affirmed as amended. *Muller v. Bayly*, 21 Gratt. 521.

Where the court below decrees a sum of money in favor of defendant, and dismisses the bill, and upon appeal by plaintiff, the court of appeals affirms the money decree, it will correct that part dismissing the bill, and affirm the decree with costs. *Kraker v. Shields*, 20 Gratt. 377.

Absolute Dismissal.—So when the appellant's bill was dismissed absolutely, when it should have been dismissed without prejudice, the decree will be merely corrected and affirmed. *Jones v. Pilcher*, 6 Munf. 425; *Stott v. Baskerville*, 6 Munf. 20; *Rootes v. Holliday*, 6 Munf. 251; *Ellis v. Baird*, 6 Munf. 456. See also, *Rankin v. Bradford*, 1 Leigh 163; *Lewis v. Billips*, 1 Leigh 353; *Stuart v. Pennis*, 3 Va. Dec. 637.

Failure to Dismiss.—If, in a decree of a superior court of chancery, reversing that of a county court, there be no error, but an omission to direct the bill to be dismissed, the court of appeals will affirm the decree and add the proper direction. *Heffner v. Miller*, 2 Munf. 43.

Declaring Conveyance Void Absolutely and Not as to Creditors Only.—When a decree declares a conveyance void and sets it aside absolutely when it should have done so only as to the creditors, whose debts were contracted before the conveyance, the decree will be corrected in this respect, but not reversed. *Linsey v. McGannon*, 9 W. Va. 154.

Omission of Credit.—A commissioner having by mistake omitted a credit in ascertaining the amount due upon a bond, the appellate court will correct the decree in this respect, and affirm it with costs. *Tazewell v. Saunders*, 13 Gratt. 354.

In *Boyce v. Smith*, 9 Gratt. 704, a decree was corrected on the admission of the bill, by the allowance of a credit, and thus affirmed.

Omission to Dispose of Small Sum in Decree.—A commissioner's report made in the cause showing that there is a small sum in the hands of an administrator, which the court below omitted to decree to be paid to the creditors in exoneration *pro tanto* of a certain person, the court will amend the decree in this respect, and affirm it with costs to the appellees. *Williamson v. Goodwyn*, 9 Gratt. 503.

Mistake as to Amount Shown Due by Report.—Where the lower court mistakes the amount shown to be due by a commissioner's report, the appellate court will merely correct the decree and affirm it with costs to appellee. *Kent v. Matthews*, 12 Leigh 590.

Failure to Require Refunding Bond.—Where a decree in favor of a legatee against an executor omits to require a refunding bond, this is not an error for which the decree will be reversed, but where it is apparent that such error resulted entirely from inadvertence, an appellate court, if the decree be correct in other respects, will affirm it so far as it has gone with costs to the appellee and then will proceed to make such further decree in relation to a refunding bond as the court below ought to have made. *Handly v. Snodgrass*, 9 Leigh 484.

Larger Damages Than Declaration Calls for.—Upon appeal from a judgment rendered for more than the amount of damages laid in the declaration, the

appellate court may correct and affirm the judgment. *Lewis v. Arnold*, 13 Gratt. 454.

Absence of Parties.—Although the lower court errs in directing a sale of land, when the heirs of the vendor are not before the court, yet where they have only the bare legal title, and there is no obstacle to obtaining such title, the decree will be amended so as to require said heirs to be brought before the court by some proper proceeding before sale is made and so affirmed. *Mott v. Carter*, 26 Gratt. 127.

Failure to Reserve Liberty to Apply to Court.—Where a decree fails to reserve liberty to the plaintiff to apply by motion on petition for the sale of property if a personal decree fail to produce the money, the appellate court will correct the decree in this respect and affirm it. *Kraker v. Shields*, 20 Gratt. 377.

Failure to Provide for Account.—A commissioner settling accounts, between tenants in common in a lead mine, reports a considerable sum as due from plaintiffs to defendant, and then says—"The complainants will hereafter render an account of a remnant of the business in their hands." There are exceptions by both parties to the accounts as stated; but the court overrules all the exceptions, confirms the report, and makes a final decree in favor of the defendant. It being not probable that the further account referred to by the commissioner will lessen the amount due the defendant, if there be no other error, the appellate court may amend the decree by providing for the further account, and affirm it. *Graham v. Pierce*, 19 Gratt. 28.

Failure to Direct Release.—The appellate court being of opinion that what was declared in a decree would, by necessary implication, relieve the certain heirs from responsibility for certain land, but that it would have been more regular to direct a release of that land, will decree such release accordingly. And the decree, being thus amended, will be affirmed. *Blessing v. Beatty*, 1 Rob. 287.

Failure to Direct Excluded Evidence to Be Received.—If a superior court of common law, in reversing a judgment and awarding a new trial, assign the reason to be that certain evidence should have been received on the former trial, but fail to direct that, upon the new trial, such evidence shall be received, the court of appeals, in affirming its judgment, will add the proper direction concerning the evidence. *Brooke v. Shelly*, 4 H. & M. 266.

General Judgment Where Some Counts Are Faulty.—There being three counts in a presentment, and the jury having found the defendant guilty on the first count and assessed his fine, and not guilty on the second and third counts, the judgment should be for the commonwealth on the first count, and for the defendant on the second and third counts.

In such case there having been a general judgment for the commonwealth, the court of appeals will amend and affirm it. *Sledd v. Com.*, 19 Gratt. 813.

5. DAMAGES.

Act Not Retroactive.—The act of the 20th of January, 1804, which gives damages and interest on the affirmance of appeals from decrees in chancery, does not apply to appeals depending at its commencement. *Beatty v. Smith*, 2 H. & M. 395.

The act of assembly allowing damages on the affirmance of decrees in chancery, does not authorize the recovery of such damages of a security in a bond bearing date before that act. *Woodson v. Johns*, 3 Munf. 230.

A petition for an appeal having been presented to

the court before the 1st of July, 1860, though the appeal was not allowed until after that date, no damages are to be allowed upon affirming the judgment. *Price v. Kyle*, 9 Gratt. 247.

When Not Allowed against Personal Representative.—Where the appellant dies, and the appeal being revived against his executor, the judgment is affirmed. Damages ought not to be awarded against the proper estate of the executor, in case of deficiency of that of the testator. *Hudson v. Ross*, 1 Wash. 74.

Decree for Costs Merely.—Damages ought not to be given upon the affirmance of a decree dismissing a bill with costs, such decree not being rendered "for any sum of money or quantity of tobacco," except the costs. See Acts of 1808, ch. 116, Ed. 1808, ch. 29, § 2, p. 29; R. C. 1819, ch. 66, § 59, p. 208; *Williamson v. Bowie*, 6 Munf. 176.

Judgment for a Fine.—The statute allowing damages on affirmance (Acts of 1830-31, ch. 11, § 32, Suppl. to R. C. p. 149) does not apply to the affirmance of a judgment imposing an amercement or fine; the amercement or fine not being a debt or damages, within the meaning of that act. But though the judgment of affirmance in such case award damages according to law for retarding the execution, yet as no specific damages are thereby adjudged, and the law gives none, the error is merely formal, and the appellate court will disregard it. *Abrahams v. Com.*, 1 Rob. 675.

J. REVERSAL.

1. **GENERAL RULE.**—Where an appellate court reverses the decision of the lower court, "it shall enter such judgment, decree or order as the court whose error is sought to be corrected, ought to have entered." *Walker v. Page*, 21 Gratt. 636, 652; *Arrington v. Cheatham*, 2 Rob. 492; *Darby v. Henderson*, 3 Munf. 115; *Mantz v. Hendley*, 2 H. & M. 308; *Blane v. Sansum*, 2 Call 495; *Janey v. Blake*, 8 Leigh 88; *Baird v. Mattox*, 1 Call 257; *Smith v. Walker*, 1 Wash. 135; *Hill v. Harvey*, 2 Munf. 525; *Machine Works v. Craig*, 18 W. Va. 559.

Where a paper signed and endorsed in blank, is filled up as a common promissory note, and value paid for it, and, pending an action against the endorser, the endorsement is filled up as a guaranty, but it is counted on both as an original promise and a guaranty, and there is a judgment for the defendant on a case agreed, on appeal the judgment will be reversed, and a judgment given against him as an original surety, without sending the case back to have the endorsement erased and filled up as an original promise. *Orrick v. Colston*, 7 Gratt. 189.

On Demurrer to Evidence.—If the lower court sets aside a demurrer to evidence and awards a new trial, the demurrant may appeal, and the court of appeals will set aside such judgment and enter such judgment as the lower court should have entered. *Knox v. Garland*, 2 Call 242. See also, monographic note on "Demurrer to the Evidence" appended to *Tutt v. Slaughter*, 5 Gratt. 364.

Cause Tried by the Court.—Where a cause is tried by the court in lieu of a jury, if the court of appeals should come to the conclusion that the judgment of the court below was plainly erroneous, it will not remand the case for a new trial, unless under the circumstances the court below ought to have awarded a new trial, but will render such judgment upon the law and evidence as the court below should have rendered. *Nutter v. Sydenstricker*, 11 W. Va. 535. See monographic note on "Juries" appended to *Chahoon v. Com.*, 20 Gratt. 733.

On Motion in Arrest of Judgment.—After verdict for the plaintiff, the defendant moves for a new trial, and also in arrest of judgment. The court below, without deciding upon the motion for a new trial, is of opinion for the defendant upon the motion in arrest, and enters judgment in his favor, which is reversed in an appellate court. That court, upon overruling the motion in arrest, will not send the cause back for a decision upon the motion for a new trial but will proceed to give final judgment for the plaintiff. *Sims v. Alderson*, 8 Leigh 479.

On Demurrer.—Where a demurrer to a plea is sustained in the lower court and judgment given for the plaintiff, the court of appeals, if of opinion that the demurrer should have been overruled will enter judgment for the defendant. *Wilson v. Bank*, 6 Leigh 570; *Hite v. Long*, 6 Rand. 457; *Lewis v. Weldon*, 3 Rand. 71. See monographic note on "Demurrers" appended to *Com. v. Jackson*, 2 Va. Cas. 501.

Decree Refusing Bill of Review.—Where a bill of review or petition for rehearing is dismissed in the circuit court, and an appeal is taken, the court of appeals may correct the error complained of without sending the cause back to allow the bill of review or petition to be heard. *Bank v. Shirley*, 26 W. Va. 563.

Where Bill Should Have Been Dismissed.—Where upon appeal, the appellate court holds that the bill should have been dismissed by the lower court, it will enter a decree dismissing the bill. *Saunders v. Griggs*, 81 Va. 506.

Greater Damages Than Pleadings Call for.—Where verdict and judgment are rendered for a greater amount than is warranted by the declaration, though the appellate court will reverse the judgment, it will not direct a new trial if the plaintiff below will release the excess, but will enter judgment for the proper amount. *Gibson v. Stewart*, 11 Leigh 600.

The court below having given judgment for the plaintiff in a *scire facias* against bail, for too large an amount, the court of appeals will reverse the judgment and enter judgment for the proper sum. *Bowyer v. Hewitt*, 2 Gratt. 198.

Where a decree is reversed because founded on matters not stated in the bill, if it appears from the record that the bill cannot be amended so as to justify any decree thereon, the bill will be dismissed. *Bier v. Smith*, 25 W. Va. 830.

2. WHEN CAUSE WILL BE REMANDED.

Where No Inquiry into Merits in Lower Court.—Where the circuit court has not acted on the merits of the case but dismissed it for supposed want of jurisdiction, it is not proper for the supreme court of appeals to consider the case on its merits; but should remand it to the circuit court to be there proceeded with in accordance with its directions. *Bd. of Ed. v. Hopkins*, 19 W. Va. 89.

Want of Proper Parties.—Where a plaintiff in equity has shown no right to relief, and his bill is dismissed, an appellate court will not reverse the decree, to enable him to introduce new parties, and thereby make a new case upon the merits. Where the plaintiff has shown a right to relief against parties before the court, but has omitted to make other necessary parties, there the bill will not be dismissed; but he will be permitted to amend his bill, and add the necessary parties. And in such a case, the appellate court, if there be a defect of parties, will send the case back to the court below. *Jamerson v. Deshields*, 3 Gratt. 4; *Londons v. Echols*, 17 Gratt.

15; *Graves v. Hedrick*, 44 W. Va. 550, 29 S. E. Rep. 1013; *Cunningham v. Patteson*, 3 Rand. 66; *Miller v. Morrison*, 47 W. Va. 664, 35 S. E. Rep. 906; *Gall v. Gall*, 50 W. Va. 523, 40 S. E. Rep. 380.

On an appeal from an interlocutory decree, if proper parties appear to be wanting, the court of appeals will not leave it to the chancellor but will itself direct such parties to be made. *Hooper v. Royster*, 1 Munf. 119.

Judgment on Demurrer.

Sustained in Lower Court.—Where the inferior court properly sustains a demurrer to a declaration, and enters judgment in the action for the defendant, without giving leave to the plaintiff to amend the court of appeals will, if the defect in the declaration appears to be amendable, reverse the judgment, and remand the case, with directions to grant leave to the plaintiff to amend if he elects to do so. But if, in such case, the record shows that the plaintiff declined to amend his declaration, then this court will not reverse the judgment, although it distinctly appears that the defect in the declaration could have been readily amended if the plaintiff had chosen to do so, but the judgment will be affirmed. *Rigg v. Parsons*, 20 W. Va. 522, 2 S. E. Rep. 81.

Where plaintiffs demur to pleas, and the demurrer is sustained, but upon appeal the judgment is reversed, the cause will be sent back with directions to permit the plaintiffs to withdraw the demurrer and reply, if they shall ask leave to do so. *Hamtramck v. Selden*, 12 Gratt. 28.

Where the trial court has, upon the prayer of a defendant, treated his answer (to which no replication has been filed) as a cross bill, and, subsequently, has erroneously sustained a demurrer to such cross bill, and treated the paper so filed as eliminated from the record for all purposes, the court of appeals although reversing the ruling on the demurrer, will not give the defendant the relief to which he would have been entitled as upon an answer to which there was no replication, but will remand the cause to the trial court, with leave to the complainants to answer the cross bill, and set up their defence, if any they may have. *Spoor v. Tilson*, 97 Va. 279, 23 S. E. Rep. 609.

Overruled in Lower Court.—Where a demurrer to a declaration, overruled in the lower court is sustained in the appellate court, the cause will be remanded with leave to the plaintiff to amend. *Fitzhugh v. Fitzhugh*, 11 Gratt. 300; *Strange v. Floyd*, 9 Gratt. 474. See monographic note on "Demurrers" appended to *Com. v. Jackson*, 2 Va. Cas. 501.

When a bill contains sufficient allegations for one character of relief sought, and insufficient for others, and the circuit court overrules a demurrer thereto, and grants relief to the full extent of the prayer of such bill, the court of appeals will reverse the decrees entered, sustain the demurrer in part, and remand the cause, with leave to the plaintiff to amend. *Billingsley v. Menear*, 44 W. Va. 651, 30 S. E. Rep. 61.

Where on a demurrer to the evidence by the defendant, the facts proven sustain the case of the plaintiff, but it is so defectively stated in the declaration that the court, on the demurrer to the declaration, ought to have sustained the demurrer, the court of appeals should set aside the judgment for the plaintiff, and remand the cause, with directions that the plaintiff have leave to amend his declaration, if advised so to do. *Quarrier v. Ins. Co.*, 10 W. Va. 508.

Where Appellate Court Has No Jurisdiction.—Where an inferior appellate court entertains an appeal in a case over which it has no jurisdiction and reverses the judgment of the lower court, a higher appellate court on appeal will reverse the judgment of the inferior appellate court without examining into the merits, itself not having jurisdiction of such cases. *Cooper v. Saunders*, 1 H. & M. 418.

The judge of a circuit court, having no authority to render a final decree in vacation, upon an appeal from such decree, the appellate court will not dismiss the appeal, but will take jurisdiction so far and so far only as to reverse the decree and remand the cause to the circuit court, there to be proceeded with according to the rules of courts of equity. *Monroe v. Bartlett*, 6 W. Va. 441; *Rollins v. Fisher*, 17 W. Va. 578.

So where a judge has entered a decree rendered by another judge not authorized to decide the case. *Johnson v. Young*, 11 W. Va. 678.

Cause Prematurely Heard.—Where a case is prematurely heard and decided in the lower court and an erroneous decision rendered, while the decree must be reversed, the cause will be remanded with leave to the plaintiff to file an amended bill. *Harrison v. Loneberger*, 11 W. Va. 175.

Cause Prematurely Dismissed.—When a circuit court prematurely dismisses an action, the judgment will be reversed, and the case remanded, to be tried in accordance with the rules of law and principles governing courts of justice. *Junkins v. Hamilton Lumber Co.*, 44 W. Va. 641, 29 S. E. Rep. 1017.

Failure to Allow Continuance.—Where a judgment is reversed for failure to grant a continuance in a proper case, the appellate court should not enter final judgment, but should send the cause back for a new hearing. *Clements v. Powell*, 9 Leigh 1.

Excessive Damages.—If it appears to the appellate court that the verdict of the jury and the judgment of the trial court are plainly right, except only that the amount is excessive, and the record shows plainly the amount of such excess, the judgment will be reversed and set aside, and the cause remanded to the trial court, with instructions to put the successful party on terms to release the excess or to award a new trial, and, if such excess is released, to enter judgment for the corrected amount. *Buena Vista Co. v. McCandlish*, 92 Va. 297, 23 S. E. Rep. 781.

Where Lower Court Failed to Decide All the Questions.—If the defendant is sued as heir and devisee, and pleads that he hath no "assets by descent," on which the plaintiff takes issue, and a verdict be found for the defendant, a repleader will be awarded by the appellate court, though not prayed in the court below; because the issue has only tried the right as to the descent but not as to the devise. *Baird v. Mattox*, 1 Call 257.

Decree Disregarding Commissioner's Report.—When a circuit court wholly disregards a commissioner's report and numerous exceptions thereto, and enters a decree on an entirely different basis from that presented in such report, and the court of appeals, reverses such decree, it will remand the cause to the circuit court, with directions to pass upon and dispose of such exceptions *seriatim*, and either to reform or recommit such report. *Holt v. Holt*, 46 W. Va. 397, 35 S. E. Rep. 19.

Where It Appears That Defects May Be Remedied.

Want of Evidence.—Where a judgment creditor, in his bill to enforce his judgment lien, alleges that he filed as part of his bill copies of his judgment and of

the lien docket marked "Exhibit B" and "C," but "Exhibit B," the copy of the judgment, is not found among the papers, or copied as part of the record, it is so probable that "Exhibit B" never was filed, but exists, and it is so necessary to a just decision of the cause, that the court of appeals will remand the case to the court below in order that the plaintiff may have an opportunity to supply said exhibit. *Love v. Tinsley*, 32 W. Va. 25, 9 S. E. Rep. 44.

Where a decree for plaintiff was reversed by the court of appeals because the allegations of the bill were not proved by competent evidence, it appearing probable that the defect could be supplied, the cause was remanded to the inferior court, to afford plaintiff opportunity of adducing other proof. *Sitlington v. Brown*, 7 Leigh 271.

A court of chancery directs issues of fact to be tried at law, without evidence regularly taken before the court, touching the facts to which the issues relate; but there was evidence, which, if regular, would have rendered the order for the issues proper. *Held*, that if the appellate court should set aside the issues, for being, in the actual state of the case, improperly ordered, it should, under such circumstances, remand the cause to the court of chancery, where the evidence may be regularly taken, and thereupon the issues ordered anew. *Watkins v. Carlton*, 10 Leigh 560.

While a bill would ordinarily be dismissed, for failure to produce necessary evidence on a point in a case, yet where this is largely due to the conduct of the defendants, the cause will be remanded for further proceedings. *Darnall v. Smith*, 26 Gratt. 878.

Where a bill filed to subject heirs to the payment of the bond of their ancestor, does not allege that the heirs are bound in the bond; but makes the bond an exhibit with the bill, and the answer does not admit or deny that the heirs are bound in the bond; and before the cause is heard the bond is lost out of the papers in the cause, but there is proof of the existence of the bond, but no proofs on the question whether the heirs were bound by it; nor is that question made in the court below; but a decree is made against the heir, it was held that although the court of appeals would reverse the decree for want of proof that the heir was bound, the cause would be sent back to give the plaintiff an opportunity to amend his bill, and show that the heir was bound in the bond. *Piper v. Douglas*, 8 Gratt. 371.

Where the circuit court sustains exceptions to depositions, and erroneously excludes material and important evidence before passing on the case, and then finds contrary to what its decision might have been, had such evidence not been excluded, the court of appeals will reverse the case for such erroneous ruling alone, and remand it for further proceedings. *Farmers' Bank of Fairmont v. Gould*, 42 W. Va. 132, 24 S. E. Rep. 547.

Where plaintiff in equity sets up claim against a mercantile house, and the only question put in issue is, whether the house is liable, or only an individual member of it, and plaintiff obtains a decree against the house; and, on appeal, the decree is reversed, because, in the opinion of appellate court, there is no proof of the liability of the house, but only of the individual partner; the appellate court will not remand the cause as to all the parties, in order to give plaintiff opportunity to adduce further proof of the liability of the house, but will dismiss the bill as to the partners held not liable, and remand the cause for further proceedings against

the partner only who is liable. *Cunningham v. Smithson*, 12 Leigh 33.

Where the contract proved varies from that set up in the bill, and the contract proved is clear and certain in its terms, and is such as a court of equity might properly enforce, and the court below decrees a specific execution of the contract set out in the bill, the decree must be reversed; but the appellate court will not dismiss the bill, but will remand the cause to the court below, to put the plaintiff to his election, whether to have a specific performance of the "contract as proved," or to have the same rescinded, and the parties put *in statu quo*. *Baldenberg v. Warden*, 14 W. Va. 397.

Where a bill of review of a decree for errors of law is dismissed by the court of chancery, and the decree dismissing the bill of review is reversed by the court of appeals, and the original decree reversed, but it appears that the plaintiff in the original cause may have a just claim, the original cause will be remanded for further proceedings. *Thornton v. Stewart*, 7 Leigh 128. See also, *Clark v. Sayres*, 48 W. Va. 33, 35 S. E. Rep. 882.

Where the court of appeals reverses the judgment of the lower court overruling a motion for judgment on a forthcoming bond on the ground that the bond is informal and defective, it should not enter judgment for the appellant unless it appears that the defendant had no other defence to make to the bond than that upon which the appellate court has decided. *Irvin v. Eldridge*, 1 Wash. 161; *Lewis v. Thompson*, 2 H. & M. 100; *Anderson v. Leitch*, 1 Leigh 462.

Declaration Defective.—When a declaration is defective and the judgment upon it is therefore reversed, and yet the declaration shows a just demand, if properly asserted, plaintiff will not be turned out of the court, but the cause will be remanded for further and correct proceedings. *Shelton v. Welsh*, 7 Leigh 175.

Bill Insufficient.—Where the bill is insufficient, but the proof shows the plaintiff is entitled to relief upon the cause of action imperfectly stated in the bill, and the decree is reversed, the cause will be remanded, with leave to amend the bill. *McClain v. Batton*, 50 W. Va. 121, 40 S. E. Rep. 500.

Suing in Wrong Character.—If the plaintiff has an interest in the subject of a suit, though he has sued in a wrong character, the appellate court, whilst it will reverse a decree in his favor, will not dismiss the bill, but will send it back that it may be amended as to the parties. *Sillings v. Bumgardner*, 9 Gratt. 273.

Failure of Nonresident to Give Security in Attachment.—The plaintiff in an attachment in equity is a nonresident of the state, and in the progress of the cause is required to give security for the costs within sixty days. He does not give it, but the court proceeds to decree in his favor. On appeal the decree is reversed. In remanding the cause the appellate court will not direct the suit to be dismissed, but will direct that he be allowed a reasonable time to comply with the order. *Anderson v. Johnson*, 32 Gratt. 558.

Want of Reference.—When a decree, in favor of the vendor, against the purchaser of lands, and sundry personal property, is reversed, and the cause remanded for a reference of the title, and a survey to be made before commissioners, the court of appeals will direct that the appellant have liberty to show, and prove to them, if he can, what parts of the personal property stipulated for were not delivered

under the contract, and the value thereof; although the court would not have remanded the cause for that purpose alone. *Beverley v. Lawson*, 3 Munf. 317.

Pleadings Uncertain.—Where in a suit in equity, the rights of the parties involve the decision of questions which were not put in issue by the pleadings, or were so vague and uncertain as not to inform the opposite party of what were the issues, between them, so as to prepare his case in a way to secure a full investigation by the court, and a decision according to the very right of the case, and which would do justice to all concerned, the appellate court will reverse the decree of the court below, and send the cause back, with leave to the parties to amend their pleadings. *Nash v. Nash*, 28 Gratt. 686.

3. EFFECT OF REVERSAL ON DEPENDENT, DECREES AND JUDGMENTS.—Where there is an appeal from the decrees in two causes, one a decree for money and the other a decree to enforce the former, a reversal of the decree for the money will operate as an implied reversal of the decree in the latter. *Roanoke St. Ry. Co. v. Hicks* (Va.), 32 S. E. Rep. 790.

Where a subsequent decree is based solely upon a previous decree in the same cause, the reversal of the earlier decree will necessarily result in the reversal of the latter. *Jones v. Gillespie*, 32 W. Va. 343, 9 S. E. Rep. 235.

Where a decree is reversed, the judgment on a forthcoming bond should also be set aside. *McCormick v. Bailey*, 17 W. Va. 585.

Reversal in Part.—It is familiar doctrine that where a decree is reversed in part, and affirmed as to the residue, such reversal does not destroy the lien of so much of the decree as is affirmed. *Shepherd v. Chapman*, 83 Va. 215, 2 S. E. Rep. 273; *Moss v. Moorman*, 24 Gratt. 97.

4. RESTITUTION.—"The record in the appellate court seldom presents the facts on which to base a specific order of restitution. The power of the lower court to repair the injury occasioned by its own wrongful adjudication is not derived from, or dependent upon, a mandate of restitution issued by the appellate court upon reversal of the lower court, but is substantially the same which the lower court exercises when its own process has been abused or used without authority. Hence the performance of the reversed decree being made to appear, as was done in this case, by the record in the lower court, an order or decree of restitution may be made upon motion, a rule in the nature of a *scire facias*, on proper pleadings, with notice to, or appearance by or for, the parties in interest." *Keck v. Allender*, 42 W. Va. 420, 26 S. E. Rep. 437.

In a decree of reversal, the appellate court will if requested, farther direct that in case the money and costs recovered by the appellee shall have been paid, the same be refunded, with lawful interest from the time of payment. *Stanard v. Brownlow*, 3 Munf. 229.

Where, in a suit by a turnpike company, plaintiff fails to prove its incorporation and there is a sale of defendant's land under a decree in the cause and a final decree directing the purchaser to pay the purchase money to the plaintiff and the defendant appeals, the court of appeals would reverse the decree and dismiss the bill but for the injury that such a decree would do to the appellant; but, the purchase money being in the hands of the purchaser the court of appeals will reverse

so much of the decree as directs the purchase money to be paid to the plaintiff and remand the cause with direction to have the purchase money collected and paid to the appellant and then to dismiss the bill at the cost of the plaintiff. *Bowyer v. Giles, etc., Turnpike Co.*, 9 Gratt. 109.

Where a court of equity erroneously cancelled deeds, and ordered a conveyance to be made to the plaintiffs and directed a writ of possession to issue to put them in possession of the land, and the court of appeals reversed the decree on appeal granted without supersedeas, it will not dismiss the bill, but will remand the cause with instructions to place the parties *in statu quo* and then dismiss the bill. *Wilson v. Harper*, 26 W. Va. 179.

Appellants entitled to restitution will not be compelled to wait until a fund, the existence of which is uncertain, is ascertained by a commissioner, when there is another fund, which they have a right to have restored, already ascertained. *Keck v. Allender*, 42 W. Va. 420, 26 S. E. Rep. 437.

Where judgment is recovered by a plaintiff in an action of unlawful detainer before a justice, and under it a writ of possession issues, and the defendant is turned out of possession, and then an appeal is granted, and then, before trial of the case, the plaintiff moves the dismissal of his action, and declares that he will not farther prosecute it, the court, if asked, should award a writ of possession to restore possession of the land to the defendant, and it is not error to refuse such dismissal except on condition of the plaintiff making such restitution. The dismissal may be entered later. *McCormick v. Short*, 49 W. Va. 1, 37 S. E. Rep. 769.

No statute of limitation can run so as to bar an order of restitution in a cause which has been a pending cause continuously down to the entering of the decree complained of. *Keck v. Allender*, 42 W. Va. 420, 26 S. E. Rep. 437.

In Criminal Cases.—When a pecuniary judgment has been rendered against a defendant in a criminal case, and he pays it, and upon appeal the judgment is reversed, the cause will be remanded to the court below, for an order of restitution to be made therein, if the money is yet in the hands or power of the court. *Old's Case*, 18 Gratt. 915.

Action at Law.—Money levied by the sheriff upon a judgment which is afterwards reversed, cannot be recovered back by general *indebitatus assumpsit* for money had and received, without proof that the money was actually received by the plaintiff, or applied to his use. *Isom v. Johns*, 2 Munf. 272; *Eubank v. Ralls*, 4 Leigh 808.

K. EXECUTION OF DECREE.—"When the supreme court of appeals has executed its power, in a cause before it, and its final decree or judgment requires some further act to be done, it cannot issue an execution, but will send its decree to the court below to be executed. Whatever was before the court, and disposed of, is considered finally settled. The inferior court is bound by the decree, as the law of the case, and must carry it into execution according to the mandate. They can examine it for no other purpose than execution, or give any other or further relief, or review it on any matter, decided on appeal, for error apparent, or intermeddle with it, further than to settle so much, as has been remanded." *Henry v. Davis*, 13 W. Va. 230; *Mason v. Bridge Co.*, 20 W. Va. 223.

A judgment or decree of the court of appeal takes effect, at latest, from its date, not from the receipt and recordation of the mandate in the

office of the court below. *Long v. Perine*, 44 W. Va. 243, 28 S. E. Rep. 701.

Mandamus is the proper remedy to compel the circuit judge or court to comply with the mandate of the court of appeals. *Koonce v. Doolittle*, 48 W. Va. 592, 37 S. E. Rep. 644.

L. COSTS IN APPELLATE COURT.—For principles governing costs in the appellate court, see monographic note on "Costs" appended to *Jones v. Tatum*, 19 Gratt. 720.

Certification of Judgment to Lower Court.—The provision of § 4080 of the Code requiring the judgment of the appellate court to be certified to the trial court and entered by the latter as its judgment, is substantially complied with by simply transcribing the judgment of the appellate court on the order book of the trial court. *Reed's Case*, 98 Va. 817, 36 S. E. Rep. 399.

VII. PRESUMPTIONS ON APPEAL.

1. GENERALLY.—Where the contrary does not appear by the record, by bill of exceptions or otherwise, the judgment or decree of a court of competent jurisdiction, will always be presumed, on appeal, to be right and founded on sufficient evidence. *Harman v. City of Lynchburg*, 38 Gratt. 37; *Saunders v. Griggs*, 81 Va. 506; *Joslyn v. Bank*, 86 Va. 287, 10 S. E. Rep. 166; *Cunningham v. Mitchell*, 4 Rand. 189; *Wright v. Smith*, 81 Va. 777; *Board of Supervisors v. Dunn*, 27 Gratt. 608, 619; *Spotts v. Com.*, 85 Va. 581, 8 S. E. Rep. 375; *Fry v. Leslie*, 87 Va. 269, 282, 12 S. E. Rep. 671; *Shipman v. Fletcher*, 91 Va. 478, 22 S. E. Rep. 468; *Sargeant v. Irving*, 3 Va. Dec. 338; *Mairs v. Gallahue*, 9 Gratt. 94; *Neale v. Farinholt*, 79 Va. 54; *McClure-Mable Lumber Co. v. Brooks*, 46 W. Va. 732, 34 S. E. Rep. 921; *Robertson v. Harmon*, 47 W. Va. 500, 35 S. E. Rep. 832; *Tully v. Despard*, 81 W. Va. 370, 6 S. E. Rep. 927; *Reinhard v. Baker*, 18 W. Va. 811; *Campbell v. Hughes*, 12 W. Va. 210; *Richardson v. Donehoo*, 16 W. Va. 685; *King v. Burdett*, 12 W. Va. 683; *Camden v. Haymond*, 9 W. Va. 680, 692; *Shrewsbury v. Miller*, 10 W. Va. 115; *Kuykendall v. Ruckman*, 2 W. Va. 332; *Probst v. Braeunlich*, 24 W. Va. 356; *Griffith v. Corrothers*, 42 W. Va. 59, 24 S. E. Rep. 569.

The presumption in favor of the regularity of the proceedings in a court of general jurisdiction is as strong in an appellate court, as where the judgment is collaterally attacked. *Hill v. Woodward*, 78 Va. 765.

The presumption in favor of the regularity of the proceedings of courts extends to every step and part thereof, and the burden is on him who alleges irregularity to show affirmatively by the record that the irregularity exists. *Dove v. Com.*, 82 Va. 301; *Smith v. Hutchinson*, 78 Va. 683.

But this principle has no application in a case where the decision of the lower court proceeded, not upon the credit to be given to the witnesses, but upon a rule of law supposed by it to be correct, but in fact erroneous. *Cheatham v. Hatcher*, 30 Gratt. 56.

Error Must Appear by the Record.—Upon a supersedeas being obtained to a judgment, it is the duty of the appellants to take a certificate of the facts proved, or a bill of exceptions containing the evidence and thus show affirmatively that there is error in the judgment, otherwise the appellate court is bound to conclude that the decision was warranted by the evidence adduced on the trial. *Gunn v. Turner*, 21 Gratt. 382; *Cooper v. Hepburn*, 15 Gratt. 551; *Ball v. Cox*, 29 W. Va. 407, 1 S. E. Rep. 673.

Where no formal bills of exception appear from

the record to have been filed to any ruling which was made prior to the rendition of the verdict, *Add*, all exceptions or points saved, during the trial, must be considered as having been abandoned. *Whalen's Case*, 90 Va. 544, 19 S. E. Rep. 182.

Cannot Supply Essential Part of Record.—It is a settled principle that the presumption that a court of general jurisdiction acts rightly cannot supply an essential part of the record in a felony case. *Spurgeon's Case*, 86 Va. 652, 10 S. E. Rep. 979; *Shelton v. Com.*, 89 Va. 450, 16 S. E. Rep. 355.

The rule that a court of general jurisdiction, acting within the scope of its authority, is presumed to act rightly and to have jurisdiction to render the judgment it pronounces, until the contrary appears, applies only as to those matters concerning which the record is silent; nor can it operate to supply jurisdictional facts which the return, according to the statute, must show affirmatively, *e. g.* that service of process on an officer of a corporation was in the county of his residence, which is required to be shown by the return. *Shenandoah V. R. Co. v. Ashby*, 86 Va. 232, 9 S. E. Rep. 1003.

4. PROCESS.

Form.—Plaintiff having sued out a summons against defendant to answer her action, and judgment being entered by default, it does not expressly appear of record, that the defendant was a person against whom the summons was the proper process under the statute, 1 Rev. Code, ch. 123, § 66, but defendant appeared in term to have proceedings at rules corrected, and did not object to the summons as improper process. *Held*, the court will presume it was the proper process. *Wynn v. Wyatt*, 11 Leigh 584.

Service.—In the absence of evidence showing affirmatively that process had not been executed on one of the parties defendant, the court below, being a court of competent jurisdiction, and both the subject-matter and parties being within that jurisdiction, the judgment "is presumed to be right until the contrary is shown."

It is not sufficient merely to raise a doubt, nor is it necessary that there be an express averment in the record that the party was served with process. *Hill v. Woodward*, 78 Va. 765; *Saunders v. Griggs*, 81 Va. 506.

5. PLEADINGS.

Allowance.—A special plea is offered, and the plaintiff objects to its being filed, but the ground of his objection does not appear. The record only shows that the special plea was filed a year after the general issue had been pleaded. An appellate court cannot say that the plea was improperly received. *Maggort v. Hansbarger*, 8 Leigh 532; *Williams v. Knights*, 7 W. Va. 335.

Rejection.—The decision in *White v. Toncray*, 9 Leigh 347, that where pleas are rejected, an appellate court will take it to have been rightly done unless the defendant has excepted, approved and acted on. *Herrington v. Harkins*, 1 Rob. 591.

Filing of Pleadings.—Where pleadings are found among the papers in a cause, and are mentioned in the cross-bill as having been filed, though there is no note of how or when they came into the record, it will be presumed that they were duly filed, where it is not denied in the pleadings and the depositions show that such parties were represented by counsel. *Smith v. Proffitt*, 82 Va. 332, 1 S. E. Rep. 67.

When it appears of record that the infant defendants appeared and answered by their guardian *ad litem*, and that there was a general replication

thereto, it will be presumed in the court of appeals that the answer was regularly filed, though the answer itself is not found among the papers in the record. *Smith v. Henkel*, 81 Va. 524.

Where the record does not show when an amended bill and answer were filed, and the court below proceeds to hear the cause upon them without objection, the appellate court will consider them as properly filed. *Henderson v. Alderson*, 7 W. Va. 217.

Overruling of Demurrer.—Where it appears that the court has adjudged the principles of a cause in favor of the plaintiff, it will be presumed that a demurrer was overruled though the record does not show what was done with it. *Smith v. Proffitt*, 82 Va. 882, 855, 1 S. E. Rep. 67; *Matthews v. Jenkins*, 80 Va. 468; *Hinchman v. Ballard*, 7 W. Va. 153; *Hood v. Maxwell*, 1 W. Va. 219, 227; *Bantz v. Bassett*, 12 W. Va. 777. See monographic note on "Demurrers" appended to *Com. v. Jackson*, 3 Va. Cas. 501.

Sustaining Demurrer.—Where the court below sustains a demurrer to the declaration, but does not state the ground on which it acted, if the judgment is right for any reason, the court of appeals will presume that the court below acted on that reason and affirm its judgment. *Rigg v. Parsons*, 20 W. Va. 522, 2 S. E. Rep. 81.

Petition for Rehearing or Bill of Review—Compliance with Requirements.—Where a writ of error is taken to the action of the lower court in overruling a petition for rehearing or bill of review, it will be presumed that such petition or motion was in writing, presented in due form and containing the requisite averments. *Scott v. Rowland*, 82 Va. 484, 4 S. E. Rep. 596.

6. EVIDENCE.

Admission.—A party complaining of the admission of improper evidence, must state the facts or the evidence in his bill of exceptions, from which it will appear affirmatively to the appellate court that the evidence was improper, otherwise it will be presumed that the lower court did not err in the admission of the evidence. *Carlton, etc., v. Mays*, 8 W. Va. 245; *Johnson v. Jennings*, 10 Gratt. 1.

A deposition having been taken, after the cause was set for hearing in the superior court of chancery, and no objection appearing to have been made in that court, the court of appeals will presume that good cause was shown for admitting it. *Stubbs v. Burwell*, 2 H. & M. 586.

Where evidence is admitted of the general reputation of the prosecutrix in rape for chastity it will be presumed that her character had been attacked when the contrary does not appear by the record. *Coleman v. Com.*, 84 Va. 1, 3 S. E. Rep. 878.

Rejection.—Where the evidence is not set forth in the record, it will be presumed that the trial court acted properly in rejecting it. *Fry v. Leslie*, 87 Va. 220, 222, 12 S. E. Rep. 671.

Assignment of error in refusing to allow a witness to answer a certain question is unavailable in the appellate court where the record does not show what the answer would have been. *Taylor's Case*, 80 Va. 100, 17 S. E. Rep. 812.

Where parol evidence is excluded, which might be proper when connected with a record, the bill of exception should state that such record was offered. Otherwise, it will be presumed that the parol evidence alone was offered. *M'Dowell v. Burwell*, 4 Rand. 317.

Sufficiency.—Unless the evidence relied on to reverse a judgment is made a part of the record the appellate court will presume that the judgment was

supported by sufficient evidence. *Preston v. Auditor*, 1 Call 471; *Winston v. Overseers*, 4 Call 357.

Upon the hearing of a rule against a person to show cause why he should not give up possession of a certain tract of land which had been sold to another under a decree of court, the court makes a decree which shows that the court heard the cause upon the rule, the answer thereto, * * * and upon the depositions taken upon the rule, and the evidence of the witnesses adduced in open court, but the record does not show what "the evidence of the witnesses adduced in open court" was. *Held*:

The appellate court will not assume that the court below erred in its decree when the testimony that was had before that court has not been preserved and is not before the appellate court. *Paxton v. Rucker*, 15 W. Va. 547.

Where the bill of exceptions fails to give the evidence before the jury, the court of appeals will presume that the verdict was correct even though there are depositions in the record, if it does not appear that they were the *only* evidence. *Ayres v. Robins*, 30 Gratt. 106.

Where all the evidence is not certified, it will be presumed that there was some evidence not set out in the record which justified the verdict of the jury. *Adams v. Hays*, 86 Va. 153, 9 S. E. Rep. 1019.

Upon a bill for a new trial of an action at law, on the ground of after-discovered evidence, the record of the case at law not showing what evidence was before the jury, or what facts were proved on the trial, and the chancery record not giving that information; and the same judge who tried the cause at law, having dissolved the injunction and dismissed the bill, the appellate court has not the materials to enable them to review the decree; but must presume it to be correct. *Markham v. Boyd*, 22 Gratt. 544.

Where a judgment was rendered against a party as principal on a bond who claims that he was surety, in the absence of any evidence in the record on the subject it will be presumed that the lower court had evidence that he was principal and not surety. *Cunningham v. Mitchell*, 4 Rand. 189.

Where accused was indicted for selling liquor at Prillman's precinct, in the county of Franklin, without a license, the jury found him guilty, and he moved to arrest the judgment because the proof was not that he sold at the house or within the curtilage at Prillman's precinct, but in the woods some three or four hundred yards from the house, and the court overruled the motion and rendered judgment on the verdict, it not appearing that the bill of exceptions contained all the evidence, the court of appeals must presume that there was proof that the sale of liquor was at Prillman's precinct, and that it was in the county of Franklin. *Massie's Case*, 30 Gratt. 841.

But where in an action on a negotiable note the lower court certifies that the certificate of the evidence contains *all* the evidence adduced, and it does not appear by the certificate that the note was offered in evidence, it cannot be presumed that it was offered. *Davis v. Poland*, 92 Va. 226, 23 S. E. Rep. 292.

Where the court below certifies the facts proved, the finding of the jury in favor of the plaintiff, does not raise the presumption that there was evidence before the jury of a fact essential to the plaintiff's case, where such fact is not certified, and the certificate purports to set out all the facts proved. *Anglin v. Bottom*, 8 Gratt. 1.

7. INSTRUCTIONS.—Until the contrary appears by bill of exceptions it will be presumed that the action of the court below in giving or refusing an instruction was correct. *Shepherd v. McQuilkin*, 2 W. Va. 90; *Wise v. Postlewait*, 3 W. Va. 452; *Fitzhugh v. Fitzhugh*, 11 Gratt. 300; *Hood v. Maxwell*, 1 W. Va. 219, 238. See also, monographic note on "Instructions" appended to *Womack v. Circle*, 20 Gratt. 192.

Where the court refuses an instruction to the jury, the appellate court would not reverse the judgment, unless enough of the evidence had been set out in the exception to show the relevancy and propriety of the instruction, because error must affirmatively appear; and for the same reason, if the court gives the instruction, before the appellate court will reverse the judgment the record must show the instruction wrong, or that it could not, in any aspect of the case be properly given. *Kinsley v. Monongalia County*, 81 W. Va. 464, 7 S. E. Rep. 445; *Powell v. Tarry*, 77 Va. 250.

Where a court refuses to give an instruction asked, and its opinion is excepted to, if the bill of exceptions does not state that evidence was offered tending to prove the case supposed by the instruction, and the court has simply declined to give the instruction, such refusal may perhaps be justified, on the ground that the case was merely hypothetical, and the instruction asked on an abstract question. But if the court not only declines to give the instruction asked, but proceeds to give another in lieu thereof, the inference is a reasonable one, that there was evidence tending to prove the case supposed, and the appellate court will not only enquire whether the law is correctly expounded in the instruction given, but will also enquire whether it is correctly stated in the instruction asked. *Chapman v. Wilson*, 1 Rob. 267.

8. ORDER SUMMONING GRAND JURY.—Where the record does not affirmatively show, that an order to summon a grand jury was made, in the silence of the record, it will be presumed that such an order was made. The order itself is not a necessary part of the record of the case, since the commencement of the case was the finding of the indictment, and that was necessarily subsequent to the making of the order. *Robinson v. Com.*, 88 Va. 900, 14 S. E. Rep. 627.

9. CHANGE OF DATE OF OFFENSE IN INDICTMENT.—Where an original indictment is brought before the appellate court, and it appears upon inspection thereof that the date of the year in which the offense is charged to have been committed has been changed, the appellate court, in the absence of anything in the record to show when the change was made, will presume that the same was made before the finding of the indictment. *State v. Ball*, 30 W. Va. 322, 4 S. E. Rep. 645.

10. DENIAL OF RIGHT TO BE TRIED SEPARATELY.—Persons jointly indicted cannot be tried jointly without the concurrent election of themselves and the attorney for the commonwealth. Either has the right to demand a separate trial. But even if it were otherwise, and the accused had the election to be tried separately or jointly where the record is silent on the subject of election, the appellate court will not presume that any right has been denied the accused, where she has been tried separately, in the absence of anything in the record to show that she elected to be tried jointly and that the right was denied her. *Barnes v. Com.*, 92 Va. 794, 23 S. E. Rep. 784.

11. DENIAL OF RIGHT TO HAVE COUNSEL.—Every

person accused of crime has a right to have counsel to aid him in his defence, but no one is compelled to employ counsel. If the record fails to show whether the accused had counsel or not, or even if it shows that he did not have counsel, it is not ground for reversal, unless it further appears that the right to have counsel was denied. It is not to be presumed that the right was denied. *Barnes v. Com.*, 92 Va. 794, 23 S. E. Rep. 784.

Keeping Prisoner in Irons.—When the record is silent as to whether there was or was not any valid excuse for retaining the irons upon the prisoner during trial, the appellate court will presume that the court below exercised a sound and reasonable discretion in not causing them to be removed. *State v. Allen*, 45 W. Va. 65, 30 S. E. Rep. 209.

12. DISCHARGE OF JURY.—If it does not appear on the record that the defendant objected, it will be presumed in the appellate court, that the court below discharged the jury, empaneled and sworn in the case, for sufficient cause, and with the consent or acquiescence of the defendant. *Dye v. Com.*, 7 Gratt. 662.

13. SPECIAL TERM OF COURT—COMPLIANCE WITH PROVISIONS OF STATUTE.—So where a special term is held under § 3000, Code Va. 1887, it will be presumed that all the provisions of that act were complied with. *Hartman v. Copenhagen*, 89 Va. 896, 17 S. E. Rep. 482.

14. ADJOURNMENT.—If it does not appear affirmatively that adjournments were irregular, in the absence of objection on that ground in the court below, an appellate court will presume that they were regular. *Hill v. Bowyer*, 18 Gratt. 364, 381.

15. VERDICT.—A verdict of a jury is taken to be correct, in an appellate court, where the record contains none of the evidence before the jury. *McClure-Mable Lumber Co. v. Brooks*, 46 W. Va. 732, 34 S. E. Rep. 921.

16. REMANDING CAUSE.—Under the statute, § 25, ch. 178, Code 1873, if the record states that the cause was remanded "for good cause shown or by consent," it will be presumed in the absence of evidence to the contrary that such action was correct, yet, if the record does not so state, it will not be presumed that it was "by consent of parties or for good cause shown," and the judgment will be reversed, nor need objection have been made in the lower court, as it would have been unavailing. *Wynn v. Heninger*, 82 Va. 172.

Where a demurrer is sustained and a cause is remanded to rules with leave to the plaintiff to amend, it will be presumed, the contrary not appearing, that it was remanded at the instance of the plaintiff. *White v. Ches., etc.*, R. Co., 26 W. Va. 800.

17. SETTING ASIDE JUDGMENT.—When a judgment is set aside by the court during the term at which it was rendered, the appellate court will presume that it was rightfully set aside unless the contrary affirmatively appears by the record. *Green v. Pittsburg, etc.*, R. Co., 11 W. Va. 665.

When the bill of exceptions sets out the specific grounds on which the court set aside the verdict of the jury, the court of appeals will presume, unless the contrary appears, that it acted on those grounds alone, and, if those grounds are clearly insufficient, that court will reverse the order setting aside the verdict; but, generally, it takes a stronger case to reverse an order granting, than it does one refusing, a new trial. *Probat v. Braenlich*, 24 W. Va. 354.

18. REVIVAL OF CAUSE.—A *scire facias* to revive an

action of detinue against an administrator, should suggest the coming of the property into the hands of the administrator, since the death of the testator, but, the *scire facias* not being in the record nor in the clerk's office of the court below and no objection appearing to have been taken to it in that court, the court of appeals will presume that it was in all respects regular. *Hunt v. Martin*, 8 Gratt. 578.

Upon a plea of *nul tiel record* to a *scire facias*, as the court below has the whole record before it, in the absence of the record in the appellate court, it will be presumed, that the part of the record recited in the *scire facias* was before the court below, and that the order reviving the decree is correct. *Garrison v. Myers*, 12 W. Va. 380.

19. **ISSUANCE OF PREVIOUS FI. FA. IN GOOD TIME.**—The presumption is, where a *f. fa.* is issued more than a year after judgment, not that it is the first *f. fa.*, but the contrary. The burden of proof is on the debtor to prove it the first. *Spotts v. Com.*, 85 Va. 531, 8 S. E. Rep. 375.

20. **QUASHING INQUISITION OF AD QUOD DAMNUM.**—Where a supersedeas is granted to a judgment of the district court affirming a judgment of the county court quashing an inquisition of *ad quod damnum* on a petition to build a mill, in the absence of a bill of exceptions to the court's opinion it will be presumed that its action was proper and its judgment will be affirmed. *Noel v. Sale*, 1 Call 495.

21. **OVERRULING MOTION TO QUASH RETURN.**—When no exception is taken to the action of the court below in overruling a motion to quash a return, it will be presumed that its action was right. *Thompson v. Boggs*, 8 W. Va. 63.

22. **HEARING OF CAUSE.**—When the record does not show that any objections were made by the appellant to the hearing of the cause, the presumption is that the cause was heard without objection. *Gardner v. Landcraft*, 6 W. Va. 86.

23. **SETTING OF CAUSE FOR HEARING.**—In an appellate court, where it does not appear from the record that a cause in chancery was set for hearing at rules before it was heard, but it does appear that the complainants, who are the appellees, had a right to set it for hearing at the rules preceding the term at which it was heard, that the decree recited that it was heard on the bill, answers and exhibits, and was argued by counsel, and the pleadings presented a mere question of law, there being no issue of fact, it will be presumed that it was actually set for hearing, or that it was heard by consent. *Raney v. Heath*, 2 Pat. & H. 206.

24. **THAT ALL THE EVIDENCE WAS FILED BY COMMISSIONER WITH REPORT.**—It will be presumed, where a cause was referred to commissioner and exceptions filed, that he filed with his report all the evidence, as required by Acts 1895, ch. 8, § 7. *Central City Brick Co. v. Norfolk & W. R. Co.*, 44 W. Va. 286, 28 S. E. Rep. 926.

25. RECITALS IN DECREES.

Attachments.—Where two decrees recite that the case was heard upon an attachment sued out and levied, it will be presumed that an attachment was duly sued out and levied, although the attachment mentioned in the record was quashed. *Taylor v. Cox*, 23 W. Va. 148, 9 S. E. Rep. 70.

Process.—Where it does not appear from the record whether process was duly served, or order of publication duly published and posted, or not, except from the decree, which declares that "process was duly served" or "order of publication was duly executed as to the defendants," it will be presumed

that it was so served or executed. But when the record shows the process or order of publication, and shows clearly that process was not served or order of publication executed as to any particular defendant, such declaration in the decree will not raise such presumption as to such defendant. *Styles v. Laurel Fork Oil & Coal Co.*, 45 W. Va. 374, 23 S. E. Rep. 237; *Moore v. Holt*, 10 Gratt. 284.

A recital in a decree that all the defendants had been duly summoned, is conclusive on appeal in the absence from the record of anything to the contrary. *Moore v. Green*, 90 Va. 181, 17 S. E. Rep. 872; *Arnold v. Arnold*, 11 W. Va. 449.

Where a decree states that an order of publication against an absent defendant, has been duly published, it is to be taken in an appellate court, that everything required by the statute was done. *Moore v. Holt*, 10 Gratt. 284.

Appearance.—Although one of the defendants was not served with process, if the record recites that the defendants appeared and pleaded, it will be presumed, on appeal, the contrary not appearing on the record, that the defendant who was not served with process also appeared and pleaded, and so waived the objection as he had a right to do. *Shields v. Bank*, 5 W. Va. 259.

26. **APPOINTMENT AND QUALIFICATION OF COMMISSIONER.**—Where the order of the circuit court, referring a cause to a person to take, state and settle an account of indebtedness, designates him "a master commissioner of this court," and there is nothing in the record to shew he was not one of the commissioners of the court, *held*, the appellate court will in such case, consider him regularly appointed and qualified as such commissioner. *Hickman v. Painter*, 11 W. Va. 386.

27. **ISSUANCE OF GRANT.**—Defendants in ejectment rely upon an outstanding title in a third person, and offer in evidence an abstract of the patent certified by the register, which is received without objection. This is to be regarded in the appellate court as *prima facie* evidence that such a grant was issued, though the case came up on a demurrer to evidence. *Atkins v. Lewis*, 14 Gratt. 30.

28. **FORECLOSURE OF MORTGAGE.**—Though the time allowed for the redemption of a mortgage be only thirty days, an appellate court will nevertheless presume that the discretion of the court below has been properly exercised, if no application appears to have been made to that court for an extension of time. *Harkins v. Forsyth*, 11 Leigh 294.

29. **DEATH OF INTESTATE'S WIFE.**—Neither the bill nor the answer referring to the wife of an intestate and there being no proof that she is alive, the appellate court will presume that she is dead, in a bill by the children of the intestate against the administrator. *Thomas v. Dawson*, 9 Gratt. 531.

30. **THAT OFFENCE WAS COMMITTED WITHIN THE PERIOD OF LIMITATION.**—After a verdict of conviction for misdemeanor, an appellate court will presume that the offence was proved to have been within the period of limitation, where the record does not show the contrary. *Earhart v. Com.*, 9 Leigh 671.

31. **PROCEEDINGS TO OPEN ROAD.**—Under the act of 1836, the county courts having authority to dispense with that act in proceedings to open a road and to proceed under the act of 1819, on appeal it will be presumed that it has made such an order, where it has proceeded under the former act. *White v. Coleman*, 6 Gratt. 138.

32. **PROBATE PROCEEDINGS.**—Upon an issue of *dev-*

isavit vel non, the verdict of the jury in favor of the will, approved by the court before which the issue was tried, concludes all mere questions of fact, depending upon the credit to be given to witnesses. And, therefore, in such case, in an appellate court, it must be taken that all the requirements of the statute, in order to establish the will, were satisfactorily proved; and the identity of the paper is one of the facts settled by the verdict. *Jesse v. Parker*, 6 Gratt. 57.

VIII. REVERSIBLE ERROR.

A. IN GENERAL.

1. **MUST BE MANIFEST.**—Courts of appellate jurisdiction cannot proceed, in annulling decrees from which appeals have been taken, upon mere conjecture or suspicion of error; the error must be made manifest, to the prejudice of the appellant. *Reed v. Nixon*, 36 W. Va. 681, 15 S. E. Rep. 416.

2. **MUST APPEAR BY THE RECORD.**—Where an appellant complains of a decree of a circuit court, and asks for a reversal, he must present such a record as will make it manifest—First, that error has been committed; and, secondly, that he has been injured thereby. *Reed v. Nixon*, 36 W. Va. 681, 15 S. E. Rep. 416.

When exception is taken to the admission or exclusion of evidence, or the granting or refusing of instructions, or indeed to any other ruling of the court below at the trial, the bill should be so framed, by the insertion of proper matter as to make the error, if any, apparent; otherwise the exception will generally be unavailing. *Harman v. City of Lynchburg*, 33 Gratt. 37; *Coleman v. Com.*, 84 Va. 1, 3 S. E. Rep. 878. See generally, monographic note on "Bills of Exception" appended to *Stoneman v. Com.*, 25 Gratt. 887.

3. **BURDEN OF PROOF.**—It is the duty of the party seeking to have a decision reversed, to show that there is error. *Rowt v. Kille*, 1 Leigh 216; *Carlton v. Mays*, 8 W. Va. 245; *Furbree v. Shay*, 46 W. Va. 736, 34 S. E. Rep. 746.

B. **MUST BE PREJUDICIAL.**—Where it clearly appears affirmatively that an error of the lower court could not affect the merits of the case, nor in any way be prejudicial to the party appealing, the appellate court will not reverse the judgment on the ground of such error. *Kincheloe v. Tracewells*, 11 Gratt. 587; *Moran v. Clark*, 30 W. Va. 358, 4 S. E. Rep. 303; *Stinson v. Barley*, 1 Va. Dec. 745; *Ogle v. Adams*, 12 W. Va. 313; *Handy v. Scott*, 26 W. Va. 710, 717; *Miller v. Rose*, 21 W. Va. 291; *Fisher v. McNulty*, 30 W. Va. 186, 3 S. E. Rep. 593; *Hood v. Bloch*, 29 W. Va. 244, 11 S. E. Rep. 910; *Tebbs v. Lee*, 76 Va. 744; *Rea v. Trotter*, 26 Gratt. 585; *James v. Gibbs*, 1 P. & H. 277; *Coyle v. Baltimore, etc., R. Co.*, 11 W. Va. 94; *Elliott v. Sutor*, 3 W. Va. 37; *Bank v. Lockwood*, 13 W. Va. 392, 432; *Bank v. Evans*, 9 W. Va. 373; *Boggs v. Bodkin*, 32 W. Va. 566, 9 S. E. Rep. 361; *Ruffner v. Hill*, 31 W. Va. 423, 7 S. E. Rep. 13; *Western M. & M. Co. v. Van Cannel Coal Co.*, 10 W. Va. 250, 295; *Anderson v. Doolittle*, 38 W. Va. 633, 18 S. E. Rep. 726; *Long v. Perine*, 44 W. Va. 243, 28 S. E. Rep. 701; *Martin v. Kester*, 49 W. Va. 647, 39 S. E. Rep. 599.

If, on the undisputed facts, the case is plainly for the defendants, all errors committed by the court on the trial are harmless errors, so far as the plaintiff is concerned. *Davis v. Living*, 50 W. Va. 431, 40 S. E. Rep. 365.

Error will be presumed prejudicial, unless it plainly appears that it could not have affected the result. *Norfolk Ry. & Light Co. v. Corletto (Va.)*, 41

S. E. Rep. 740; *Stainback v. Bank of Va.*, 11 Gratt. 280; *Colvin v. Menefee*, 11 Gratt. 87; *Clarke v. Beina*, 12 Gratt. 98; *Johnson v. Jennings*, 10 Gratt. 1; *Early v. Wilkinson*, 9 Gratt. 68; *Ross v. Gill*, 1 Wash. 87; *Pate v. Spotts*, 6 Munf. 394; *Morris v. Morris*, 4 Gratt. 293; *Crawford v. Morris*, 5 Gratt. 90; *Vance v. McLaughlin*, 8 Gratt. 269; *Franklin v. Depriest*, 13 Gratt. 267; *Carrington v. Goddin*, 13 Gratt. 467; *Richmond, etc., R. Co. v. Medley*, 75 Va. 499; *W. U. Tel. Co. v. Reynolds*, 77 Va. 174; *Rorer Iron Co. v. Trout*, 83 Va. 397, 2 S. E. Rep. 713; *Clark v. City of Richmond*, 83 Va. 355, 5 S. E. Rep. 369; *Richmond, etc., R. Co. v. Norment*, 84 Va. 167, 4 S. E. Rep. 211; *Lucas' Case*, 84 Va. 303, 4 S. E. Rep. 606; *Handly v. Snodgrass*, 9 Leigh 484.

A criminal case will not be reversed unless the record shows error committed, prejudicial to the prisoner. *State v. Lane*, 44 W. Va. 730, 29 S. E. Rep. 1020.

Where the appellant is not interested in an assignment of error, the appellate court will not consider it. *Tebbs v. Lee*, 76 Va. 744; *Reid v. Stuart*, 13 W. Va. 338; *Sturm v. Fleming*, 26 W. Va. 54.

An appellant has no right to complain of matters decreed between co-appellees in the cause which are not to his prejudice. *Mann v. Lewis*, 3 W. Va. 215.

In a suit to set aside a conveyance from husband to wife as fraudulent, the decree will not be reversed on the appeal of the wife alone because depositions were read against her husband, of the taking of which he had no notice, where she had notice. *Silverman v. Greaser*, 27 W. Va. 550.

When the parties, whose interests would entitle them to call for a decision upon a particular question presented by the record, waive such decision, the court of appeals will not pass upon such question at the instance of a party who cannot be benefited or affected by such decision. *Stribling v. Splint Coal Co.*, 31 W. Va. 82, 5 S. E. Rep. 331.

Where a defendant, a short time before the institution of a suit against him, has relinquished all right to and interest in the subject-matter of controversy, and subsequently, before the hearing, has his relinquishment put upon record, he cannot complain that the circuit court, without awarding any costs against him, has entered a decree in favor of the plaintiff, confirming the relinquishment. *Workman v. Doran*, 34 W. Va. 604, 12 S. E. Rep. 770.

So where appellant is not entitled to set up the plea of the statute of limitations, he cannot complain because the court below did not sustain the plea when set up by his debtor. *Clayton v. Henley*, 32 Gratt. 65.

Beneficial Error.—Appellant shall not be heard to object to errors which are for his benefit. *Hammit v. Bullett*, 1 Call 567; *Smith v. Harmanson*, 1 Wash. 6; *Pendleton v. Vandevier*, 1 Wash. 281; *Martin v. Stover*, 2 Call 514; *Farmers' Bank v. Willis*, 7 W. Va. 32; *Logan v. Dils*, 4 W. Va. 397; *Orange, etc., R. Co. v. Fulvey*, 17 Gratt. 366; *Elb v. Martin*, 5 Leigh 132.

If an exception is taken to an opinion of the court excluding written evidence, and the evidence is made a part of the exception, and is against the party excepting, the exclusion of the evidence is not error of which the exceptant can complain. *Johnson v. Jennings*, 10 Gratt. 1.

Instances—Application of Money Due by Covenant.—A person bound by covenant to pay a sum of money, cannot complain of any error in the application of

such money, since such error is not prejudicial to him. *Chappell v. Robertson*, 3 Rob. 590.

Refusal to Sign Bill of Exceptions.—The court of appeals will not reverse a judgment on the ground that the court below refused to sign and seal a bill of exceptions to its opinion overruling a motion for a new trial, if the weight of evidence exhibited, support the verdict. *Shanks v. Fenwick*, 3 Munf. 478.

Refusal to Suspend Decree.—Although the lower court in violation of § 4, ch. 178, Code 1887, refuses to allow a suspension of a decree in order to allow the appellant to apply for an appeal, if he obtain an appeal from the court of appeals promptly, and is not injured by such action, the decree will not be reversed on that account. *Todd v. Gallego, etc.*, 57 G. Co., 84 Va. 596, 597, 5 S. E. Rep. 676.

Priority of Liens.—In a suit to subject the land of a debtor to the payment of his debts, neither the debtor nor a creditor on appeal can complain that the debtor's interest in a certain tract of land was not laid off, where that interest was not decreed to be sold. *Grantham v. Lucas*, 24 W. Va. 281.

Failure of Verdict to Set Out Character of Estate.—Where the verdict in ejectment fails to find the character of the estate which the plaintiff claims, he alone can complain of that, not the defendant. *Elliott v. Sutor*, 3 W. Va. 37.

Nor can the debtor object that the priorities of the several judgments was fixed according to the date of the docketing of the judgments, instead of the date of the judgments themselves, neither of these errors being to the prejudice of the party complaining. *Grantham v. Lucas*, 24 W. Va. 281; *Hill v. Morehead*, 20 W. Va. 429.

Personal Decree Improperly Made.—So where a personal decree is improperly made, but it is satisfied out of land which is properly liable to the payment of the charge, the appellant not being prejudiced, the decree will not be reversed. *Fisher v. Brown*, 24 W. Va. 713.

Refusal to Rehear Correct Decree.—A decree will not be reversed on account of the refusal of the lower court to rehear a decree in which there is no error. *Camden v. Haymond*, 9 W. Va. 680, 693.

Allowing Petition for Rehearing to Be Filed after End of Term.—Although the action of the lower court in allowing a petition for a rehearing to be filed after the end of the term by entirely new parties was erroneous, it is not ground for a reversal, where appellant is not aggrieved thereby. *Roanoke, etc., Bank v. Farmers', etc., Bank*, 84 Va. 603, 5 S. E. Rep. 682.

Want of Notice.—If the plaintiffs in error have sustained no injury by the want of notice of a motion to set aside a judgment, and could not possibly have sustained any, they certainly are not entitled to reverse upon that ground the order setting aside a judgment and quashing the execution. *Ballard v. Whitlock*, 18 Gratt. 235.

Prejudice to Any Party Sufficient.—A decree need not be prejudicial to the appellant in order to be reversed. It is sufficient if it is prejudicial to the right of any parties, appellant or appellee since the whole decree may be reviewed and any error therein to the prejudice of any parties to the suit, whether appellants or appellees, complaining thereof, may be corrected.

This follows from the fact that a general affirmation of the decree would bar any of the parties from an appeal thereunder. *Worthington v. Staunton*, 16 W. Va. 208, 234.

Compensating Errors.—Although a decree gives interest on a sum which, according to the mode of stating the account, is itself interest, yet if it be manifest that a settlement upon proper principles would have made the balance larger, and that such balance would have been the principal, the decree will not be reversed at the instance of the debtor. *Handly v. Snodgrass*, 9 Leigh 484.

Where, though the decree makes no allowance for improvements which purchasers allege they have made upon the lands, yet, as the rents and profits of the lands, or the interest on the purchase money, with neither of which they are charged, would amount to more than these improvements which they claim, it was held there was no error in the decree. *Toash v. Robertson*, 27 Gratt. 270.

If the inferior court has admitted an improper plea, notwithstanding the objections of the plaintiff, and has afterwards rejected the evidence in support of it, it has but remedied the first error by the commission of the second; and the court of appeals could with no propriety reverse the last act, and thereby resuscitate the former error to the plaintiff's prejudice. *Wilson v. Spencer*, 11 Leigh 261.

C. MUST BE MATERIAL.

Insignificant Error.—Where the amount involved in the error is insignificant, the decree will not be reversed on the principle of *de minimis lex non curat*. *Lovett v. Thomas*, 81 Va. 245, 257.

Mere Informalities.—Though the proceedings of the lower court were irregular, yet if the results reached are the same as if they had been regular, the decree will not be reversed on that account. *Max Meadows, etc., Co. v. McGavock*, 98 Va. 411, 36 S. E. Rep. 490; *Beery v. Homan*, 8 Gratt. 48.

The appellate court will not reverse a decree for mere formal errors which may be corrected by that court, when upon the whole record it appears that the decree complained of is manifestly right or that no error was committed to the prejudice of the party seeking to reverse it. *Barnett v. Ames*, 1 Va. Dec. 1.

In debt on a bond with a collateral condition, the jury who try the issues find the same for the plaintiff, and assess his damages, and allow interest thereon: and the judgment is entered for the damages so assessed, with interest and costs, instead of being entered for the penalty of the bond and costs, to be discharged by the damages, interest and costs. *Held*, though the judgment is not entered in proper form, yet the error in the form producing no injury to the defendant, the judgment will not be reversed therefor. *Accord. Pate v. Spotts*, 6 Munf. 394; *Wilson v. Spencer*, 11 Leigh 261; *Sangster v. Com.*, 17 Gratt. 124.

If an improper plea be received, and issue be taken on it, the court may afterwards set aside the issue and the plea; and if this be in substance and effect done, though in form irregularly done, the proceedings shall not be reversed for such irregularity. *Kemp v. Mundell*, 9 Leigh 12.

A decree will not be reversed for a mere technical error committed upon the trial of an issue, when the appellate court can see from the record that the case has been rightly decided. *Fishburne v. Ferguson*, 84 Va. 87, 114, 4 S. E. Rep. 575.

Upon an appeal from an interlocutory decree, the principles of the decree, and not mere informalities in the form thereof, are the proper subjects of consideration in the appellate court. The decree will not, therefore, be reversed for such errors of form; but will be affirmed without prejudice to the appel-

laint's right to move the court below for a modification of the decree in these respects. *Woodson v. Perkins*, 5 Gratt. 345.

Clerical Errors.—Mere clerical errors are no ground for reversing a judgment. *Roach v. Blakey*, 89 Va. 767, 17 S. E. Rep. 228.

Error Must Not Involve Less Than Jurisdictional Amount.—Where there is no error in a decree except that it gives interest on the aggregate of principal and interest from a time anterior to the rendition of the decree but the difference is not sufficient in amount to give the court of appeals jurisdiction, the decree will be reversed with costs to the appellee and a decree entered for the correct amount. *Lamb v. Cecil*, 25 W. Va. 228.

D. ERRORS NOT AVAILABLE ON APPEAL.

1. **INVITED ERROR.**—An appellant cannot complain of irregularities in the court below for which he is himself accountable, nor of errors of his own committing. *Carpenter v. Utz*, 4 Gratt. 270.

It is not competent for a complainant to dismiss his own bill and then object, in an appellate court, that the prayer of the bill has not been decreed in his favor. *Pitts v. Tidwell*, 8 Munf. 88.

Although the bill names certain parties and asks that they be required to answer the bill, if they do not appear as parties, and the plaintiffs take no decree *nisi* or other order against them, but bring the cause to a hearing or acquiesce in a hearing, and the bill is dismissed generally, the plaintiffs on appeal have no right to have the decree reversed, because the cause was not matured as to such parties. *Warren v. Syme*, 7 W. Va. 474, 500.

Upon the filing of a petition in a pending suit asking to postpone the confirmation of a sale of real estate, if the parties have proceeded to a hearing upon affidavits alone without objection, the appellate court will not reverse the decree for this cause only. *Houghton v. Mountain Lake Land Co.*, 93 Va. 149, 24 S. E. Rep. 920.

Although it was irregular to allow a defendant to file a plea, after an office judgment has been entered, it is not prejudicial to him, and he cannot complain. *Hunter v. Snyder*, 11 W. Va. 198.

A defendant, who by his answer asks the court to make inquiries through its commissioner, more extended than the statement in the bill might justify, and, upon such inquiry, to decree between him and a co-defendant, is thereby precluded in the appellate court from assigning as error such enlarged extent of inquiry, or that a decree between co-defendants was based thereon. *Varce v. Evans*, 11 W. Va. 342.

A judgment ought not to be reversed on the ground that the court, at the instance of the party against whom it was rendered, admitted improper evidence, or erroneously compelled the other party to join in a demurrer to evidence. *Harrison v. Brock*, 1 Munf. 22; *Gimml v. Cullen*, 20 Gratt. 439.

If a party objects to the introduction of evidence which is admitted, and afterwards introduces the same evidence himself, it is not ground for reversing the judgment, although the evidence objected to was incompetent. *New York L. Ins. Co. v. Tallaferrero*, 95 Va. 522, 28 S. E. Rep. 879.

A judgment for the plaintiff ought not to be reversed, on the ground that the court, at the instance of the defendant, gave an erroneous instruction to the jury. *Murrell v. Johnson*, 1 H. & M. 449; *Richmond, etc., R. Co. v. Medley*, 75 Va. 499.

2. **ERRORS CONSENTED TO.**—What is done by con-

sent of parties is no ground for reversal. *Roach v. Blakey*, 89 Va. 767, 17 S. E. Rep. 228.

Consent that the suit shall not abate by the death of parties is obligatory and operates like a release of errors. *Garlington v. Chutton*, 1 Call 580.

3. **ESTOPPEL.**—The plaintiff in error cannot question the jurisdiction of the lower court, whose action he wishes reviewed. *Railroad v. Bd. of Pub. Works*, 28 W. Va. 364.

3. ERRORS IN PLEADINGS.

Improper Rejection.—The rule is settled in West Virginia that the court of appeals will always presume that the defendant was prejudiced by the rejection of a proper plea in the court below, and that, unless it affirmatively appears by the record that no injury could have resulted to the defendant by such rejection of his plea, the judgment will be reversed, without inquiring whether or not the defendant could have been injured. *Flint v. Gilpin*, 29 W. Va. 740, 3 S. E. Rep. 82.

The same is true of the improper rejection of a replication. *Van Winkle v. Blackford*, 28 W. Va. 670.

The appellant is not prejudiced by the rejection of special pleas, every fact provable under which, could have been proved under the general issue which was also pleaded. *Virginia Fire & Marine Ins. Co. v. Buck*, 88 Va. 517, 13 S. E. Rep. 973.

Where a statutory plea in the nature of a plea of set-off is filed, and another is tendered, which only, varies from the first in the amount of damages laid, or in asking to rescind the contract entirely, the rejection of this last plea by the court is not ground for reversing the judgment upon appeal, where the verdict negatives the facts stated in both pleas. *Fleming v. Toler*, 7 Gratt. 310.

Improper Admission.—So where an improper plea has been admitted, the appellate court will presume that it was injurious to the plaintiff unless it appears affirmatively by the record that the plaintiff could not have been injured. *Van Winkle v. Blackford*, 28 W. Va. 670; *Bank v. Kimberlanda*, 16 W. Va. 557.

So where all of plaintiff's evidence was admissible under his general replication and the decree is correct, the decree will not be reversed for error in permitting him to file a special replication, such error not being to the prejudice of the defendant. *Dower v. Seeds*, 28 W. Va. 113, 129.

In an action for defamation, where a special plea of justification is permitted to be filed, which undertakes to justify all the charges in the declaration, but is insufficient in its specifications as to any of them, and other special pleas are filed, justifying, by proper specifications, certain of the charges, and on the trial it appeared that the defendant offered no evidence to the jury to prove the truth of any of the charges not specifically justified in such other pleas, the appellate court will regard the filing of said insufficient plea as harmless error. *Amos v. Stockert*, 47 W. Va. 109, 34 S. E. Rep. 881.

Filing of Pleas to Answer.—Where, with the answer of a defendant, a bond of the plaintiff's decedent was filed, and the plaintiff filed no replication but pleaded *non est factum* to the bond filed with the answer, and on the evidence being heard, the court below decided that the bond was not the deed of the plaintiff, it was held that, while it was irregular and improper to have allowed a plea to have been filed to an answer, and the proper course was, for the plaintiff to have filed a general replication to the answer, accompanied by an affidavit, putting in issue

the execution of the bond, which would have been sufficient to require the defendant to prove such execution, yet, as the plea, which was sworn to, could be treated as an affidavit, as the parties took issue on it, and testimony, and the appellant had not been prejudiced by the irregular proceedings and trial on said plea as such, the decree would not be reversed for such irregularities, substantial justice having been done between the parties. *Simmons v. Simmons*, 33 Gratt. 451.

Rejecting Improper Plea Already Filed.—Although it may, strictly speaking, be irregular for the court after an improper plea has been filed, and thereby become a part of the record, to entertain and grant a motion to reject the same, still if the court does so, it must in substance and effect, be regarded as setting aside the plea, and though it is done irregularly, the proceedings will not be reversed for such irregularity. In such case the court having done right substantially, its proceedings will not be reversed because of mere informality in the mode of doing it. *Hart v. Balt. & O. R. R. Co.*, 6 W. Va. 134.

Want of Plea in Proceeding before a Justice.—A conviction for a violation of an ordinance of a municipal corporation will not be reversed for want of a plea by the defendant. *Town of Moundsville v. Veltion*, 35 W. Va. 217, 13 S. E. Rep. 373.

In a case taken by appeal from the judgment of a justice to the circuit court, where it was tried by a jury, the court of appeals will not reverse the judgment simply because the jury were sworn to "try the issue" between the parties, and the record fails to show that any plea had been filed or issue made in the case, in the absence of anything to show that the plaintiff in error was prejudiced by such irregularity if it was such. *Tully v. Despard*, 31 W. Va. 370, 6 S. E. Rep. 927.

Failure to Swear to Special Plea of Set Off.—Where a special plea in the nature of a plea of set off under § 3290, Code 1887, conforms to the statute except that it was not sworn to, the judgment will not be reversed for such defect, when, upon a survey of the whole record, the judgment appears to be substantially right. *Grayson v. Buchanan*, 38 Va. 251, 13 S. E. Rep. 457.

Failure to Specify Act of Limitation Relied on.—A plea of the statute of limitations should state on what act the defendant relies. Though if it appears that the plaintiff could not probably be mistaken as to the act relied on, the appellate court will not reverse the judgment for the failure of the plea to specify the act. *Wortham & Co. v. Smith*, 15 Gratt. 457.

Want of a Replication.—Where defendant has taken depositions as if there had been a replication, the decree will not be reversed for want of a replication. Code 1873, ch. 177, § 4; *Jones v. Degge*, 84 Va. 635, 5 S. E. Rep. 799; *Kern, Barr & Co. v. Wyatt & Co.*, 20 Va. 285, 17 S. E. Rep. 549.

Under the operation of §§ 35, 36, ch. 125, Code W. Va., where the answer contains material allegations constituting a claim for affirmative relief, and no "reply in writing" is filed by a general replication, and the cause has been heard upon the pleadings thus made up and the proofs taken, if the record shows that it is not such a case, as would before the passage of said sections have made the filing of a crossbill necessary in order to entitle the defendant to the relief sought, the decree will not reverse because no "reply in writing" was filed. *Cunningham v. Hedrick*, 23 W. Va. 579.

Want of Special Replication.—Where there is an answer calling for a special reply, and there is a general replication to it, and the party filing it has gone on and taken depositions as if there were a special reply denying it, and there has been a full hearing of the merits, as if there had been such special reply, the decree will not be reversed for want of such special reply. *Long v. Perine*, 41 W. Va. 314, 23 S. E. Rep. 611.

Filing Special Replication.—If the defendant does not ask affirmative relief, it is error to permit the filing of a special replication, but, if no evidence is offered in support thereof except such as is admissible in support of a general replication, such error will be deemed harmless. *Wick v. Dawson*, 48 W. Va. 469, 37 S. E. Rep. 639.

Failure to Pass on Special Pleas.—Where a cause is tried upon the general issue, and there is a verdict and judgment for the plaintiffs, whilst there is a demurrer to one special plea, and an objection to the admission of another, not acted on by the court, if these pleas present no bar to the action, the failure of the court to pass upon them affords no ground for reversing the judgment. *Peshine v. Shepperson*, 17 Gratt. 472.

Overruling Demurrer.—Where the court overrules a demurrer to certain counts, but all the evidence is admissible under another unobjectionable count, the judgment will not be reversed because of error in overruling the demurrer, since the defendant could not have been prejudiced. *Hood v. Bloch*, 20 W. Va. 244, 11 S. E. Rep. 910.

So also where there is afterwards a demurrer to evidence. *Stolle v. Aetna, etc., Ins. Co.*, 10 W. Va. 546, 550.

To a declaration in assumpsit containing two counts, the defendant pleads the general issue. Afterwards he files two additional pleas to the first count. Upon a demurrer to these pleas, the circuit court, holding both of them to be good, enters judgment for the defendant upon the first count. At a subsequent day, the issue is tried on the second count, and verdict and judgment rendered for the defendant on that count. Upon a supersedeas, the court of appeals is of opinion that there was error in overruling the demurrer. *Held* nevertheless, the defendant is entitled to the benefit of the verdict and judgment on the second count. *Dunn v. Price*, 11 Leigh 203.

Improperly Sustaining Demurrer.—If there are common counts in the declaration, and a special count be included, which is such, that all the facts alleged in it, and on which it is based, could be as well proven by the plaintiff under the common counts, and the court improperly sustains a demurrer to such special count, and the record shows, that at the trial of the case the plaintiff in point of fact sustained no injury from the action of the court in sustaining the demurrer to the special count, the appellate court will not reverse the judgment below because of such error. *Moore v. Supervisors*, 18 W. Va. 630.

Where two counts in a declaration in an action for personal injuries state in detail all the circumstances connected with the occurrence, and there has been a verdict for the plaintiff, which was set aside on a demurrer to the evidence, the court of appeals will not reverse the judgment of the trial court sustaining a demurrer to another count in the declaration stating the same case in very general terms, although the counts may have been good. If there was error, it was harmless. *Childress v. Chesapeake & O. Ry. Co.*, 94 Va. 186, 26 S. E. Rep. 424.

Where a cause is heard on its merits and all the material allegations of the bill are denied in the answer and are not supported by proof, the fact that a demurrer to the bill was sustained, is not error to the prejudice of the appellant. *Tilden v. Maslin*, 5 W. Va. 577.

Refusal to Allow Demurrer to Be Filed.—In an action of detinue there are two counts in the declaration. The first does not allege property in the plaintiff. The second does allege it. The court refuses to allow the defendant to demur to the several counts. The jury find expressly that the property is the property of the plaintiff. *Held*, if the first count is defective, yet the second being good, and the jury finding that the property was the property of the plaintiff, the defendant is not injured by the refusal of the court to allow the demurrer to be filed, and it is no cause for reversing the judgment. *Binns v. Waddill*, 32 Gratt. 588.

If the court below declines to entertain a demurrer, and the declaration is good, the defendant is not prejudiced thereby. *Coyle v. B. & O. R. R. Co.*, 11 W. Va. 94.

Failure to Pass on Demurrer.—Although a demurrer does not appear to have been passed upon, if the appellate court is of opinion that it ought to have been overruled, a judgment for the plaintiff will not be reversed. *Jones v. Stevenson*, 5 Munf. 1; *Creel v. Brown*, 1 Rob. 265; *Dower v. Seeds*, 28 W. Va. 118, 130.

But if of opinion that the demurrer should have been sustained, the decree will be reversed and the cause remanded to proceed to judgment on the demurrer unless the plaintiff amend his declaration on leave obtained in that court. *Creel v. Brown*, 1 Rob. 265; *Green v. Dulany*, 2 Munf. 518.

Failure to Consider Answer.—While it is error to render a decree without considering the answer, yet the decree will not be reversed on that account, if the answer would not have changed the result. *Linsey v. McGannon*, 9 W. Va. 154.

Failure to Consider Exceptions to Answer.—If exceptions to an answer are not well founded, it is not ground to reverse a decree, that they were not set down to be argued, but the cause was heard and decided without passing upon them. *Goddin v. Vaughn*, 14 Gratt. 102.

Failure to Join Issue.—Though an issue be not made up on a special plea, yet if the evidence to sustain it was admissible under the general issue and non assumpsit had been pleaded, the appellate court ought not to reverse a judgment on a verdict for such irregularity, when all the evidence is certified, and sustains the verdict. *Douglass v. Central Land Co.*, 12 W. Va. 502.

Refusal to Allow Withdrawal of Joinder of Issue.—The court of appeals will not reverse a judgment because the court below refused to allow defendant to withdraw his joinder of issue and demur to the replication, where the latter is sufficient in law. *Virginia Fire & Marine Ins. Co. v. Saunders*, 86 Va. 969, 11 S. E. Rep. 794.

F. ERRORS IN EVIDENCE.

Admission.

Generally.—If, in the trial of a case, a court admits evidence offered by the plaintiff against the protest of the defendant, ruling improperly that such evidence is proper testimony, and there is a verdict and judgment against the defendant, the appellate court will, when the question is properly brought before it, presume that the defendant was prejudiced by such improper ruling of the court,

unless it appears from the record affirmatively that, in point of fact, the defendant could not have been prejudiced by such ruling; and this can ordinarily only be made to appear by all the evidence having been certified, and the appellate court being satisfied that, if this improper evidence had been excluded, the plaintiff's case would still have been made out so clearly that, if the jury had found a verdict for the defendant, the court ought to set aside such verdict as unsustained by the evidence, or contrary thereto. *Hall v. Lyons*, 29 W. Va. 410, 1 S. E. Rep. 582; *Preston v. Harvey*, 2 H. & M. 55; *Taylor v. Balt.*, etc., R. Co., 37 W. Va. 39, 10 S. E. Rep. 29; *State v. Musgrave*, 43 W. Va. 672, 28 S. E. Rep. 814; *Nease v. Capehart*, 15 W. Va. 299; *Ins. Co. v. Trear*, 29 Gratt. 255; *Payne v. Com.*, 31 Gratt. 855; *Kerr v. Lunsford*, 31 W. Va. 659, 8 S. E. Rep. 498; *Bernard v. Richmond*, etc., R. Co., 85 Va. 792, 8 S. E. Rep. 785; *State v. Hull*, 45 W. Va. 767, 32 S. E. Rep. 240; *Gerst v. Jones*, 22 Gratt. 518; *Steptoe v. Pollard*, 30 Gratt. 689.

If it may have prejudiced him, though it be doubtful whether it did or not, it will be cause for reversal of the judgment. *Webb v. Big Kanawha & O. R. Packet Co.*, 43 W. Va. 800, 29 S. E. Rep. 519; *Taylor v. Railroad Co.*, 33 W. Va. 39, 10 S. E. Rep. 29; *Insurance Co. v. Trear*, 29 Gratt. 259; *Poindexter v. Davis*, 6 Gratt. 481.

If improper evidence is permitted to go to the jury, and there is an exception thereto, an appellate court must reverse the judgment, though there was other evidence as to the same fact, before the jury. *Poindexter v. Davis*, 6 Gratt. 481.

A party in whose favor the verdict is found on all points is not prejudiced by rulings of the trial court upon the admission of evidence. *Wash.*, etc., R. Co. v. *Alexandria*, 98 Va. 344, 36 S. E. Rep. 385; *Chapman v. Real Estate Co.*, 96 Va. 177, 31 S. E. Rep. 74.

Sufficient Competent Evidence.—A decree appearing plainly right from the competent evidence in the case will not be reversed because of the admission of incompetent evidence. *Ball v. Stewart*, 41 W. Va. 654, 24 S. E. Rep. 632; *Kimmel v. Shroyer*, 28 W. Va. 506; *Watkins v. Wortman*, 19 W. Va. 78; *Ball v. Kearns*, 41 W. Va. 657, 24 S. E. Rep. 633; *Payne v. Grant*, 81 Va. 164; *First Nat. Bank v. Prager*, 50 W. Va. 660, 41 S. E. Rep. 363.

Aliter where it does not clearly so appear. *Kimmel v. Shroyer*, 28 W. Va. 506.

Incompetent and inadmissible testimony will not reverse a decree where the uncontroverted facts in the bill are sufficient to sustain it. *Talbott v. Woodford*, 48 W. Va. 449, 37 S. E. Rep. 680.

Although improper evidence was admitted, *e. g.* that plaintiff was a widow and had six children, nevertheless if it appears that the damages found by the jury are not in excess of what was fully warranted by the legitimate evidence, it is not error for which the judgment will be reversed. *Moore v. City of Huntington*, 31 W. Va. 842, 8 S. E. Rep. 513. So a judgment will not be reversed on account of the admission of the illegal evidence, where conclusive evidence to the same point is afterwards adduced. *Preston v. Harvey*, 2 H. & M. 55.

When a case is tried by a court in lieu of a jury, it is not an error, for which the appellate court will reverse, to hear illegal testimony, if there be enough legal testimony to justify the judgment. *State v. Thacker Coal & Coke Co.*, 49 W. Va. 140, 38 S. E. Rep. 539.

Where a copy of a paper has been properly introduced in evidence, the admission of another copy of

the same paper is no ground for reversing the judgment. *Corbett v. Nutt*, 18 Gratt. 624.

The protest of a negotiable instrument being sufficient to bind the endorser, though parol evidence in aid of it is inadmissible, yet its admission is no ground for reversing the judgment, not being prejudicial to the defendant. *Stainback v. The Bank of Virginia*, 11 Gratt. 260.

Where Evidence Did Not Influence Verdict.—A judgment ought not to be reversed on the ground, that improper evidence offered to the jury by the appellant, was admitted by the inferior court, where it appears that such evidence did not influence the verdict. *Faulcon v. Harriess*, 3 H. & M. 550.

In assumpsit for money lent and paid, the issues being "nonassumpsit," and "the statute of limitations," and the verdict being for the defendant on the last plea alone the admission of improper evidence having reference to the issue on the first plea only, and which could have no influence on the issue on the last plea, is not ground for reversing the judgment. *Johnson v. Jennings*, 10 Gratt. 1.

Where two matters are submitted to a jury, one of them improperly, and the evidence given is pertinent alone to that improperly submitted, such improper submission to the jury, and the evidence thereon, will not affect the verdict on the matter properly before the jury, where the matters are distinct, and it appears that such improper submission and evidence did not confuse the jury, or operate to the prejudice of the party upon the issue properly before the jury. *Miller v. White*, 46 W. Va. 67, 13 S. E. Rep. 332.

Admitted under Immaterial Issues.—The admission of improper evidence under an immaterial issue is no ground for reversal. *Richardson v. Justices*, 11 Gratt. 190.

Admitted under Proper Instructions.—Although evidence was improperly admitted yet if the court had properly instructed the jury, to find as they did, it could not have prejudiced the appellant and hence is not ground for reversal. *Early v. Wilkinson*, 9 Gratt. 68.

Exclusion.

Generally.—The converse of this proposition is equally true,—that, to authorize the reversal of a judgment for refusing to admit relevant testimony, not only must the evidence be relevant, but it must be of such a nature that its rejection may have prejudiced the party offering it. If he may have been so prejudiced, even though it be doubtful whether in fact he was or not, that is sufficient ground for reversing the judgment. *Kerr v. Lunsford*, 31 W. Va. 659, 8 S. E. Rep. 493; *Bartlett v. Patton*, 33 W. Va. 71, 10 S. E. Rep. 21; *Nease v. Capeheart*, 15 W. Va. 299; *Bernard v. Richmond, etc.*, R. Co., 85 Va. 792, 8 S. E. Rep. 785; *George v. Pilcher*, 28 Gratt. 239.

It must be manifest from the record that, notwithstanding such misruling, the party complaining could not have been prejudiced thereby, and that the verdict conforms to the substantial justice of the case. *Krell Plano Co. v. Kent*, 39 W. Va. 294, 19 S. E. Rep. 409.

Afterwards Introduced.—Although the trial court may have refused to permit a proper question to be answered by a witness, its ruling will not be reversed where it appears that, at a subsequent stage of the trial, the facts sought to be elicited by the question brought out, and no prejudice resulted from the refusal. *Crescent Horseshoe Co. v. Eynon*, 95 Va. 151, 37 S. E. Rep. 935.

If a party objects to the introduction of evidence which is admitted, and afterwards introduces the same evidence himself, it is not ground for reversing the judgment although the evidence objected to was incompetent. *New York L. Ins. Co. v. Talliaferro*, 95 Va. 523, 23 S. E. Rep. 879.

Other Sufficient Evidence.—Where evidence is improperly rejected, and such evidence tends to prove an item which may or may not have been taken into account by the jury in fixing the amount in their verdict, and it is manifest and plain that outside of such item, under the evidence, there was ground for finding a verdict for at least the amount found by the jury, and a new trial is refused by the court below, the court of appeals will not for that cause reverse the judgment. *Bartlett v. Patton*, 33 W. Va. 71, 10 S. E. Rep. 31.

Though the chancellor has erroneously excluded evidence, yet if the court of appeals upon full consideration of all the evidence, including that excluded, sees no error in the decree appealed from, it will affirm it. *Rorer Iron Co. v. Trout*, 83 Va. 397, 3 S. E. Rep. 713.

Exclusion of the deposition of defendant in regard to matters covered by allegations of his answers, which are responsive to the bill, is harmless error, the answer being itself evidence. *Smith v. Smith*, 92 Va. 606, 24 S. E. Rep. 280.

Questions.—Where a question is objectionable, but the answer is so indefinite and uncertain that the appellant could not have been injured by it, the decree will not be reversed therefor. *Bullington v. Newport News, etc.*, R. Co., 33 W. Va. 436, 9 S. E. Rep. 876.

Prejudice Must Be Shown by Exceptions.—If a bill of exceptions to the ruling of the trial court allowing or refusing to allow a question to be answered by a witness, fails to give the answer of the witness, or what is expected to be proved by him, the appellate court cannot determine the relevancy, admissibility, or value of the answers, and the exception will not be considered. *Childress v. Chesapeake & O. R. Co.*, 94 Va. 186, 26 S. E. Rep. 424; *Nease v. Capehart*, 15 W. Va. 299.

The party complaining in the appellate court of the rejection of evidence by the court below must state the facts or evidence in his bill of exceptions, from which it must appear affirmatively to the appellate court, that he was prejudiced by the rejection of the evidence. *Taylor v. Boughner*, 16 W. Va. 327.

G. ERRORS OCCURRING AT THE TRIAL.

Rejection of Qualified Juror.—Where a disqualified juror is put on a jury, it is of course error, but, where a qualified juror is improperly rejected, it is a wholly different thing. In such case the man taking his place is qualified and unexceptionable and a judgment will not be reversed for such cause, the appellant not being prejudiced. *Thompson v. Douglass*, 35 W. Va. 337, 13 S. E. Rep. 1015.

Allowing Defendant to Have Affirmative of Issue.—Though the order directing the issue be irregular, still such irregularity, as to giving the defendant the affirmative upon the trial of the issue, not being to his prejudice, he cannot be heard to complain thereof in the appellate court. *Ogle v. Adams*, 12 W. Va. 213.

Denial of Right to Open and Conclude.—The denial of the right to open and conclude the argument is error for which the judgment will be reversed unless it clearly appears from the record that he could not have been prejudiced thereby. *Sammons v.*

Hawvers, 36 W. Va. 678. See, however, Steptoe v. Harvey, 7 Leigh 501.

Unless however the party aggrieved makes a motion for a new trial in the court below, and, on its being overruled, excepts, he will be deemed to have waived his objections. *Sammons v. Hawvers*, 25 W. Va. 678.

Refusing Oyer of Bond.—It is not error to the appellant's prejudice, for the lower court to refuse oyer of a bond, if afterwards the oyer is allowed, when craved a second time. *Vandiver v. Hyre*, 5 W. Va. 114.

Refusal of View.—The appellate court cannot reverse the judgment for the refusal of the court below to send the jury to view the premises, unless it appears from the record that a view was necessary to a just decision. *Baltimore & Ohio R. R. Co. v. Polly, Woods & Co.*, 14 Gratt. 447.

Remarks of Judge to Jury.—Where the court, on the trial of an issue, makes a remark calculated to prejudice the minds of the jury against the defendant, but at the same time tells the jury, that the remark has nothing to do with the cause, and ought not to influence their verdict; and a verdict is rendered for the plaintiff; it was held that such remark was no ground for reversing the judgment on the verdict. *Brooks v. Calloway*, 13 Leigh 466.

Statements of the court in the presence of the jury on immaterial points or such as cannot operate injury to the appellants though improper are not error for which the appellate court will reverse a judgment. *Newlin v. Beard*, 6 W. Va. 110.

Jury Usurping Functions of Court.—Where it is proper that the court, and not the jury, should pass on a matter, and find thereon, but a jury finds upon it and the court renders judgment, if the judgment is the same as the court should have rendered if it had expressly found on such matter, this error is harmless, and not cause for reversal. *Miller v. White*, 46 W. Va. 67, 33 S. E. Rep. 332.

Reading to the Jury from Law Books.—Reading from law books to the jury is not error for which the judgment will be reversed at least where they are read before instructions are given, or if read after they are given, if not in conflict therewith. *Bloyd v. Pollock*, 27 W. Va. 75, 142.

Remarks of Counsel.—Where the remarks of counsel in the closing argument, as to the result of a former trial of the case, were not, in view of the instructions of the court on the subject, prejudicial to the plaintiffs in error, the judgment will not be reversed. *Taylor v. Mallory*, 96 Va. 18, 30 S. E. Rep. 472.

In order to authorize the court of appeals to reverse errors predicated upon the abuse by counsel of the privilege of argument, it should be made to appear that the party asked for, and was refused an instruction to the jury to disregard the authorized statements of the counsel. *Landers v. Ohio River R. Co.*, 46 W. Va. 492, 33 S. E. Rep. 296.

Court Answering Question without Notifying Counsel.—A judgment otherwise correct will not be reversed because the court answered a question propounded by the jury, without notifying counsel. *Bunton v. Danville*, 93 Va. 200, 212, 24 S. E. Rep. 836.

Refusal to Sign Bill of Exceptions.—The court of appeals will not reverse a judgment, on the ground that the court below refused to sign and seal a bill of exceptions to its opinion overruling a motion for a new trial; if the weight of evidence exhibited supports the verdict. *Shanks v. Fenwick*, 2 Munf. 478.

Disregard by Court of One of Its Own Rules.—The

disregard by a circuit court of a rule adopted by itself for the regulation of the practice there is not ground of reversal. *Hudson v. Kline*, 9 Gratt. 379.

H. ERRORS IN VERDICT.

Severing Damages.—In a joint action of trespass an instruction that the jury may sever in the damages, while erroneous, is not error for which the judgment will be reversed on a supersedeas by the defendant. *Crawford v. Morris*, 5 Gratt. 90.

Failure of Verdict to Set Out Character of Estate.—Where the verdict in ejectment fails to find the character of the estate which the plaintiff claims, he alone can complain of that, not the defendant. *Elliott v. Sutor*, 8 W. Va. 37.

Release of Excess in Verdict.—Where, under a lease, there may be recovery of monthly rental for a number of months, but not for all claimed by plaintiff, and he recovers a verdict for more than he is entitled to, he may release the amount beyond the proper number of months, and defendant cannot complain of it. *Roberts v. Bettman*, 45 W. Va. 143, 30 S. E. Rep. 95.

When the illegal part of the damages ascertained by the verdict of a jury is clearly distinguishable from the rest, and may be ascertained by the court without assuming the functions of the jury and substituting its judgment for theirs, the court may allow plaintiff to enter a remittitur for such part, and then refuse a new trial. *Chapman v. Beltz*, 48 W. Va. 1, 35 S. E. Rep. 1013.

Where plaintiff who has recovered a judgment which, as rendered, is clearly erroneous, seeks to avoid a reversal by striking out a part of the judgment, it is incumbent on him to satisfy the court either by materials in the record or by fair presumption, that this can be done without injustice to the defendant. If he cannot do this the defendant is entitled to have the erroneous judgment reversed. *O. & A. R. Co. v. Fulvey*, 17 Gratt. 366.

Failure to Give Nominal Damages.—The failure to give nominal damages, unless it be upon a matter which involves the settlement of a right other than a right to recover damages, is not a ground for reversal. *Briggs v. Cook*, 99 Va. 273, 38 S. E. Rep. 148.

I. ERRORS IN INSTRUCTIONS.

Giving.—It is well settled that the accused has a right to a full and correct statement by the court of the law applicable to the evidence in his case, and that any misdirection by the court, in point of law, on matters material to the issue, is ground for a new trial. *Honesty v. Com.*, 81 Va. 283.

If a misdirection or other mistake of the court appear in the record, it must be presumed that it affected the verdict of the jury, and is therefore a ground for which the judgment must be reversed, unless it plainly appears from the whole record that the error did not, and could not, have affected the verdict. *Kimball v. Borden*, 95 Va. 303, 28 S. E. Rep. 307; *Edmunds v. Harper*, 81 Gratt. 637; *Dinges v. Branson*, 14 W. Va. 100; *Danville Bank v. Waddill*, 27 Gratt. 448; *Rich. Ry., etc., Co. v. Garthright*, 92 Va. 627, 24 S. E. Rep. 267; *Clay v. Robinson*, 7 W. Va. 348.

When an appellate court is of opinion that an instruction given to the jury by the court below is erroneous, the appellate court cannot undertake to determine that the verdict, notwithstanding the erroneous instruction, is right upon the evidence, and therefore to affirm the judgment. But the judgment must be reversed and the cause remanded for a new trial. *Wiley v. Givens*, 6 Gratt. 277.

This seems to be in conflict with the weight of authority. For full discussion, see *foot-note* to Colvin v. Menefee, 11 Gratt. 87.

An instruction given by the court, which, upon the statement of the evidence given by the party excepting, could not be injurious to him, is no ground for reversing the judgment. Colvin v. Menefee, 11 Gratt. 87; Clark v. City of Richmond, 33 Va. 355, 5 S. E. Rep. 309.

In the case of Payne v. Grant, 81 Va. (6 Hansbrough) 164, HINTON, J., delivering the opinion of this court, says: "But we may also add that if there were any error in the giving, or refusal to give instructions, that as the verdict is manifestly right, the defendant could not have been prejudiced thereby; and therefore, such error, if any was committed, can afford no ground for a reversal of the judgment complained of." Bernard v. R. F. & P. R. R. Co., 85 Va. 792, 8 S. E. Rep. 785.

Where the documentary evidence and other facts not controverted, establish conclusively the right of the plaintiffs to a verdict, whether the instructions or any of them properly state the law or not, the giving or refusing to give them cannot injure the defendants. Mercer Academy v. Rusk, 8 W. Va. 373.

An instruction that a killing is *prima facie* wilful and premeditated, and therefore murder in the first degree, held not prejudicial to defendant where a verdict of murder in the second degree, as rendered, was clearly justified by the evidence. State v. Morrison, 49 W. Va. 210, 38 S. E. Rep. 481.

A party in whose favor the verdict is found on all points is not prejudiced by instructions given or refused by the trial court. Washington, etc., R. Co. v. Alexandria, 98 Va. 344, 38 S. E. Rep. 385; Chapman v. Va. Real Estate Inv. Co., 98 Va. 177, 31 S. E. Rep. 74.

Where an instruction is given, which may be understood in two senses, in one correct and erroneous in the other, yet no exception or objection was taken when the instruction was given, and it is obvious, from all the evidence, that the prisoner could not have been injured by the instruction, it affords no ground for reversing the judgment and ordering a new trial. Thornton's Case, 24 Gratt. 667.

If an instruction correctly expounds the law, and is expressed in terms familiar to the books, and well understood by the judicial mind, and especially if the jury or the counsel do not ask an explanation of it, an appellate court will not set the verdict aside, because its true import and meaning possibly may not have been comprehended by the jury. Stoneman's Case, 25 Gratt. 887.

An instruction given at the request of the defendant, and covering only a part of the theory of the defense to which it relates, and tending to prove which there is evidence in the case, is open to criticism because of its narrowness; but if no general instruction stating the law upon such theory is given in the case, and the instruction is not in such terms as to give undue importance to the evidence referred to in it, and it is manifest that the giving of such instruction has not operated to the prejudice of the plaintiff, the judgment will not be reversed on account thereof. Maxwell v. Kent, 49 W. Va. 542, 39 S. E. Rep. 174.

An instruction as to the sufficiency of evidence upon a point which is immaterial, is not error for which the appellate court will reverse the judgment. Pitman v. Breckenridge, 8 Gratt. 127.

If an erroneous instruction be given to a jury

by a court, and it appears, by other bills of exception, that the question, on which that erroneous instruction was given, did not arise in the case, the judgment will be affirmed, notwithstanding the erroneous instruction. Hunter v. Jones, 6 Rand. 540.

Where there have been two trials of an action at law, the first resulting in a verdict for the plaintiff, and the second in a verdict for the defendant, and the defendant has failed to except to the rulings of the trial court in granting or refusing instructions at the first trial, neither party can object to such rulings in the court of appeals; the plaintiff, because he was not injured thereby, and the defendant because he failed to except. Marshall v. Valley R. Co., 97 Va. 653, 34 S. E. Rep. 455.

Refusal.—The court of appeals will not reverse a judgment on account of the refusal of the trial court to give instructions asked for, if the party has not been aggrieved by the refusal. R. & D. R. Co. v. Norment, 84 Va. 167, 4 S. E. Rep. 211.

Whenever a correct instruction is refused, the judgment will be reversed, unless the appellate court can see from the whole record that, even under correct instructions, a different verdict could not have been rightly found, or unless it is able to perceive that the erroneous ruling of the court could not have influenced the jury. Davis v. Webb, 46 W. Va. 6, 33 S. E. Rep. 97; Hall v. Com., 89 Va. 171, 179, 15 S. E. Rep. 517; Boggess v. Taylor, 47 W. Va. 254, 34 S. E. Rep. 739.

The refusal of proper instructions is not error, if other instructions are given covering the same questions. Arthur v. City of Charleston (W. Va.), 41 S. E. Rep. 171.

Rule in West Virginia.—It now being made the duty of the court of appeals to consider the whole evidence by legislative enactment, instructions, whether improperly given or improperly refused, are relegated to a position of minor importance, for the first inquiry must necessarily be as to whether the verdict of the jury is sustained by a decided preponderance of the evidence; and, if such determination is reached, all errors of law committed by the court during the trial must be placed in the category of harmless errors, unless they are so gross that a different ruling would have materially weakened or destroyed the preponderance of evidence. Bank of Huntington v. Napier, 41 W. Va. 481, 23 S. E. Rep. 800.

For the effect of error in giving wrong instructions or refusing correct instructions, see *monographic note* on "Instructions" appended to Womack v. Circle, 29 Gratt. 192.

J. ERRORS IN COSTS.—Whether a decree for costs is as it should be or not is a question that cannot be looked into by the appellate court, when the appeal cannot be supported on any other ground. Boggess v. Robinson, 5 W. Va. 402, 413; Franklin v. Geho, 30 W. Va. 27, 8 S. E. Rep. 168; Pritchard v. Evans, 31 W. Va. 137, 5 S. E. Rep. 461.

Where there is no other error in a decree or judgment, the court of appeals will not reverse it on account of an error in costs merely. Boggess v. Robinson, 5 W. Va. 402; King v. Burdett, 12 W. Va. 688.

But while an appeal does not lie to the court of appeals from a decree for error of judgment in the court below for costs, still where the cause is properly before the court upon subjects other than costs, although the court sees no other error in the decree of the court than in its decree for the costs,

this court may correct the decree of the court below as to the matter of costs, and affirm the decree as thus corrected, although it will not reverse the decree because of error as to costs alone. *Jones v. Cunningham*, 7 W. Va. 707; *Richardson v. Donehoo*, 16 W. Va. 685; *Farmers' Bank v. Woodford*, 84 W. Va. 481, 12 S. E. Rep. 544; *Graham v. Bank*, 45 W. Va. 701, 32 S. E. Rep. 245; *Ashby v. Kiger*, 3 Rand. 165; *Ross v. Gordon*, 2 Munf. 289.

K. ERRORS IN PARTIES.

Defect.—If it appears affirmatively that a person, if made a party, would have been a mere formal party, against whom no decree would have been asked, and whose presence was not necessary for the protection of any of the defendants, the appellate court will not reverse a decree for his absence. *James River and Kanawha Co. v. Littlejohn*, 18 Gratt. 53.

Although necessary parties are not made, yet where they have set up their claims by petition eight years after the institution of the suit and their claims have been investigated on answer filed thereto, the decree will not be reversed. *Triplett v. Romine*, 33 Gratt. 651.

An appellate court will not reverse a decree, dismissing the plaintiff's bill for want of equity, because all proper parties were not before the court. *Mitchell v. Chancellor*, 14 W. Va. 22.

Improper Joinder.—A decree will not be reversed for improper joinder of parties, where the parties alleged to have been improperly joined are asking no relief for themselves, but simply united in a petition as evidence of their acquiescence therein. *Ward v. Funsten*, 86 Va. 359, 10 S. E. Rep. 415.

L. ERRORS IN INTERLOCUTORY DECREES.—Upon an appeal from an interlocutory decree for the sale of land, the appellate court will not reverse the decree because the court did not decree against an absent debtor or direct the giving of security as provided by law in behalf of absent defendants. The final decree may provide for these things. *Kelly v. Linkenhoger*, 8 Gratt. 104.

When a decree appealed from consists in part of an order of reference for a report upon certain specified matters and such other matters, as the commissioner may deem pertinent or be required by any party, if such order is justified by the pleadings and proofs as to the matters specified, the court of appeals will not, before such report is made and acted upon by the court below, reverse or consider the order, because some party under said general clause may require irrelevant or improper matter to be reported to the court. *Sturm v. Fleming*, 26 W. Va. 54.

Failure to Direct Inquiry as to Sufficiency of Rents and Profits.—The appellate court will not reverse an interlocutory decree of sale for failure to direct an inquiry whether the rents and profits will not pay the judgment within five years, if none of the parties ask for it, but will amend the decree, allowing the defendant to have such an enquiry and affirm it so amended. *Ewart v. Saunders*, 26 Gratt. 203.

Where the bill alleges that the rents, etc., will not pay off the debt in five years, and the answer simply contains a general denial of the averments of the bill, the decree will not be reversed for a failure to make the proper inquiry, but, the decree being interlocutory, it may be modified so as to allow it, if the appellant desires it. *Johnson v. Wagner*, 76 Va. 597.

Failure to Give Infants Their Day.—It is not a suffi-

cient ground for reversing an interlocutory decree, that no day was given to an infant defendant to show cause against it, after he should come of age; because such omission may be corrected in the final decree. *Pickett v. Chilton*, 5 Munf. 467.

M. ERRORS IN CHANCERY PROCEEDINGS.

Failure to Direct Issue.—The direction of an issue out of chancery is a matter of sound discretion. The mere omission to do so will not reverse a decree, unless it was asked for. *West Va. Bldg. Co. v. Saucer*, 45 W. Va. 483, 31 S. E. Rep. 966.

Failure to Let Commissioner's Report Lie Thirty Days.—Where a final decree is made upon a commissioner's report less than thirty days after it was returned to the court, and there is nothing to show that the cause was heard by consent, such error may be corrected by appeal, as there is no other mode of correcting it, but no other errors will be considered and the decree will be merely reversed with costs. *Gray v. Dickenson*, 4 Gratt. 87.

N. STATUTE OF JEOPAILS.—For the effect of the statute of jeofails in preventing the reversal of judgments in the appellate court, see monographic note on "Amendments" appended to *Snead v. Coleman*, 7 Gratt. 300, and also monographic note on "Judgments" appended to *Smith v. Charlton*, 7 Gratt. 425.

O. RELEASE OF ERRORS.—A release of errors may and should be pleaded to a writ of error, and if a release is pleaded and found for the plaintiff in error, yet if there is no error, the court cannot reverse the judgment; and if the release be found for the defendant, a different judgment must be given, according as the error assigned is sufficient or not; if it is good error, the judgment must be that plaintiff be barred of his writ of error and not that the first judgment be affirmed. The same is true of a supersedeas. *Hite v. Wilson*, 2 H. & M. 263.

If an appellant, pending his appeal, convey all his right involved in the appeal to his adversary in the appeal, or in any way release error, the fact may be pleaded in bar of his appeal; but failure to so plead will not conclude the right of such adversary under his conveyance. *Ward v. Ward*, 50 W. Va. 517, 40 S. E. Rep. 472.

A party having obtained an injunction to a judgment at law upon the usual condition of a release of errors, omits to execute the release. Pending the injunction suit, he obtains a supersedeas to the judgment at law, but does not perfect the appeal by giving the security. There are repeated applications by him for a renewal of the supersedeas, which are granted, but he does not perfect the appeal. The injunction is proceeded in and decided against him, and he afterwards, more than ten years from the date of the judgment, asks that he may have a writ of error to the judgment at law, without giving security, except for costs, which is granted. His laches in perfecting his appeal being wilful, deliberate and repeated, and the application for the appeal, having been, under the circumstances, improper, the court of appeals will, upon motion by the appellee, dismiss the appeal. *Ross v. Reid*, 8 Gratt. 230.

Acceptance of Less Than Amount Claimed.—Acceptance by appellant of satisfaction of a decree giving him less than he claimed, will not amount to a release of error or estop him from appealing from such decree. *Morris v. Garland*, 78 Va. 215, 335.

IX. ABATEMENT OF APPEAL.

A. BY DEATH OF PARTY.

1. PENDING APPEAL.

a. Generally.—Though there is no abatement of

appellate causes in the court of appeals, whether at law or equity, and our statutes for revival of actions or suits have no application to them; yet a practice prevails there, probably borrowed in substance from that of the English House of Lords, in equity, requiring in case of the death of either party, a revival of the appeal or writ of error by consent or by *scire facias*. It is, however, a general rule of convenience and policy, applicable only where the death of the party is made known to the court and suggested on its record; and there may be circumstances under which the suggestion itself will not be permitted by the court. And if the appellate cause passes through the court without such suggestion, there is no ground for the imputation of error or irregularity in the proceedings there; and the judgment or decree of the appellate court is remitted to the court below, and entered upon the record there, and a revival then had there of the original judgment or decree in case of affirmance, or of that of the appellate court in case of reversal. *Reid v. Strider*, 7 Gratt. 76.

Appeals should be revived in the names of deceased's representatives, not in the name of the representatives generally. *Buster v. Wallace*, 8 H. & M. 217; *Turpin v. Thomas*, 2 H. & M. 139.

b. Death of Appellant.—Where appellant dies pending an appeal, his death should be suggested on the record, and the appeal revived by his executor by *scire facias*. *Hudson v. Ross*, 1 Wash. 74.

An appeal having abated at March term by the death of the appellant a *scire facias* to revive it may be awarded at the ensuing October term although the April term has intervened, in consideration of the short interval between the March and April terms. *Buster v. Wallace*, 8 H. & M. 217.

An appeal having abated at one term, by the death of the appellant; at the next term a *scire facias* was awarded on the motion of his administrator, who had qualified since the abatement, for the appellee to show cause why the appeal should not be revived. *Gibbs v. Perkinson*, 2 H. & M. 211.

Where an appeal is revived by the appellee by *scire facias*, the writ should be served on the appellant's executor. *Hudson v. Ross*, 1 Wash. 74.

c. Death of Appellee.—Where the defendant in an action of trespass *q. c. f.* dies after verdict and judgment against the plaintiff, and pending an appeal, the plaintiff appellant has a right to a *scire facias* against the personal representative of the defendant, though not against his heir, to reverse the judgment if he can. *Harris v. Crenshaw*, 3 Rand. 14.

In *Daniel v. Robinson*, 1 Wash. 154, the appellee being dead, an appearance was entered for the executors, and on the motion of their counsel, the cause was tried without waiting for a *scire facias*.

But in *Wood v. Webb*, reported in note to above case, the court upon a similar motion, refused to revive the appeal upon an appearance being entered and directed a writ of *scire facias* to issue, saying that the above case had not been duly considered at the time the motion was granted.

But in *Meek v. Baine*, 1 H. & M. 388, it was held that where two terms of the court of appeals had elapsed since the appeal and before the record was brought up, and the appellee having died since the appeal, his representative may have the appeal dismissed on motion without resorting to a *scire facias*. This case was distinguished on the ground that in *Wood v. Webb*, the appeal being docketed, the judgment might either have been reversed or affirmed, but in

this case, the record not having been brought up, the appeal might only be dismissed.

Where the appellee dies, the court of appeals will not take up the appeal in the name of his executors, no appearance having been entered, especially where, a great length of time having elapsed since the appeal, the appellant may have satisfied the judgment, such a case coming within the reason of the general rule, 3 H. & M. p. 270, allowing one term, after new parties made, to prepare for trial; but a *scire facias* to revive the appeal in the name of the executors will be awarded. *Scott v. Adams*, 3 H. & M. 501.

Scire Facias Necessary to Have Benefit of Supersedeas Bond.—If, after a supersedeas obtained, the defendant in error die, a *scire facias* must be awarded against his executors, or administrators, and not a new writ of supersedeas, because the latter could not be considered as a continuing process, and consequently the executor could not sue upon the supersedeas bond first given. *Keel v. Herbert*, 1 Wash. 208.

d. Death of One of Several Appellants.—One of several appellants dies after the appeal to the court of appeals is perfected. *Held*, that either party, appellant or appellee, may proceed to have the appeal revived in the name of the representative of the deceased appellant; and the party wishing to have the case revived, must take measures to have it done. *Raine v. Bank of Va.*, 4 Gratt. 150.

Where there are two plaintiffs in a supersedeas, if one of them die, the cause will abate as to him, and proceed in the name of the surviving plaintiff. *Hairston v. Woods*, 9 Leigh 308.

e. Death of One of Several Appellees.—An appeal from, or supersedeas to, an order quashing an execution against two defendants, need not, if one of them die, be revived against his representative, but should be proceeded on as to the other only. *Bullitt v. Winstons*, 1 Munf. 209.

f. Where Sergeant Acts as Administrator.—If the appellant dies, and no person will administer on his estate, so that the court orders the sergeant to take possession of it, no *scire facias* to revive the appeal, lies against the sergeant. *Braxton v. Andrews*, 2 Call 357.

g. Under the Statute.—Code, § 3305, provides that where a party dies after verdict and before judgment, the judgment may be entered as if he had not died. Section 3307 provides that if, pending an appeal, writ of error, etc., the death of a party, which, if it had occurred after verdict in an action, would not have prevented judgment being entered, be suggested or relied on in abatement in the appellate court, said court may enter judgment as if such death had not occurred. *Held*, that such statutes do not authorize the supreme court of appeals to enter judgment in a case in which the alleged plaintiff in error died before the appellate proceedings were begun.

The fact that, before he died, the alleged plaintiff in error assigned his cause of action to a third person, does not authorize such judgment. *Booth v. Dotson*, 93 Va. 238, 24 S. E. Rep. 935.

h. Unlawful Detainer.—Where the defendant in a proceeding of unlawful detainer dies pending an appeal by the plaintiff below, the cause cannot be revived. *Chapman v. Dunlap*, 4 Gratt. 86.

i. Ejectment.—If, in ejectment, judgment be given for the defendant, and the plaintiff appeals; pending which, the appellee dies, the appellant cannot

sure out a *scire facias* against his heirs, but he must bring a new suit. *Tomkies v. Walters*, 6 Call 44.

2. DEATH OF APPELLANT BEFORE PETITION FOR APPEAL PRESENTED.—But where the party in whose name the petition for the writ of error is presented, died *before* the petition was presented to the court of appeals, the writ of error must be dismissed. His personal representative is the party aggrieved and the person to apply for writ of error or appeal. *Booth v. Dotson*, 93 Va. 233, 24 S. E. Rep. 935.

3. DEATH OF ONE OF SEVERAL APPELLANTS BEFORE DECREE.—When, apparently, two defendants, by counsel, petition for an appeal, which is allowed, and so appear and prosecute the appeal, though, on the hearing, evidence is found in the case, tending to show that one was dead before the decree appealed from was rendered, yet, in the court of appeals, it appearing that the decree is erroneous, and the other appellant having the right to prosecute the appeal and have the decree reversed as to both, the court will not, of its own motion, institute an inquiry to ascertain whether the party be living: but will treat him as before the court, by counsel, and reverse the decree, with cost to both appellants. *Rittenhouse v. Harman*, 7 W. Va. 380.

Death of Appellee between Verdict and Judgment.—In *Buckner v. Blair*, 2 Munf. 336, it was held that no process of revivor was necessary in the court of appeals where the appellee died between verdict and judgment, there being no change of parties since the appeal.

B. BY DISSOLUTION OF CORPORATION.—In *Rider v. Union Factory*, 7 Leigh 154, it was held under the state of the law at that time that, where, pending an appeal, the charter of the company expired by efflux of time, the appeal abated on the ground that there was no one to represent the corporation.

Where the board of supervisors, the appellants, have ceased to exist, pending the appeal, either as a court or corporation, the court of appeals having judicial knowledge of the fact, will direct the appeal to be dismissed. *Board v. Livesay*, 6 W. Va. 44.

In *Bank of Alexandria v. Patton*, 1 Rob. 499, under the same circumstances except that the corporation had made an assignment of its rights in the subject of controversy prior to the dissolution, it was held that the case should proceed without notice of the dissolution.

See monographic note on "Corporations (Private)" appended to *Slaughter v. Com.*, 13 Gratt. 767.

X. DISMISSAL OF APPEAL.

A. CONSTITUTES VALUABLE CONSIDERATION.—If the appellant promise the appellee, that if the latter will agree to have the appeal dismissed, the appellant will pay him the full amount of the debt, damages and cost then due upon the appeal, and the appellee consents thereto and the appeal is dismissed as agreed, the appellee may maintain assumpsit on this promise. The court may leave the question of damages in such a case, to the jury. *Spotswood v. Pendleton*, 2 Call 209.

B. GROUNDS.

Failure to Give Bond.—The dismissal of an appeal for failure to give the required bond, operates as an affirmance of the decree of the lower court, without any consideration by the appellate court. *Hicks v. Brick Co.*, 94 Va. 741, 27 S. E. Rep. 596; *Sites v. Wileland*, 5 Leigh 80.

Failure to Bring Up Transcript.—An appeal terminates by operation of law by § 12, ch. 185, Code W.

Va., unless the record is filed with the clerk before the commencement of the second term after the appeal is perfected, unless the court, for good cause shown, allow it to be proceeded with, and a motion to dismiss the appeal is superfluous. *Sydenstriker v. Beard*, 4 W. Va. 707.

Where the appellant fails to bring up the record in time, the appellee may move the court of appeals to docket and dismiss the appeal, though he has only a copy of the decree in the lower court and the appeal therefrom. *Wilson v. Caldwell*, 2 Rand. 190.

Showing Good Cause.—In *Craig v. Thorn*, 3 H. & M. 209, the appellee's counsel having moved to dismiss the appeal because the transcript of the record had not been brought up within two terms after the appeal was granted and the motion being opposed by counsel for the appellants on the ground that, although he had used every exertion to obtain the necessary information from his client as to the cause which produced the delay in sending up the record, yet his remote situation had prevented him from acquiring the information sought through the postoffice, a rule was entered that the appeal stand dismissed unless the appellants show cause to the contrary before a certain date. On cause being shown before that date, the above order was set aside and the appeal placed on the docket.

Failure to Enter Appearance.—The counsel for the appellee may move to dismiss the appeal, for want of an appearance being entered for the appellant, before he opens the record, but not afterwards. *Collins v. Lowry*, 2 Wash. 75.

Allowing Two Terms to Pass.—If the appellant let two terms of the court of appeals elapse, after the appeal has been granted by the district court, the appellee may bring up the record, and have the suit dismissed, with costs; but, he cannot have the judgment affirmed, as he could have done if he had brought up the record at the second term, under the act of assembly. *Mills v. Black*, 1 Call 241.

Lapse of Five Years from Date of Judgment.—An appeal will be dismissed under Act 1873, § 17, whenever five years shall appear to have elapsed from the date of the judgment to the time when the record is delivered to clerk, and this applies although the judgment was rendered and the appeal allowed before the passage of that act, if the record was filed after it went into effect. *Modisett v. Dayton*, 11 W. Va. 339.

Motion to Speed the Cause.—The parties obtaining an appeal, failing to have it perfected by service of process upon the appellees, or publication where that is proper, the court will, on motion of an appellee, who has appeared, make a rule upon the appellants to speed the cause; and if they fail to perfect the appeal in the time appointed, or show good cause for their failure, the appeal will be dismissed. *Michie v. Michie*, 17 Gratt. 109.

Where notice is given that such a motion will be made on the tenth day of the term, Sunday is not to be counted as one of the days of the term. *Michie v. Michie*, 17 Gratt. 109. See also, *Read v. Com.*, 23 Gratt. 924.

Appeal Taken without Appellant's Consent.—An appeal taken in the name of a party without his knowledge or consent, may be dismissed as to him, on his motion. *Watson v. Watson*, 4 Rand. 611.

Escape of Plaintiff in Error in Criminal Case.—Where a prisoner convicted of felony obtains a writ of error which is directed to operate as a supersedeas, and he then escapes from jail, the appellate court will discharge so much of the order awarding the

writ of error as directed it to operate as a supersedeas to the judgment. And will further direct that the writ of error be dismissed by a certain day, unless it shall be made to appear to the court by that day, that the plaintiff in error is in custody of the proper officer of the law. *Sherman v. Com.*, 14 Gratt. 677; *State v. Conners*, 20 W. Va. 1, 12.

In *Leftwich v. Com.*, 20 Gratt. 716, it was said that the same order would have been made as in *Sherman v. Com.*, 14 Gratt. 677, but, as the case had been heard and decided without information that the plaintiff in error was at large, the court held it proper not to set aside the judgment already entered in the case but permitted the same to stand in full force.

C. DISMISSAL BY CESTUI QUE TRUST.—Where an appeal is taken by a trustee and his *cestui que trust* and the *cestui* afterwards dismisses the appeal so far as she is concerned, such dismissal operates as a dismissal of the entire appeal, it appearing that the trustee was acting wholly in a representative capacity and had not suffered any personal injury from such decree. *Ratliff v. Patten*, 37 W. Va. 197, 16 S. E. Rep. 464.

D. EFFECT OF DISMISSAL.

On Parties Appealing.—The dismissal of an appeal has the same effect as an affirmance under § 18, ch. 178, Code 1873, providing that "After the dismissal of an appeal, writ of error, or supersedeas, no other appeal, etc., shall be allowed to, or from the same judgment, order, or decree." *Cobbs v. Gilchrist*, 80 Va. 508.

And this applies as well to the dismissal of an appeal for failure to print the record as for any other cause. *Woodson v. Leyburn*, 83 Va. 848, 3 S. E. Rep. 873; *Barksdale v. Fitzgerald*, 76 Va. 892; *Beecher v. Lewis*, 84 Va. 630, 6 S. E. Rep. 307.

Where three successive appeals are allowed from three decrees in a cause and the first two are dismissed, it seems that on the last appeal which relates only to the last decree, matters involved in the former appeals cannot be inquired into, under the spirit of § 18, ch. 178, Code 1873. *Barksdale v. Fitzgerald*, 76 Va. 892.

If one writ of error be dismissed for matter merely formal, the effect is, so far as any rehearing is concerned, the same as an affirmance in the court of appeals. *Alvey v. Cahoon*, 86 Va. 173, 9 S. E. Rep. 964.

On Parties Not Joining in Appeal.—But a dismissal of one party's appeal for lack of jurisdiction, will not effect the other party's right of appeal, if it satisfies the jurisdictional requirement as to amount and the appellate court will consider both causes, so far as they effect the party entitled to appeal. *Tebbs v. Lee*, 76 Va. 744.

A fair interpretation of the first section of ch. 185, Code 1868, permits any one of the parties to a controversy to appeal, or have a writ of error or supersedeas, in such cases as are designated by the statute, without prejudice to those who were not made party to the appeal, writ of error, or supersedeas; and that, notwithstanding one defendant took an appeal, writ of error, or supersedeas, and, under the statute, was deemed to have abandoned it, it does not militate against the right of, or, conclude, either of the other defendants, who were not parties to the appellate proceedings, from prosecuting an appeal, writ of error, or supersedeas, in the same matter within the time prescribed by statute. *Adamson v. Pearce*, 9 W. Va. 249.

Judge May Still Give His Opinion.—Although a

writ of error be dismissed as improvidently awarded, still any judge of the court of appeals may give his opinion upon the merits if he so desires. *White v. Ches.*, etc., R. Co., 26 W. Va. 800; *Steenrod v. Railroad*, 25 W. Va. 183, 188; *Wills v. Jackson*, 8 Munf. 458; *Goolsby v. Strother*, 21 Gratt. 107.

XI. REINSTATEMENT.

After regularly dismissing an appeal for want of prosecution, the appellate court cannot reinstate the same at a subsequent term, without a rule having been made upon, or due notice given to, the adverse party to appear and contest the motion. *Cropper v. West*, 4 Munf. 299. See also, Rule IX, 1 H. & M. VI.

If a suit be dismissed, by surprise of the appellant it may be redocketed at a subsequent term in the place where it formerly stood. *Thornton v. Corbin*, 3 Call 232.

An appeal taken to the court of appeals prior to the statute of February 1825, Supp. to Rev. Code, ch. 98, was dismissed after the statute was passed, for want of sufficient security. *Held*, appellants were not entitled either to have the appeal reinstated, or to have a new appeal allowed, on the terms provided by that statute, namely, on giving security for costs only, and taking the appeal without a supersedeas; not to have it reinstated on those terms, because before the said act, security to perform the decree was necessary, not to have a new appeal allowed under said statute, since that is forbidden by said statute after a former appeal, etc., has been dismissed. *Sites v. Wieland*, 5 Leigh 80.

XII. SUCCESSIVE APPEALS.

Except in the case provided for in the statute viz. where the appeal is dismissed for failure to print the record or to deposit with the clerk a sufficient fund for that purpose, where a writ of error or appeal has been dismissed (because of the failure of the appellant to give a new bond with good security when required by the court), he is not entitled to a second writ of error or supersedeas. *Casanova v. Kreusch*, 21 W. Va. 720; *Perry v. Horn*, 21 W. Va. 723.

Ch. 172, Acts 1872-3, providing that, if an appeal or writ of error be dismissed for failure to provide for the printing of the record within six months after the case is docketed in the appellate court, the case may be renewed at any time within five years from the date of the judgment, order, etc., appealed from, is only intended to allow one additional appeal or writ of error not an indefinite number of such appeals within the five years. *Perry v. Horn*, 21 W. Va. 723.

Second Appeal.—By the Act of 1825, Supp. Rev. Code, a second appeal cannot be granted after one has been dismissed. *Sites v. Wieland*, 5 Leigh 80.

XIII. JURISDICTION OF SUPREME COURT OF APPEALS.

A. GENERALLY.

Constitutional Provisions.—The provision in art. VI, Constitution of West Virginia, that the court of appeals shall have appellate jurisdiction in civil cases when the matter in controversy is of greater value or amount than \$200 merely means that the legislature cannot make a greater amount necessary to give jurisdiction but they make the limit 200 or less. By the act of 1863 the amount was fixed at that required for an appeal to the district courts in Virginia, i. e. \$100. *Tompkins v. Burgess*, 2 W. Va. 187.

Section 2, art. 6, of the Constitution of Virginia enu-

merates the cases in which the court of appeals shall have jurisdiction irrespective of pecuniary value, hence the act of March 12, 1884, conferring it at the instance of the commonwealth, in all suits instituted under the act of Jan. 14, 1882, entitled "An act to prevent frauds against the commonwealth and the holders of her securities in the collection and disbursements of her revenues," is unconstitutional and void, these cases not being among the cases enumerated in the constitution. *McIntosh v. Braden*, 80 Va. 21.

Appellate jurisdiction may be conferred without regard to the matter in controversy, provided the power of the legislature is not restricted by the constitution. *McIntosh v. Braden*, 80 Va. 217.

The constitution does not, *proprio vigore*, confer jurisdiction upon the court of appeals, and therefore whatever jurisdiction it exercises must be by virtue of statutory authority given in pursuance of the constitution. The provisions of the constitution in this particular are carried into effect by §§ 3154 and 3455, of the Code. *Barnett v. Meredith*, 10 Gratt. 450; *Price v. Smith*, 93 Va. 14, 24 S. E. Rep. 474; *Gresham v. Ewell*, 84 Va. 784, 6 S. E. Rep. 134; *Page v. Clopton*, 30 Gratt. 417; *Prison Ass'n v. Ashby*, 93 Va. 671, 25 S. E. Rep. 893; *Cook v. Daugherty*, 99 Va. 500, 39 S. E. Rep. 223.

The words "or some other matter not merely pecuniary" used in § 3455, of the Code, have the same meaning as the words "matters not merely pecuniary" used in the constitution. *Price v. Smith*, 93 Va. 14, 24 S. E. Rep. 474.

Jurisdiction Statutory.—The powers of the supreme court of appeals are statutory. It has no claim whatever to power from any other source; neither custom, prescription, long usage nor precedent have any effect. *Clarke v. Conn*, 1 Munf. 160.

Unless an appeal can be brought within some provision of the statute authorizing appeals, it must be dismissed. *Hill v. Als*, 27 W. Va. 218; *Laidley v. Kline*, 21 W. Va. 21; *Childs v. Hurd*, 25 W. Va. 530; *State v. Hays*, 30 W. Va. 107, 3 S. E. Rep. 177.

Jurisdiction Essential.—Until the court has legal possession of any cause, although it be upon their docket, it has no power over it but to dismiss it. Jurisdiction must in all cases precede discretion. *Clarke v. Conn*, 1 Munf. 160.

The defendant in error cannot question the jurisdiction of the lower court, where he is contesting the jurisdiction of the appellate court, for if his contention is sustained, the only order that the appellate court can make is one dismissing the writ of error. *Railroad Co. v. Board of Pub. Works*, 28 W. Va. 264.

Jurisdiction Must Appear Affirmatively.—Although the question of jurisdiction has not been raised it is the duty of the appellate court to consider it, and, unless the record shows affirmatively that it has jurisdiction in a case, to decline to take jurisdiction in such case. *Shirey v. Musgrave*, 29 W. Va. 131, 11 S. E. Rep. 914; *Hill v. Als*, 27 Va. 215; *State v. Hays*, 30 W. Va. 107, 3 S. E. Rep. 177; *Adkins v. City of Richmond*, 98 Va. 91, 34 S. E. Rep. 967.

Burden of Proof.—The onus is upon the party seeking revision to establish the jurisdiction of the appellate court. *Harman v. City of Lynchburg*, 33 Gratt. 57; *Buckner v. Metz*, 77 Va. 107; *Southern Fertilizing Co. v. Nelson*, 1 Va. Dec. 465; *Saunders v. Waggoner*, 82 Va. 216; *Martin v. Fielder*, 82 Va. 456, 4 S. E. Rep. 602; *Com. v. Chaffin*, 87 Va. 545, 12 S. E. Rep. 972; *Stanley v. Hubbard*, 27 W. Va. 740; *State v. Hays*, 30 W. Va. 107, 3 S. E. Rep. 177.

Hence where the appellant fails to show the amount of his judgment the court of appeals will decline jurisdiction. *Southern Fert. Co. v. Nelson*, 1 Va. Dec. 465.

Court Equally Divided.—Where the members of the court of appeals are equally divided on the question of the jurisdiction of the court of appeals, the jurisdiction of the court must be sustained and the case decided on its merits. *State v. Hays*, 30 W. Va. 107, 3 S. E. Rep. 177.

Consent and Acquiescence.—Neither consent, nor long acquiescence of parties can give the court of appeals jurisdiction. An appeal, therefore, (having been improvidently granted,) was dismissed on motion, five years after it was entered on the docket. *Clark v. Conn*, 1 Munf. 160; *McCall v. Peachy*, 1 Call 55; *Shirey v. Musgrave*, 29 W. Va. 131, 11 S. E. Rep. 914.

Act of 1792.—The Act of 1792, Rev. Code, vol. 1, p. 68, declaring that appeals, etc., from the district courts, shall be granted, etc., by the court of appeals on the same principles as appeals, etc., to those courts are granted from the county courts, means that appeals, etc., lie in those cases and those cases only where they lie from the county to the district courts. *Cooper v. Saunders*, 1 H. & M. 418; *Wingfield v. Crenshaw*, 3 H. & M. 245.

Law Applicable.—The Code 1849, ch. 182, § 2, taking away the right of appeal where the matter in controversy is less than \$300 and merely pecuniary, is applicable to all judgments, etc., whether rendered prior or subsequent to July 1st, 1850, unless the petition for the appeal, etc., was presented prior to that date. *McGruder v. Lyons*, 7 Gratt. 233; *Crawford v. Halsted*, 20 Gratt. 211, 225.

B. WHERE "MATTER IN CONTROVERSY IS MERELY PECUNIARY."

1. **GENERALLY.**—The form or character of the remedy or proceeding in the inferior court cannot affect the jurisdiction of the court of appeals under this clause of the constitution. No matter what may be the form of the controversy, if the decision of the inferior court, if erroneous, has caused an injury to the plaintiff in error, or appellant, to an amount greater than the jurisdictional amount, the court of appeals will review the case at his instance. And as the injury to the party who brings the case before that court, is the basis of its jurisdiction, it may happen that one party may have a right to have a case reviewed which the other may not. *Dryden v. Swinburn*, 15 W. Va. 234.

Affidavit Not Sufficient.—A mere affidavit that the amount in controversy exceeds \$100 exclusive of interest and costs will not give the court of appeals jurisdiction when the affiant states no facts by which the correctness of his statement may be ascertained, and it does not appear either by such affidavit or by the record that the interests of the appellants are of such an amount that the controversy in relation to the matter of that value will be continued by the appeal. *McCoy v. McCoy*, 33 W. Va. 60, 10 S. E. Rep. 19.

Penal Bonds.—The court of appeals has jurisdiction to revise any judgment on a bond, provided the penalty amount to the sum limited by law. *Newell v. Wood*, 1 Munf. 555.

Where judgment is entered in a county court on a single bill for more than \$100, that being the pecuniary limit at that time, to be discharged by the payment of a sum less than \$100, and, on a writ of supersedeas from the district court at the instance of the defendant, the judgment is reversed, the

plaintiff cannot appeal to the supreme court of appeals, the amount by which the judgment may be discharged, not the amount of the bill, being the true criterion. *Lewis v. Long*, 3 Munf. 136; *Rymer v. Hawkins*, 18 W. Va. 309.

2. IN VIRGINIA.—Where the matter in controversy is merely pecuniary and less in amount than \$500, the court of appeals has not jurisdiction. *Bransford v. Karn*, 87 Va. 243, 12 S. E. Rep. 404; *Shacklett v. Asylum*, 87 Va. 313, 12 S. E. Rep. 678; *Pattie v. Guggenheimer*, 86 Va. 993, 12 S. E. Rep. 95; *Clinch River Veneer Co. v. Kurth*, 88 Va. 223, 16 S. E. Rep. 168; *Craig v. Williams*, 90 Va. 500, 18 S. E. Rep. 899; *Cocke v. Minor*, 25 Gratt. 246; *Saunders v. Waggoner*, 82 Va. 316; *Martin v. Fielder*, 82 Va. 455, 4 S. E. Rep. 608; *Com. v. Chaffin*, 87 Va. 545, 12 S. E. Rep. 972; *Cralle v. Cralle*, 81 Va. 773; *Litchford v. Day*, 87 Va. 71, 12 S. E. Rep. 107.

To give the court of appeals jurisdiction of a cause, except in certain specified cases, the judgment or decree must amount to \$500, principal and interest, at the date of the judgment or decree, except where the claim of the plaintiff is for more than that amount, and he applies for the appeal. *Gage v. Crockett*, 27 Gratt. 735; *Tebbs v. Lee*, 76 Va. 744; *McCrowell v. Burson*, 79 Va. 290; *Hartsok v. Crawford*, 85 Va. 413, 7 S. E. Rep. 588; *Cox v. Carr*, 79 Va. 26; *Hawkins v. Gresham*, 85 Va. 34, 6 S. E. Rep. 472; *Craig v. Williams*, 90 Va. 500, 18 S. E. Rep. 899.

The court of appeals has not jurisdiction of an appeal from an order vacating an injunction restraining appellees from levying a *f. f. a.* on a judgment for less than \$500 principal and interest, on appellant's homestead effects. *Pattie v. Guggenheimer*, 86 Va. 993, 12 S. E. Rep. 95.

To give the court of appeals jurisdiction under the Rev. Code, vol. 1, p. 60, of an appeal from a decree of a court of chancery dissolving an injunction to a judgment, the matter in controversy must have amounted to \$150 exclusive of all costs, whether incident to the original judgment or to the injunction. *Cooke v. Piles*, 3 Munf. 151.

Where less than \$500 is allowed as compensation for land condemned by a railroad company, no appeal lies to the court of appeals although refused by the circuit court. *Richmond, etc., R. Co. v. Knopfs*, 86 Va. 961, 11 S. E. Rep. 881.

In *Reeves v. Waller*, Jeff. 8, a writ of error was allowed although the principal debt was under five pounds, on the ground that that limitation applied only to the defendant.

Correction of Double Tax Imposed as a Penalty.—A writ of error will not lie to a judgment in a proceeding for the correction of a double tax imposed for refusal to pay a license tax, where the matter in controversy is less than \$500, either on the ground that it is a criminal proceeding or that it comes under any of the exceptions enumerated in the constitution. *Neal v. Com.*, 21 Gratt. 511.

3. IN WEST VIRGINIA.—The court of appeals has jurisdiction in civil cases, where the matter in controversy is merely pecuniary, only where the matter in controversy, exclusive of costs, is of greater value or amount than \$100. *Jones v. Cunningham*, 7 W. Va. 707; *Love v. Pickens*, 26 W. Va. 341; *McCoy v. McCoy*, 33 W. Va. 60, 10 S. E. Rep. 19; *Aspinall v. Barrickman*, 29 W. Va. 508, 2 S. E. Rep. 795; *State v. Blair*, 29 W. Va. 474, 2 S. E. Rep. 333; *Shahan v. Shahan*, 48 W. Va. 477, 37 S. E. Rep. 552.

Where the only error in a decree is a possible one in a sum of \$15, the court of appeals has no juris-

diction to correct it. *Shahan v. Shahan*, 48 W. Va. 477, 37 S. E. Rep. 552.

Where the appellant appeals on two grounds of error, together involving more than \$100 but one of the claims is disallowed by the supreme court of appeals, and the other amounts to less than \$100, that court, if the error be merely clerical or one which it could correct under § 6, ch. 134, of the Code of W. Va., would merely correct the error and affirm the decree with costs to the appellee, but, the error being judicial, and requiring the decree to be reversed, the said court will reverse it with costs to the appellee. *Bee v. Burdett*, 23 W. Va. 744.

The proceedings in a chancery cause, the decree for the plaintiff for his costs, and the proceedings and judgment on a forthcoming bond given on an execution issued on such decree, together constitute one proceeding, so far as a supersedeas from the court of appeals is concerned, when such decree is appealed from, and, if that court has jurisdiction to review the decree in the chancery cause, it will have jurisdiction also to award a supersedeas to the judgment on the forthcoming bond, though the amount of such judgment is less than \$100. *Vanscoy v. Stinchcomb*, 29 W. Va. 263, 11 S. E. Rep. 927.

Cases Involving an Office.—Under art. 8, Constitution of West Virginia, giving the supreme court of appeals appellate jurisdiction of cases in which the matter in controversy is of greater value than \$100, that court has jurisdiction of an appeal in a case involving an office, the fees of which during the term of office exceed \$100. *Dryden v. Swinburn*, 15 W. Va. 234.

4. MATTER IN CONTROVERSY.—The term "matter in controversy" as used in reference to the jurisdiction of the court of appeals in § 2, art. VI, of the Virginia Constitution, means the "subject of litigation, the matter for which suit is brought and upon which issue is joined, and in relation to which jurors are called, and witnesses examined." *Harman v. City of Lynchburg*, 33 Gratt. 37; *Gage v. Crockett*, 27 Gratt. 735; *Atlantic, etc., R. Co. v. Reid*, 87 Va. 119, 12 S. E. Rep. 223; *Norfolk, etc., R. Co. v. Clark*, 92 Va. 118, 22 S. E. Rep. 867.

The matter in controversy, in reference to the appellate jurisdiction of the supreme court of appeals is that which is the essence and substance of the judgment and by which the party may discharge himself. *Lewis v. Long*, 3 Munf. 136; *Umbarger v. Watts*, 25 Gratt. 167; *Rymer v. Hawkins*, 18 W. Va. 309; *Atlantic, etc., R. Co. v. Reid*, 87 Va. 119, 12 S. E. Rep. 222; *Smith v. Rosenheim*, 79 Va. 540; *Buckner v. Metz*, 77 Va. 107; *Hartsok v. Crawford*, 85 Va. 413, 7 S. E. Rep. 588; *Hawkins v. Gresham*, 85 Va. 34, 6 S. E. Rep. 472; *Kendrick v. Spotts*, 90 Va. 148, 17 S. E. Rep. 853.

The matter in controversy is that for which the suit is brought or for which judgment is rendered, not that which may or may not come in question. *Hawkins v. Gresham*, 85 Va. 34, 6 S. E. Rep. 472.

On an appeal from a decree perpetually enjoining a sale under a deed of trust given to secure notes amounting to \$500, from which a usurious discount of \$52 had been deducted, the amount in controversy is the whole amount secured, hence the court of appeals has jurisdiction. *Schmelz v. Rix*, 95 Va. 509, 28 S. E. Rep. 890.

Where the grantee in a second deed of trust, which includes only a part of the land conveyed in the first, files a bill to sell the land conveyed by both deeds, and if that is not enough to satisfy both deeds of trust, then so much more of the land conveyed

by the first deed as will do so; and the former is done, but the court refuses to decree the sale of the latter, which had been released without the knowledge of the grantor in the second deed, the court of appeals has not jurisdiction where the amount of the second deed remaining unsatisfied is less than \$500, since that is the amount in controversy. *Marchant v. Healy*, 94 Va. 614, 27 S. E. Rep. 464.

By "matter in controversy" as to the appellants is meant the matter in dispute between the appellant and appellee in the lower court, hence where the amount in controversy is swelled beyond \$500 by an assignment which was not recognized in the commissioner's report as confirmed by the court, but merely endorsed on one of the exhibits in the cause, the court of appeals has no jurisdiction. The case of *Fink v. Denny*, 75 Va. 668, is distinguished on the ground that in that case the commissioner's report and decree appealed from recognized the assignment, and thus the assigned claim had been judicially determined to be the appellant's property before the appeal was taken. *McCarty v. Hamaker*, 82 Va. 471, 5 S. E. Rep. 538.

Where a pecuniary demand in a suit in a circuit court is \$95, and the answer of the defendant admits as due, and offers to pay \$61.95, and the decree is against the defendant for \$104.83, leaving the amount actually in controversy \$42.88, there is no jurisdiction of an appeal by the defendant. *Hedrick v. Mutual Guarantee Building & Loan Ass'n (W. Va.)*, 41 S. E. Rep. 118.

An appeal lies from an order requiring an answer to a bill of discovery, when the amount involved in the action at law in aid of which discovery is sought exceeds \$100, exclusive of costs, although the order appealed from is not an order for the payment of money, nor one directly involving freedom. *Hurricane Tel. Co. v. Mohler (W. Va.)*, 41 S. E. Rep. 421.

A chancery suit is brought in a circuit court by a surety in a forfeited forthcoming bond, to be subrogated to the lien of the judgment creditor on the land of a co-security and to enforce out of such land the payment of one-half of the debt and the costs of the original case and the costs in a chancery suit, which had been brought by the creditor to enforce out of the lands of the sureties the payment of the debt and costs, all the debt and costs in the original suit as well as the costs of the chancery suit having been paid by the complainant. *Held*, that in determining whether the court of appeals has jurisdiction on an appeal from the circuit court dismissing the bill, the subject in controversy must be regarded as a moiety of all the moneys paid by the plaintiff, whether on the forfeited forthcoming bond or the costs attending it, or the costs of the first chancery suit, and the interest on such sums. *Clevenger v. Dawson*, 15 W. Va. 348.

In a suit against the sureties of an administrator, who has defaulted, if the claims against the administrator are less in amount than \$500, these claims, which are the measure of the sureties' liability determine the jurisdiction of the court of appeals and not the original claims against the estate, and that court will not have jurisdiction. *Hartsook v. Crawford*, 85 Va. 418, 7 S. E. Rep. 538.

In an action to recover assessments on a stock subscription, although the amount recovered be less than \$500, if the defendant denies that he is a stockholder, and his subscription amounts to \$500, the court of appeals has jurisdiction, since the validity of his subscription is in controversy. *Stuart v. Valley R. Co.*, 32 Gratt. 146.

Where a decree finds a debt of \$951.79 as due from a partnership, which is controverted by the appellant, the administratrix of one of the partners, and also decrees a debtor of the firm, to the extent of \$2,196.93 to pay off this debt and then to pay one-half of the residue to the appellant, the matter in controversy is the \$951.79, not the difference between that and one-half of \$2,196.93, since she may have to pay the whole amount if said debtor fail to pay it, hence the court of appeals has jurisdiction. *Mad-dock v. Skinner*, 93 Va. 479, 25 S. E. Rep. 535.

In a suit to enforce the lien of a trust deed, if the amount of the lien is not less than \$500, the court of appeals has jurisdiction although the property itself be of less value than \$500, since the matter in controversy is the amount of the lien, not the property merely. *Eacho v. Cosby*, 26 Gratt. 112.

Although it is the amount in controversy in the appellate court that determines its jurisdiction and not the amount in controversy in the court below, yet where the amount of the judgment has been reduced below \$100 by the payment into court of a part, the appellate court still has jurisdiction, if the plaintiff refuse to accept such sum in satisfaction of the judgment, since on appeal the whole judgment may be reversed, so that is the matter in controversy in the appellate court. *Railroad v. Foreman*, 24 W. Va. 662.

In *Stone v. Ware*, 6 Munf. 541, the circumstances that the amount of the usurious gain was less than \$150, and that relief ought to be given to that extent only, was not considered, on an appeal from a superior court of chancery, as furnishing a valid objection to the jurisdiction of the court of appeals; the subject in controversy upon the appeal being the whole debt and interest, which amounted to more than \$150.

Where appellants held notes, secured by a trust deed, amounting to \$520.16, and appellee held notes, secured by same deed, amounting to \$428, and upon a sale of the trust property, the proceeds amounted to \$556, and the appellants claimed priority of payment; and on a bill being filed for a distribution of the fund, the court below divided it *pro rata*, giving appellants \$236.72 and appellees \$228, which, together made up the amount to be distributed after deducting costs, and from this decree appellants appealed, it was held that as appellee made no objection to appellants sharing in a *pro rata* distribution of the fund, really the "amount in controversy" was only the \$228 paid to appellee, and this being "less than \$500, exclusive of costs," the appellate court had no jurisdiction. *Bachelder v. Richardson*, 1 Va. Dec. 474.

Where Appellee Cross-Assigns Error.—Where appellee obtains a decree for \$1,170.40 in a suit by appellant to enjoin the sale of land conveyed to secure a debt, but claims at the same date the sum of \$1,792.46, the appellee may cross-assign error, the difference being more than \$500, and that being the amount in controversy as to the appellee. *Ware v. Building Ass'n*, 95 Va. 680, 29 S. E. Rep. 744.

5. COSTS.—In determining the right of appeal, costs are never to be considered any part of the "matter in controversy" even in the absence of legislative prohibition. *Norfolk, etc., R. Co. v. Clark*, 92 Va. 118, 22 S. E. Rep. 897; *Hartsook v. Crawford*, 85 Va. 413, 7 S. E. Rep. 538; *Cox v. Carr*, 79 Va. 28; *Hawkins v. Gresham*, 85 Va. 84, 6 S. E. Rep. 472; *Duffy v. Figgat*, 80 Va. 664; *Neal v. Van Winkle*, 24 W. Va. 401.

So, where the appellant appeals only from the decree requiring each party to pay his own costs,

the court of appeals will not have jurisdiction. *Ashby v. Kiger*, 3 Rand. 165.

Where nothing was decreed against the appellant except costs, and he claimed nothing in the suit, though the original matter in controversy was sufficient to support the jurisdiction of the court of appeals, such an appeal cannot continue the original controversy as to the matter of the suit, and the appellate court will dismiss the appeal for want of jurisdiction. *Garrett v. Childers*, 2 Munf. 377.

But the court of appeals is not deprived of jurisdiction of an appeal on the ground that it is from a decree for costs only, where it appears that it was for costs of an entirely different proceeding, and the amount exceeds \$500. *Shipman v. Fletcher*, 95 Va. 555, 29 S. E. Rep. 325.

An appeal will lie from an order or decree overruling a motion to quash an execution, although the matter in controversy consists wholly of costs, since such an appeal is not from the decree in the principal cause, but as independent of it as if it were a decree in an independent suit to subject realty to costs in a former suit. *Taney v. Woodmansee*, 3 W. Va. 709.

6. **INTEREST.**—Interest upon the judgment or decree is to be included, in determining whether the court of appeals has jurisdiction. *Arnold v. Lewis Co. Court*, 38 W. Va. 142, 18 S. E. Rep. 476; *Stratton v. Mutual Assurance Soc.*, 6 Rand. 22.

In *Arnold v. Lewis Co. Court*, *supra*, there were two judgments one before a justice and another in the circuit court, and it seems to have been held that interest from the date of the first judgment to that of the second was to be included, so that this proposition is not in conflict with the succeeding one.

In calculating the amount in controversy interest is never to be estimated beyond the date of the decree. *Hartsok v. Crawford*, 85 Va. 413, 7 S. E. Rep. 538; *Hawkins v. Gresham*, 85 Va. 34, 6 S. E. Rep. 472; *Duffy v. Figgat*, 80 Va. 664.

An erroneous ascertainment of interest in excess of \$100, when an adjudication and not a mere clerical error, is appealable to the court of appeals. *Wick v. Dawson*, 48 W. Va. 469, 37 S. E. Rep. 639.

7. **DAMAGES.**—The damages allowed by law, upon affirmation of a county court judgment by a superior court of law, are not to be reckoned as part of the "matter in controversy," for the purpose of giving the court of appeals jurisdiction. If, therefore, the judgment be for less than one hundred dollars, but would amount to more, by adding the damages, upon affirmation, an appeal does not lie to the court of appeals. *Melson v. Melson*, 2 Munf. 542.

In an action of detinue for the recovery of specific personal property, the damages recovered for the detention of the property will be added to the alternative value, named in the judgment, of the property recovered, in deciding the question of jurisdiction in the court of appeals, under § 4, ch. 113, of the Code. *Davis v. Webb*, 46 W. Va. 6, 33 S. E. Rep. 97.

8. **AS TO PLAINTIFF BELOW.**—When the plaintiff seeks a revision of the judgment below, if he claims in his declaration money or property of the value of not less than the jurisdictional amount, the court of appeals has jurisdiction, although the judgment may be for less, or for the defendant. *Harman v. Lynchburg*, 33 Gratt. 37; *Gage v. Crockett*, 27 Gratt. 76; *Fink v. Denny*, 75 Va. 663; *Duffy v. Figgat*, 80 Va. 664; *Batchelder v. Richardson*, 75 Va. 836; *Hartsok v. Crawford*, 85 Va. 413, 7 S. E. Rep. 538; *Cox v. Carr*,

79 Va. 28; *Hawkins v. Gresham*, 85 Va. 34, 6 S. E. Rep. 472; *Kendrick v. Spotts*, 90 Va. 148, 17 S. E. Rep. 853; *Melendy v. Barbour*, 78 Va. 544, 556; *Arnold v. Lewis County Court*, 38 W. Va. 142, 18 S. E. Rep. 476. See *Marion Mach. Works v. Craig*, 18 W. Va. 559. It is not the difference between his claim and the amount of the judgment. *Pitts v. Spotts*, 86 Va. 71, 9 S. E. Rep. 501.

That the plaintiff may enjoy it, his claim must not be less than the jurisdictional amount, principal and interest. *Craig v. Williams*, 90 Va. 500, 18 S. E. Rep. 899.

In determining the question of jurisdiction in an action for the recovery of money on contract, which comes to the court of appeals on appeal to the circuit court, and writ of error, the amount claimed in the summons must determine the question of jurisdiction. *Case Mfg. Co. v. Sweeny*, 47 W. Va. 628, 35 S. E. Rep. 853.

Where a set-off claimed to be over the jurisdictional amount is disallowed, its amount tests the jurisdiction upon appeal. *Faulconer v. Stinson*, 44 W. Va. 546, 29 S. E. Rep. 1011.

Although a decree is for less than the jurisdictional amount, yet, where the matters in dispute exceed that sum, the supreme court of appeals has jurisdiction. *Minor v. Goodall*, 3 Call 395; *Rymer v. Hawkins*, 18 W. Va. 309.

Though the sum decreed to the plaintiff in chancery be less than the jurisdictional amount or the bill be dismissed, still the plaintiff may appeal if the matter in controversy exclusive of cost be equal thereto, and this right is not lost because upon the hearing of the cause, the court of appeals determines that the plaintiff is not entitled to so great an extent. *Rymes v. Hawkins*, 18 W. Va. 309.

The same rule applies where the plaintiff claims more than the jurisdictional amount in his declaration, and there is a special verdict fixing the damages at less than that amount subject to the opinion of the court, and the court decides for the defendant on the law of the case. The plaintiff is not concluded as to the amount in controversy by the amount stated in the special verdict, but his claim is the matter in controversy and the court of appeals has jurisdiction. *McCrowell v. Burson*, 79 Va. 290.

Yet, to this rule, there are exceptions, and where, on an examination of the pleadings or record, the appellate court sees, that the real "amount in controversy" is less than the jurisdictional amount, exclusive of costs, it will dismiss the appeal or writ of error. *Batchelder v. Richardson*, 1 Va. Dec. 474.

If a judgment of a county or corporation court, being for less than the jurisdictional amount, exclusive of costs, be reversed by a superior court of law, upon a writ of supersedeas, whereupon judgment is entered that the plaintiff take nothing by his bill, etc., he cannot appeal to the court of appeals, notwithstanding his declaration demanded a larger sum than one hundred dollars. *Henry v. Elcan*, 2 Munf. 541.

Where the sum claimed in the plaintiff's bill with interest, and not including costs, at the date of the final decree complained of, exceeded the jurisdictional amount, and there is nothing to indicate that the sum claimed was fixed with the express view of getting jurisdiction in the court of appeals, the claim as made in the bill should furnish the criterion.

By this it must not be understood that the plain-

tiff by any reckless unfounded claim could acquire jurisdiction in the court of appeals, especially, if looking to the whole record, the court can see that the amount is claimed with a view of improperly acquiring jurisdiction in said court.

"If the claim is merely colorable in order to give the court jurisdiction, and that was made to appear, jurisdiction would be declined, for jurisdiction can no more be conferred than it can be taken away by improper devices of parties." *Cox v. Carr*, 79 Va. 28.

9. AS TO DEFENDANT BELOW.—But where the revision is sought by the defendant, the amount or value of the judgment at its date, determines the jurisdiction. This is the general rule. For exceptions to it, see 32 Gratt. 298; and the onus is upon the party seeking the revision, to establish the jurisdiction of the appellate court. *Harman v. City of Lynchburg*, 33 Gratt. 37; *Gage v. Crockett*, 37 Gratt. 785; *Rymer v. Hawkins*, 18 W. Va. 309; *Duffy v. Figgat*, 80 Va. 664; *Hartsook v. Crawford*, 85 Va. 413, 7 S. E. Rep. 538; *Hawkins v. Gresham*, 85 Va. 34, 6 S. E. Rep. 472; *Cook v. Bondurant*, 85 Va. 47, 6 S. E. Rep. 618; *Kendrick v. Spotts*, 90 Va. 148, 17 S. E. Rep. 853; *Melendy v. Barbour*, 78 Va. 544, 556; *Greathouse v. Sapp*, 26 W. Va. 87. See also, *Marion Machine Works v. Craig*, 18 W. Va. 559.

In order that the defendant may enjoy the right of appeal when it depends on the amount, the judgment or decree must be for at least the jurisdictional amount, principal and interest, exclusive of cost. *Craig v. Williams*, 90 Va. 500, 18 S. E. Rep. 899.

Where the defendant is the appellant, the "matter in controversy" is the sum decreed against him, not that sum plus the aggregate of the disallowed claims set up in the answer. *Kendrick v. Spotts*, 90 Va. 148, 17 S. E. Rep. 853.

Where the claim of plaintiff below is for less than the jurisdictional amount, the defendant cannot give the court of appeals jurisdiction by setting up a merely specious claim to a set-off, greater than that amount. *Manchester Paper Mills Co. v. Heth*, 1 Va. Dec. 776.

Jurisdiction is not conferred on the court of appeals by the fact that a set-off was improperly allowed to be filed larger than the jurisdictional amount. *Case Mfg. Co. v. Sweeny*, 47 W. Va. 688, 35 S. E. Rep. 853.

Where an action of replevin is brought to try the title to personal property, valued in the declaration at more than the jurisdictional amount, and judgment is rendered for the plaintiff, and \$20 damages, an appeal lies to the court of appeals. *Valden v. Bell*, 3 Rand. 448.

Release of Part by Plaintiff.—Where the plaintiff recovers a verdict for the jurisdictional amount, he cannot by releasing five dollars of it deprive the court of appeals of jurisdiction of the case on appeal by defendant, but the judgment will be considered to be for the jurisdictional amount. *Hansbrough v. Stinnett*, 22 Gratt. 593.

10. ASSIGNMENTS.—A merely colorable assignment by one plaintiff to another, in order to give the court of appeals jurisdiction, will have no effect. *Fink v. Denny*, 75 Va. 663.

But one party plaintiff may acquire the claim of another by assignment, and if his claim is thereby brought up to the jurisdictional amount, the court of appeals will have jurisdiction, even though the assignment took place after suit brought, if before decree, provided such assignment was *bona fide* and not merely colorable in order to give the appellate

court jurisdiction; but in the absence of proof to the contrary it will be presumed to have been *bona fide*. *Fink v. Denny*, 75 Va. 663.

An assignment of a judgment taken after suit brought but before decree, by which the appellant's claim is swelled beyond the jurisdictional amount, will be presumed to be in good faith and not merely colorable, where it is under seal and purports on its face to be for value, until the contrary is shown. Though, if the contrary is shown to be the fact, the jurisdiction will be defeated. *Filler v. Tyler*, 91 Va. 458, 23 S. E. Rep. 235.

11. APPELLANTS OCCUPYING REPRESENTATIVE CAPACITY.

Trustees.—A trustee suing for the recovery of a trust fund may prosecute an appeal from an adverse decision which involves a sum greater than the jurisdictional amount required by law, although, when he comes to distribute the fund, the amount coming to each distributee may be much less. *Fleshman v. Hoyman*, 37 W. Va. 738; *Fleshman v. Fleshman*, 12 S. E. Rep. 713, 34 W. Va. 343.

The trustee in an assignment for the benefit of creditors may appeal from a decree against him as the representative of the whole trust fund although none of the claims secured amount to the jurisdictional sum, if in the aggregate they do, and the trust fund itself amounts to that sum. *Atkinson v. McCormick*, 76 Va. 791; *Saunders v. Waggoner*, 82 Va. 816.

Where the aggregate of the claims of trustees under a deed of trust, the appellants, against policy holders exceeds the jurisdictional amount, though all the claims against the defendants severally are less than that amount, the aggregate of the claims is the amount in controversy and the trustees represent the creditors, hence the court of appeals has jurisdiction. *Cabell v. Ins. Co.*, 1 Va. Dec. 610.

Administrators.—Where the whole amount decreed against an administrator is greater than the jurisdictional amount, though the amount decreed to each ward of the intestate is less, the court of appeals will have jurisdiction of an appeal on behalf of the administrator. *Martin v. Fielder*, 83 Va. 455, 4 S. E. Rep. 602.

Where in a suit against an administrator and the heirs of an intestate, there is a decree not against the administrator *in solido* but a decree severally against each of the heirs, for the sake of convenience, if the aggregate amount exceeds the minimum jurisdictional amount, though the several items are less, still the court of appeals has jurisdiction on the appeal of the heirs, since it is in substance a decree against the estate for the whole amount. *Uplike v. Lane*, 78 Va. 132.

Heirs.—Where a decree ascertains the amount due from intestate's heirs to be more than the jurisdictional amount, it is immaterial that the amount payable to one of the appellees may be found by the commissioner to be less than \$500. *Alexander v. Byrd*, 85 Va. 690, 8 S. E. Rep. 577.

12. SUITS TO SUBJECT PROPERTY TO THE LIEN OF A JUDGMENT.

Where the Value of the Property is Above Jurisdictional Amount.—It is the amount of the judgment, not the value of the land sought to be subjected, that determines the jurisdiction in the appellate court, in a suit to subject land to a judgment. *Pitts v. Spotts*, 86 Va. 71, 9 S. E. Rep. 501; *Smith v. Rosen-*

heim, 79 Va. 540; Showalter v. Rupe, 2 Va. Dec. 553; Cook v. Daugherty, 99 Va. 590, 39 S. E. Rep. 223.

So where suit is brought to enforce a judgment for less than the jurisdictional amount and to set aside a conveyance made after the lien of the judgment attached, it was held that defendants below could not appeal, on the ground that the bill admits the validity of the conveyance and the title of the grantees and merely seeks the enforcement of a lien existing at the time of the conveyance, hence is not a controversy "concerning the title or boundary of land," but merely pecuniary and involving less than the jurisdictional amount and the appellants might have discharged themselves by paying the amount of the judgment. *Patteson v. McKinney*, 86 Va. 743, 14 S. E. Rep. 379.

But in the case of *Snoddy v. Haskins*, 12 Gratt. 308, where an execution for less than the jurisdictional amount was levied upon a slave alleged to be of a great value and an injunction to restrain the sale of the slave was granted and afterwards dissolved, and an appeal was taken from that decree, and the question was, whether in such a case the court of appeals had jurisdiction, at the hearing the court of four judges was equally divided. JUDGES SAMUELS and DANIEL maintaining that the court had jurisdiction, and JUDGES MORGAN and LEE holding a contrary opinion. The question cannot therefore be considered as settled in Virginia, though in the case mentioned jurisdiction was taken and the decision of the court below affirmed on its merits.

Where the Value of Property Is Below the Jurisdictional Amount.—Where suit is brought to enforce the lien of a judgment against a tract of land, although the amount of the judgment exceed the jurisdictional amount, if the value of the tract sought to be subjected is less than that amount, the court of appeals has no jurisdiction. *RICHARDSON, J.*, dissenting. *Buckner v. Metz*, 77 Va. 107.

The court of appeals has no jurisdiction to entertain an appeal from a decree in a controversy as to the liability of property worth less than the jurisdictional amount to be sold for taxes, although the taxes amount to more than that amount. *Stanley v. Hubbard*, 27 W. Va. 740.

13. SUITS TO SET ASIDE FRAUDULENT CONVEYANCES.—In a suit to set aside as fraudulent a deed, conveying property worth \$1500, or more than the jurisdictional amount, as stated in the deed, although the amount of the debts secured is less than the jurisdictional amount, still the "amount in controversy" is the property covered by the deed, hence an appeal may be granted. *Kahn v. Kerngood*, 80 Va. 342.

Where the original suit is to set aside an alleged fraudulent sale of a tract of land worth \$800 for \$50, on appeal, the matter in controversy is not the \$50, but the land or its value, \$800, hence the court of appeals has jurisdiction. *Ayers v. Blair*, 26 W. Va. 558.

The court distinguished this case from that of *Rymer v. Hawkins*, 18 W. Va. 309, where the suit was to subject land to the lien of a judgment for less than \$100, it being held in that case that whatever the value of the land, the appellant could discharge it by paying less than \$100 hence that was the amount in controversy and the court of appeals had not jurisdiction, but in this case the appellant could not relieve his land by paying the \$50. *Ayers v. Blair*, 26 W. Va. 558.

14. CONSOLIDATED CLAIMS.

Plaintiffs Appellant—Claims Separate and

—Where the jurisdiction of the court of appeals is fixed by the amount in controversy, and the claim of each of several complainants is less than \$500, and the decision of the trial court is adverse to the claim, the court of appeals has no jurisdiction of the appeal, and, if awarded, it will be dismissed. *Gilman v. Ryan*, 95 Va. 494, 28 S. E. Rep. 875.

In a creditors' bill to subject the debtor's land, in order to entitle the plaintiffs to appeal, the amount of each judgment must not be less than \$500. It is not sufficient that the aggregate amount of all the judgments is not less than \$500, since their claims are separate and distinct. *Umbarger v. Watts*, 25 Gratt. 167; *Rymer v. Hawkins*, 18 W. Va. 309; *Pink v. Denny*, 75 Va. 663; *Thompson v. Adams*, 82 Va. 673; *Craig v. Williams*, 90 Va. 500, 18 S. E. Rep. 899.

Where a decree ordering the sale of land to satisfy liens, none of which amounts to \$100, is reversed on bill of review or petition for rehearing, the court of appeals has no jurisdiction of an appeal from the decree of reversal. *Deaton v. Mitchell*, 45 W. Va. 670, 31 S. E. Rep. 968.

Where creditors file their bill to set aside a deed as fraudulent, if the claims of none of them amount to \$500 the court of appeals cannot entertain their appeal. The fact that other creditors whose claims amount to more than the required amount have filed their petition in the cause is immaterial, if they were filed without leave of court, since they are not parties to the suit. *Walter v. Chichester*, 84 Va. 723, 6 S. E. Rep. 1.

Where the appellants' claims are separate and distinct and evidenced by separate judgments rendered in independent actions, and neither plaintiff has any interest or privity in the judgments of the others, their several claims cannot be consolidated so as to give the court of appeals jurisdiction. *Saunders v. Waggoner*, 82 Va. 316; *Southern Fertilizing Co. v. Nelson*, 1 Va. Dec. 465.

It is not the value of the entire property sought to be subjected which is the matter in controversy, but the amount of each separate judgment. *Southern Fertilizing Co. v. Nelson*, 1 Va. Dec. 465.

Where the amount involved in each case is less than \$500 the appeals in several cases cannot be united so as to give the court of appeals jurisdiction. *Lawson v. Bransford*, 87 Va. 75, 12 S. E. Rep. 108; *Gregory v. Bransford*, 87 Va. 77, 12 S. E. Rep. 109.

Where the claims of one of the appellants is less than \$500, it cannot help him that another appellant whose claim is greater than \$500 unites with him in the appeal, their claims being separate and distinct, but his appeal must be dismissed. *Tebbs v. Lee*, 76 Va. 744; *Hartscock v. Crawford*, 85 Va. 413, 7 S. E. Rep. 538.

Where the interests are distinct and separate on the part of the appellants, the decree may be reversed as to one, and dismissed as to another, as having been improperly awarded, because the subject of controversy, as to him, is less than \$500. *Craig v. Williams*, 90 Va. 500, 18 S. E. Rep. 899; *Cocke v. Minor*, 26 Gratt. 246, 260.

In *Clalborne v. Gross*, 7 Leigh 331, it was held that where two suits by two judgment creditors to set aside a fraudulent conveyance were consolidated, and then dismissed and both plaintiffs appealed, and in one of the suits, the amount in controversy was less than the jurisdictional amount, the appeal in

that suit should be dismissed. *Rymer v. Hawkins*, 18 W. Va. 309.

Several beneficiaries under a deed of trust unite in a bill against the trustee for a settlement of his account, and a distribution of the proceeds remaining in his hands, and obtain a decree against him directing him to pay to each complainant in severally a separate amount, as ascertained by a commissioner in chancery. One item of \$250 charged against him in the bill is disallowed by the commissioner, exception taken by the complainants and their exception overruled, the report confirmed, and the complainants obtain an appeal to the court of appeals. *Held*, the appeal must be dismissed as improvidently awarded, because the several interests of the appellants in the disputed item amount to less than \$100, and as to them, therefore, the subject in controversy is not sufficient to give the court of appeals jurisdiction. *Fleshman v. Fleshman*, 34 W. Va. 342, 12 S. E. Rep. 718.

And it is equally well settled that, if several distributees are proceeding, each for his own distributive share, against the trustee, then the jurisdiction of the appellate court is determined as to each one separately, and, if any distributee claims less than the jurisdictional amount, the appeal as to him, should be dismissed as improvidently awarded. *Fleshman v. Fleshman*, 34 W. Va. 342, 12 S. E. Rep. 714.

Where the plaintiff in a suit in equity seeks relief on account of deficiencies in two distinct tracts of land, and it is clearly shown by both the pleadings and proofs in the cause that there is in fact no deficiency as to one of the tracts, and the value of the deficiency in the other is less than \$100, and relief is denied in the circuit court, the court of appeals has no jurisdiction to review the decree of the circuit court. *Currey v. Lawler*, 29 W. Va. 111, 11 S. E. Rep. 897.

Claims Joint.—But where the amount in controversy involved in the appeal is above the jurisdictional amount as to one of the appellants, the question is properly before the court of appeals as to that one; and when the questions as to all others are identical, and the claims have been consolidated and heard together, the validity or invalidity of the decree will affect them all, and involve the validity of the decree as to all and in all respects, and the appeal will not be dismissed as to them, though their claims be for less than \$500. The interests in such case are such that they cannot be severed in any court where they are considered, and the decision in the court of appeals as to the rights of one will conclude the rights of all in like condition. *Craig v. Williams*, 90 Va. 500, 18 S. E. Rep. 899; *Witz v. Osburn*, 83 Va. 227, 2 S. E. Rep. 33; *Atkinson v. McCormick*, 76 Va. 791.

Where an appeal is presented by several creditors secured by a deed of trust, if some of the debts secured are above the jurisdictional amount, the appeal will be entertained as to all of them, since their interests are identical, and a reversal will enure to the benefit of all. *Atkinson v. Beckett*, 34 W. Va. 584, 12 S. E. Rep. 717.

Where the same party brings three separate suits on three notes, which are consolidated into one, if the aggregate of the plaintiff's claims is not less than \$500, the court of appeals has jurisdiction. *Devries v. Johnston*, 27 Gratt. 806.

Defendants Appellants.—It is not the amount decreed to the several plaintiffs but the aggregate amount decreed against the defendant, which de-

cides the defendant's right to appeal, hence, if the aggregate of the sums decreed against the defendant amounts to \$500, he may appeal, though none of the sums decreed to the several plaintiffs amount to that sum. *Hicks v. Brick Co.*, 94 Va. 741, 27 S. E. Rep. 594.

The debtor in such case may appeal when the aggregate of the judgments sought to be enforced against him is not less than \$500. *Winch., etc., R. Co. v. Colfelt*, 27 Gratt. 777.

The owner of property, which creditors are seeking to subject to their debts when the total of the debts is as much as \$500, although severally the claims be less, may appeal. *Craig v. Williams*, 90 Va. 500, 18 S. E. Rep. 899.

The court of appeals has jurisdiction where the amount in controversy exceeds the minimum jurisdictional amount, though the judgment is not entire, but divided into smaller sums payable to the persons respectively entitled. *Peters v. McWilliams*, 78 W. Va. 597.

15. CONTROVERSY OF JURISDICTIONAL AMOUNT MUST BE CONTINUED IN APPELLATE COURT.—The matter in controversy in the lower court must not only equal the jurisdictional amount, but the controversy in relation to matters of that value must be continued by the appeal. *Duffy v. Figgat*, 80 Va. 664; *Hartsook v. Crawford*, 85 Va. 413, 7 S. E. Rep. 535; *Hawkins v. Gresham*, 85 Va. 34, 6 S. E. Rep. 472; *Ashby v. Kiger*, 3 Rand. 165; *Ross v. Gordon*, 3 Munf. 289; *Rymer v. Hawkins*, 18 W. Va. 309; *Greathouse v. Sapp*, 26 W. Va. 87; *Jones v. Cunningham*, 7 W. Va. 707.

Where the final decree is not appealed from, and the controversy is only as to a surplus, below the jurisdictional amount, the appeal does not continue the original controversy and will be dismissed. *McKinney v. Kirk*, 9 W. Va. 36.

Although a decree ascertains that certain land worth more than \$100 is subject to liens amounting to more than \$100 in the aggregate, yet if the only controversy in the court of appeals is whether two of the debts, amounting together to less than \$100, are liens on the land, the court of appeals has no jurisdiction and the appeals must be dismissed. *Morrison v. Goodwin*, 28 W. Va. 338.

Though the plaintiff's claim be originally large enough to give the court of appeals jurisdiction, if the defendant admits the plaintiffs' claim in part, so that the only amount concerning which there is any controversy is less than \$500, the court of appeals will not have jurisdiction. *Batchelder v. Richardson*, 75 Va. 835.

When some of the questions litigated in the inferior court are decided by that court in favor of the appellant, or a part of the sum claimed by him has been recovered or settled before the appeal is taken, the actual amount still in controversy, and not that involved in the suit as originally framed, determines the jurisdiction of the court of appeals. The amount in controversy continued by the appeal must exceed one hundred dollars or the court of appeals will not have jurisdiction. *Neal v. Van Winkle*, 24 W. Va. 401; *Love v. Pickens*, 26 W. Va. 341.

Where the only error complained of in the decree is that it required the sum of \$975 to be divided amongst five instead of four heirs and hence required each of the four heirs to pay one fourth of what they had received or \$48.75 to the fifth heir, such decree is not appealable by the four heirs, whether \$195 or \$48.75 be considered the matter in controversy.

being less than the jurisdictional amount. *Whitmer v. Spitzer*, 81 Va. 64.

Where, upon a motion to quash an execution, a credit is allowed the debtor on the execution, a writ of error to such judgment will be dismissed where the amount of the credit is less than \$500, since that is the matter in controversy not the amount of the execution. *Campbell v. Smith*, 32 Gratt. 288.

The court of appeals cannot entertain an appeal by the plaintiff in the lower court from the refusal of the district court to enter judgment on a verdict for a sum below the jurisdictional amount, although the amount claimed in the declaration exceeds the jurisdictional amount. *Hepburn v. Lewis*, 2 Call 497.

16. **FRAUD ON JURISDICTION.**—Jurisdiction can no more be conferred than it can be taken away by fraud or improper device. *Fink v. Denny*, 75 Va. 668.

C. MATTERS NOT MERELY PECUNIARY.

1. **MUST BE DIRECTLY THE SUBJECT OF CONTROVERSY.**—If the jurisdiction of the court of appeals is invoked on the ground that the litigation draws in question a freehold or franchise, or the title or boundaries of land, or some matter not merely pecuniary, these jurisdictional matters must be directly the subject of controversy, and not merely incidentally and collaterally involved. *Cook v. Daugherty*, 99 Va. 500, 39 S. E. Rep. 233; *Hutchinson v. Kellam*, 3 Munf. 202; *Greathouse v. Sapp*, 26 W. Va. 87.

2. CONTROVERSIES TOUCHING THE TITLE OR BOUNDARIES OF LAND.

a. *Generally.*—If, therefore, in an action of trespass *quare clausum fregit*, the damages recovered be less than one hundred dollars, the defendant cannot appeal to the court of appeals; notwithstanding it appears from the record that the title, or bounds of land, were drawn in question. *Hutchinson v. Kellam*, 3 Munf. 202; *Greathouse v. Sapp*, 26 W. Va. 87.

Under the language of the Code 1849, ch. 182, § 2, providing that no petition for an appeal, etc., should be presented to the court of appeals when the "matter in controversy" was merely pecuniary and not of greater amount than \$200 exclusive of costs, it was held in *Clark v. Brown*, 8 Gratt. 549, that it was not sufficient that some matters not merely pecuniary were drawn in question, and that the court would not have jurisdiction of an appeal from an action of trespass on the case for a nuisance, although the freehold was drawn in question, if the damages awarded were less than \$200.

Where neither the right of a railroad company to take the land nor the title of defendant to the land is contested but the only matter in dispute is the amount of damages, the "matter in controversy" is "merely pecuniary" and must not be less than \$500. *Atlantic, etc., R. Co. v. Reid*, 87 Va. 119, 12 S. E. Rep. 223.

b. *Unlawful Detainer.*—The court of appeals has jurisdiction in all controversies concerning the title of lands, irrespective of the amount in controversy and it is immaterial whether the possession or the title is in question; hence, it has jurisdiction in cases of unlawful detainer. *Pannill v. Coles*, 81 Va. 360; *Gorman v. Steed*, 1 W. Va. 1.

c. *Estate Taken under Will.*—The grantee in a deed of trust has a right to appeal irrespective of the amount involved, where the question is as to the estate he took through his grantor under a will, and thus concerns the title to land. *Sellers v. Reed*, 68 Va. 377, 13 S. E. Rep. 764.

d. *Decree Allowing Widow Homestead.*—The court of

appeals has jurisdiction of an appeal from a decree allowing a widow a homestead, by an heir seeking partition of the real estate and denying the right to the homestead, although the value of that part claimed by her is less than \$500, since the controversy concerns the title of the widow to the homestead. *Barker v. Jenkins*, 84 Va. 395, 6 S. E. Rep. 459.

Judgment Removing a Trustee of Land.—The judgment of the circuit court removing the trustees of church property under § 9, ch. 77, Code Va. 1860, and appointing others is reviewable in the court of appeals being rendered in a civil case within the meaning § 2, ch. 182, Code Va. 1860, and being a controversy concerning the title to land. *Venable v. Coffman*, 2 W. Va. 102.

e. *Estate by Eligit.*—A creditor extending the land of his debtor under an *eligit*, stands, in judgment of law, as if he had taken a lease for years in satisfaction of his debt; and by virtue of such extent, he acquires a title to the premises which may be the subject of adjudication in the court of appeals, as a controversy concerning the title to land. *Lyons v. McGuire*, 22 Gratt. 202.

f. Suits to Set Aside Deeds as Fraudulent.

In Virginia.—A suit to set aside deeds as fraudulent and subject the land conveyed is not a "controversy concerning the title or boundaries of land" within the meaning of the constitution, art. 6, § 2, so as to give the court of appeals appellate jurisdiction irrespective of pecuniary value, but the "matter in controversy" is pecuniary in such case and is the amount of the debt, to satisfy which the suit is brought, so that the debt must not be less than \$500. *Fink v. Denny*, 75 Va. 668.

It makes no difference that it was necessary to attack as fraudulent a conveyance made prior to the rendition of the appellant's judgments. *Thompson v. Adams*, 82 Va. 672.

In West Virginia.—In a suit to subject land to a debt and set aside a deed from the debtor as fraudulent, there is a decree subjecting the land. Though the debt is less than \$100, yet the *alienae* holding under such deed may appeal, because the case involves the title to the land, within the meaning of art. 8, § 3, of the Constitution. *McClagherty v. Morgan*, 36 W. Va. 191, 14 S. E. Rep. 992.

In *Parker v. Valentine*, 27 W. Va. 677, where land worth \$150 was decreed to be sold in a suit to set aside a conveyance of said land as fraudulent, an appeal was allowed to the grantee on the ground that the land to be subjected was worth more than \$100 though the judgment was for less than \$100. But in *McClagherty v. Morgan*, 36 W. Va. 191, 14 S. E. Rep. 992, this decision was held right, but it was put on the ground that it was a controversy concerning the title or boundaries of land.

But the debtor or grantor in the fraudulent deed could not appeal since the controversy as to him was merely pecuniary and the amount involved was merely pecuniary and less than \$100. *Parker v. Valentine*, 27 W. Va. 677.

g. *Suits to Enforce a Lien on Land.*—A suit brought to enforce the lien of a judgment against land is not a suit "concerning the title or boundaries of land" so as to give the court of appeals jurisdiction irrespective of pecuniary amount. *Buckner v. Metz*, 77 Va. 107; *Faulconer v. Stinson*, 44 W. Va. 546, 29 S. E. Rep. 1011.

In a suit to subject lands to the payment of the lien of a judgment, where the defendant appeals, the jurisdiction of the court of appeals is regulated by the amount decreed against him, or declared to

be a lien on the land. The "title or boundary of land" is not involved, although the appeal be taken by one who is not the judgment debtor, and the controversy is over the liability of the land to the lien of the judgment. *Cash v. Humphreys*, 98 Va. 477, 36 S. E. Rep. 517.

A creditors' bill to subject the debtor's land to their judgments is not a controversy concerning the "title or bound of lands" so as to give the supreme court of appeals jurisdiction irrespective of pecuniary amount. *Umbarger v. Watts*, 25 Gratt. 167.

The fact that a claim of homestead arises in a suit to subject land to the lien of a judgment, does not make a case "concerning the title or boundaries of land." *Smith v. Rosenheim*, 79 Va. 540; *Buckner v. Metz*, 77 Va. 107; *RICHARDSON, J.*, dissenting; *Cook v. Daugherty*, 99 Va. 590, 39 S. E. Rep. 223.

The right to subject land to a lien thereon for taxes is not a controversy concerning the title to the land, and if a decree for such taxes amounts to less than \$500, no appeal lies therefrom to the court of appeals. *Florance v. Morien*, 98 Va. 25, 34 S. E. Rep. 890.

h. Decree Ordering the Sale of Land.—The fact that land is decreed to be sold unless the sum decreed against the defendant is paid, does not make it a controversy, touching the "title or boundaries of land"; the pecuniary demand is "the matter in controversy." *Cook v. Bondurant*, 85 Va. 47, 6 S. E. Rep. 618.

3. RIGHT TO LEVY TOLLS OR TAXES.—Under art. VI, § 2 of the Constitution, the court of appeals has jurisdiction of an appeal or writ of error irrespective of the amount involved where the right of a county or corporation to levy taxes is involved, as in an action to recover money paid as taxes on the ground that the county had no right to levy them. *Prince George County v. Atlantic, etc.*, R. Co., 87 Va. 283, 12 S. E. Rep. 667.

Where a franchise is drawn in question, *e. g.* the right of the board of supervisors to levy a tax, the court of appeals has jurisdiction irrespective of the amount involved. *Board v. Catlett*, 86 Va. 158, 9 S. E. Rep. 999; *City of Staunton v. Stout*, 86 Va. 321, 10 S. E. Rep. 5.

Under § 8, art. 8 of the Constitution of West Virginia giving appellate jurisdiction to the court of appeals "irrespective of the amount in controversy" in all cases "concerning the right of a corporation or county to levy tolls or taxes," it is not enough that the right of the corporation to levy tolls is drawn in question, but the right to levy tolls must be the *direct* subject of controversy. Hence where the subject of controversy is merely the *amount* of tolls under the circumstances of the case and not the *right to levy* tolls, the court of appeals has no jurisdiction. *Miller v. Navigation Co.*, 32 W. Va. 46, 9 S. E. Rep. 57.

So the court of appeals has not jurisdiction of a writ of error to a case where the right of a county to levy taxes, is not in dispute, but only the valuation of the land. *Mackin v. County Court*, 38 W. Va. 338, 18 S. E. Rep. 632.

The court of appeals has not jurisdiction of a writ of error to a judgment for less than \$500 in an action of assumpsit against the treasurer of a city for money paid for taxes to the state under the general assessment and tax laws of the commonwealth, neither the right to levy the tax nor the constitutionality of any law being involved. *Callan v. Bransford*, 86 Va. 536, 10 S. E. Rep. 817.

4. CONTROVERSIES TOUCHING A FRANCHISE.—The

word "franchise" used in Act 1869-70, p. 323, means only such franchises as the constitution enumerates. *Neal v. Com.*, 21 Gratt. 511.

Upon the refusal of the circuit court to grant a liquor license, an appeal or writ of error and superseas lies to or from the supreme court irrespective of the amount in controversy, it being a final judgment or order in a civil case touching the exercise of a right or privilege conferred by an act of the legislature. *Leigton v. Maury*, 76 Va. 865.

5. CONTROVERSIES TOUCHING THE CONSTITUTIONALITY OF A LAW.—Where the constitutionality of a law is drawn in question, *e. g.* action of debt to recover a penalty imposed by such law, the court of appeals has jurisdiction irrespective of the amount involved. *Norfolk, etc., R. Co. v. Pendleton*, 86 Va. 1004, 11 S. E. Rep. 1062; *Pretlow v. Bailey*, 29 Gratt. 212.

An order improperly refusing an appeal in a case tried by a jury in a justice's court, in obedience to the decisions of the supreme court of appeals, holding an act of the legislature allowing appeals in such cases to be unconstitutional, is a case involving the constitutionality of a law, and such appeal lies, although the amount in controversy is less than \$100. *Clark v. W. Va. Cent. & P. Ry. Co.*, 50 W. Va. 1, 49 S. E. Rep. 351.

Any proceeding which necessarily puts such validity in issue, whether it be by demurrer, plea, instruction, or otherwise, is sufficient to give the court of appeals jurisdiction of the case. *Adkins v. Richmond*, 98 Va. 91, 34 S. E. Rep. 967.

Where the jurisdiction of the court of appeals has been invoked in good faith to determine the constitutionality of a law, a writ of error will not be dismissed as improvidently awarded merely because, after it was awarded, but before hearing, the law has been held to be constitutional in some other case. And, having jurisdiction on one ground, it has it for all purposes, although the amount involved is less than \$500. *Western Union Telegraph Co. v. Powell*, 94 Va. 268, 26 S. E. Rep. 828.

But a writ of error is properly dismissed, as improvidently awarded, where the jurisdiction of the court is dependent upon a question which was no longer debatable at the time the writ was awarded. *W. U. Tel. Co. v. Goddin*, 94 Va. 513, 27 S. E. Rep. 429; *W. U. Tel. Co. v. Reynolds (Va.)*, 41 S. E. Rep. 856.

The court of appeals has jurisdiction on appeal of an action necessarily involving the validity of coupons cut from bonds issued under acts March 30, 1871, and March 28, 1879, relating to the funding and payment of the public debt, and offered in payment of taxes, although less than the jurisdictional minimum is involved, as the constitutionality of those acts is brought in question. *Com. v. McCullough*, 90 Va. 597, 19 S. E. Rep. 114.

One who has restrained an oyster inspector from collecting fees and fines under Code 1867, § 2134, as amended by act March 5, 1894, on the ground that the act is unconstitutional, cannot dispute the jurisdiction of the supreme court of appeals, to which an appeal may be taken in all cases involving the constitutionality of a statute. *Thomas v. Rowe*, 2 Va. Dec. 118.

6. CONTROVERSIES TOUCHING THE PROBATE OF WILLS.—Section 2, ch. 178, providing for an appeal by any person who thinks himself aggrieved by an order in a controversy concerning the probate of a will, is to be considered along with the provision of § 82, ch. 118, "or in any case wherein there is a final judgment," so that an appeal will not be al-

lowed from any order, but only from a final order or sentence, so that an appeal allowed to the order of a circuit court setting aside the verdict of a jury against a will and awarding a new trial will be dismissed as improvidently awarded. *Tucker v. Sandridge*, 82 Va. 532.

7. **CONTROVERSIES TOUCHING MILLS.**—In an action on the case for consequential damages, occasioned by the erection of a mill, if the damages recovered be less than one hundred dollars, the defendant cannot appeal to the court of appeals, notwithstanding it appears from the record that the right to erect the mill was drawn in question. *Skipwith v. Young*, 5 Munf. 276. See monographic note on "Mills and Milldamns" appended to *Calhoun v. Palmer*, 8 Gratt. 88.

8. **MANDAMUS CASES.**—The court of appeals has appellate jurisdiction by writ of error in mandamus cases, though the amount involved is less than \$500, such jurisdiction being expressly conferred by art. VI, § 2 of the Constitution, and being included among the "matters not merely pecuniary" in § 8455 of the Code. *Price v. Smith*, 93 Va. 14, 24 S. E. Rep. 474.

9. **CERTIORARI CASES.**—Const. art. 8, § 3, giving the supreme court of appeals appellate jurisdiction in cases of *certiorari*, and not the clause fixing the court's jurisdiction by the value of the matter in controversy, determines the court's jurisdiction when error is brought on the ground that the circuit court refused defendant a writ of *certiorari* on a conviction by a town council for maintaining a nuisance. *Town of Davis v. Davis*, 40 W. Va. 464, 21 S. E. Rep. 906.

By § 2, art. VIII, Constitution of West Virginia, the supreme court of appeals is given appellate jurisdiction over *certiorari* cases, in the same manner as over mandamus and prohibition cases, i. e. without reference to the amount involved or the character of the case, and this though the commissioner's report confirmed by the county court, which is brought up to the circuit court on *certiorari* is only declared to be *prima facie* correct and the court might not otherwise have had jurisdiction on account of the want of finality. *Board of Ed. v. Hopkins*, 19 W. Va. 84.

In *Board of Ed. v. Hopkins*, 19 W. Va. 84, it was held that this jurisdiction over *certiorari* cases could only be exercised by writ of error.

The supreme court of appeals has no jurisdiction to review by writ of error or otherwise an order of a circuit judge refusing a writ of *certiorari* to the judgment of a justice on the application of the defendant rendered on the verdict of a jury, where the amount of such judgment is less than \$100, and the matter in controversy is merely pecuniary. Section 2, art. VIII of the Constitution, giving the supreme court authority to review cases of *certiorari*, etc., without regard to pecuniary value applies only to cases reviewable by *certiorari* at common law, and not to such as have been made so by statute since the adoption of the constitution. *Farnsworth v. Railroad Company*, 28 W. Va. 816.

XIV. LIMITATION TO APPEAL.

A. GENERALLY.

1. **LAW GOVERNING.**—The law in force at the time an appeal is allowed, governs. *Sexton v. Crockett*, 20 Gratt. 857.

Laws allowing appeals merely relate to the remedy, hence apply to rights of appeal already accrued. Nor will a provision protecting "rights accrued" protect a mere right of appeal. *Crawford v. Halsted*, 20 Gratt. 211, 225.

But in the act of 1870 to prevent this injustice a provision was put expressly providing that no right of appeal under the old law should be affected by the new law limiting the right of appeal to two years. *Crawford v. Halsted*, 20 Gratt. 211, 225.

2. **CHANGES IN LAW.**—A statute placing a limitation on the right of appeal even from existing judgments is not unconstitutional. *Gaskins v. Com.*, 1 Call 194.

A suit in which there has been a final decree is not a pending suit in the sense of the Code 1849, ch. 16, § 18, or ch. 215, § 2, providing that the repeal of previous acts should not affect a prosecution, suit or proceeding pending on that day. *Yarborough v. Deshazo*, 7 Gratt. 374.

Nor does this section operate so as to save to the party a remedy by way of appeal, etc., to the court of appeals, allowed by previous acts but taken away by the act in question. *McGruder v. Lyons*, 7 Gratt. 233.

The proviso in the act for limitation of suits as to rights existing when the Code took effect, contained in § 19, ch. 149, p. 594, is restricted to actions and rights barred by that chapter, and does not extend to the law limiting and regulating appeals. *Yarborough v. Deshazo*, 7 Gratt. 374.

3. **STATUTES MANDATORY.**—Whether the supreme court of appeals can grant an appeal after the time limited by law is a question of jurisdiction, not discretion; hence, the statute requiring an appeal to be taken in the vacation next after the term when the decree was rendered, 1 Rev. Code, ch. 64, § 59, a party allowing that period to elapse without appealing, is concluded from thereafter taking an appeal. *Clarke v. Conn.*, 1 Munf. 160; *Anderson v. Anderson*, 2 Call 198.

4. **NO OBJECTION NECESSARY.**—"In appeals or writs of error to this court, whilst a motion to dismiss as improvidently awarded, or to quash, in advance of hearing on the merits, is advisable as singling out a preliminary point of defense, and saving labor, yet, so far as I am advised, or have seen from the reports, no motion is required to enable the party to have the benefit of the statute, but the court will *ex mero motu* dismiss a writ of error or appeal barred by the statute, or where not barred, will refuse to consider any appealable decree older than the limit, and the petition must show a right to appellate process from a decree or judgment within the limit, else it will not be allowed, or, if allowed, will be dismissed." *BRANNON, P.*, in *Morgan v. Ohio R. Co.*, 39 W. Va. 17, 19 S. E. Rep. 588.

Under the statute prohibiting the granting of appeals, writs of error or supersedeas after five years from the date of a final judgment or decree, the judges of the court of appeals have no authority to grant an appeal, etc., after five years or to consider the merits of a cause after the expiration of five years, though the objection be not taken by plea or otherwise and even though it be expressly waived by consent of parties. *Com. v. Moore*, 1 Gratt. 294.

5. **APPLICABLE TO THE COMMONWEALTH.**—The general rule of law, which exempts the commonwealth from the operation of the statutes of limitation, is applicable to original controversies, and not to cases in which the rights of the parties have been adjudicated by the judgment, decree, or sentence of a court of competent jurisdiction. In such cases, the question whether the merits of the judicial decision can be reviewed by another tribunal, must be governed by the laws prescribing and regulating

the jurisdiction of the appellate forum. Hence the act of assembly, Supp. Rev. Code, § 31, April 16, 1881, limiting the time in which an appeal from, or writ of error or supersedeas to, any final decree, judgment, etc., may be taken, to five years from the date of such decree, etc., applies to the commonwealth as well as to any other party. *Com. v. Moore*, 1 Gratt. 294.

Decree on Petition to Reverse Barred Decree.—If decree appealed from was rendered within the statutory period of appeal, the court of appeals has jurisdiction, though the decree was on a petition to reverse a former decree pronounced anterior to the said period. *Offending v. Ford*, 86 Va. 917, 12 S. E. Rep. 1.

6. **LACHES.**—An appellant cannot be guilty of laches in taking an appeal, when it is taken within the period prescribed by law for taking appeals. *Keck v. Allender*, 42 W. Va. 420, 26 S. E. Rep. 437.

B. PERIOD OF LIMITATION.

1. FINAL DECREES AND JUDGMENTS.

a. *Virginia*.

Act of 1792.—Under the act of 1792 constituting the court of appeals, no writ of error lay to a judgment of the general court after five years from the rendition thereof. *Gaskins v. Com.*, 1 Call 194; *Overstreet v. Marshall*, 3 Call 192.

Under Code of 1819.—No appeal could be taken after the lapse of three years from the date of a final decree. *Elcan v. Lancasterian School*, 2 P. & H. 53; *Cocke v. Gilpin*, 1 Rob. 20; *Fleming v. Bolling*, 8 Gratt. 292; *Thorntons v. Fitzhugh*, 4 Leigh 200.

Act 1830-1.—Under Act 1830-1, § 31, Supp. Rev. Code 1849, the petition for an appeal must have been presented within five years. *Williamson v. Gayle*, 4 Gratt. 180; *Fleming v. Bolling*, 8 Gratt. 292.

Under Acts of 1867 and 1870.—By the act of 1867 the period was reduced to two years, but by act of 1870 the period from the 26th January, 1870, to the 5th November was excluded from the computation of the two years, so that the longest period of limitation within which a petition for an appeal, writ of error and supersedeas could be presented, was two years nine months and ten days as to final judgments, decrees and orders rendered before the passage of the act of November 5th, 1870; and as to those afterwards rendered, such period of limitation was two years. *Callaway v. Harding*, 23 Gratt. 542; *Ambrose v. Keller*, 22 Gratt. 709; *Sexton v. Crockett*, 23 Gratt. 857.

By the saving in the act of 1869-70, five years instead of two were allowed to perfect an appeal, i. e. give the record to the clerk and execute the required bond where the decree appealed from was rendered prior to the passage of that act. *Sexton v. Crockett*, 23 Gratt. 857.

Under Code 1887.—The period of limitation to appeals and writs of error being one year from the date of the judgment or decree, a writ of error awarded after more than one year has elapsed must be dismissed. *Thompson v. Carpenter*, 88 Va. 702, 14 S. E. Rep. 181; *Kern v. Wyatt*, 89 Va. 885, 891, 17 S. E. Rep. 549; Code Va. 1887, § 8455.

Decree Refusing Bill of Review.—Petition for an appeal from a final decree refusing a bill of review, must be presented within six months from the date of such decree, and it is immaterial whether such decree of refusal be to the filing of the bill of review or to the prayer of a bill of review. Code 1887, § 8455; *Jordan v. Cunningham*, 85 Va. 418, 7 S. E. Rep. 540.

Under the terms of § 8455 of the Code, the peti-

tion for an appeal from a decree refusing a bill of review to a decree rendered more than six months prior thereto must be presented within six months from the actual date of the decree appealed from, and not from the beginning or the end of the term at which it was rendered. *Buford v. North Roanoke Land Co.*, 94 Va. 616, 27 S. E. Rep. 509.

b. *West Virginia*.

Act 1877.—By the act 1877 the time for taking an appeal was limited to five years from the date of the decree. *Lloyd v. Kyle*, 26 W. Va. 534. This was also the law prior to 1877. *Farmers' Bank v. Montgomery*, 11 W. Va. 109.

Act 1882.—By the act of 1882 this period was reduced to two years. *Hoy v. Hughes*, 27 W. Va. 778.

Code 1891.—Under § 3, ch. 135, Code W. Va. 1891, an appeal from a final decree entered by a circuit court must be prosecuted within two years after the same has been rendered. *Kanawha Valley Bank v. Wilson*, 35 W. Va. 36, 13 S. E. Rep. 66; *Shumate v. Crockett*, 43 W. Va. 491, 27 S. E. Rep. 260.

2. **INTERLOCUTORY DECREES AND JUDGMENTS.**—An appeal may be taken from an interlocutory decree, at any time, so long as the cause is pending in court. *Kendrick v. Whitney*, 28 Gratt. 646; *Cocke v. Gilpin*, 1 Rob. 20; *Fleming v. Bolling*, 8 Gratt. 292; *Thorntons v. Fitzhugh*, 4 Leigh 200. See also, *Camden v. Haymond*, 9 W. Va. 681.

The limitation of appeals to one year from the rendition of the decree applies only to final decrees. *Barker v. Jenkins*, 84 Va. 895, 6 S. E. Rep. 459.

A decree adjudicating the principles of a cause while, by statute, it is appealable, yet is not a final decree so that the statute of limitations will run against it. *Penn v. Chesapeake, etc., R. Co.*, 2 Va. Dec. 224.

In West Virginia by the Act of 1877, ch. 44, § 3, no petition, for an appeal, even from an interlocutory decree, can be entertained after five years from the date of the decree. *Lloyd v. Kyle*, 26 W. Va. 534.

By Acts of 1882, ch. 157, no appeal can be entertained from a decree of any character, whether final or interlocutory, which has been rendered more than two years before the petition for the appeal was presented. *Hoy v. Hughes*, 27 W. Va. 778.

3. CALCULATION OF PERIOD.

Generally.—The limitation to appeals and writs of error is subject to but few exceptions, for reasons no doubt founded upon a sound public policy. No suggestion of hardship, surprise, or accident, can avail in the least in defeating or suspending this limitation. If the party does not give the bond within the statutory period whether he be in default two months or two days, the result must be the same—he must be dismissed by the court. *Pace v. Ficklin*, 76 Va. 292.

Where Petitioner Is Not in Fault.—Where a petition was presented to the court of appeals, praying writs of supersedeas to two distinct final orders of a circuit court in one cause, and the court allowed the supersedeas to one of the orders, without any notice of the prayer for the supersedeas to the other, though it was plainly erroneous, it was held that the petitioner had a right to the judgment of the court, on both the prayers of his petition; and, as the court omitted to give judgment on one of them, it was not too late to award the supersedeas, after five years, the limitation to the writ, had elapsed, the omission having been owing to the inadvertence of the court, not to the fault of the petitioner. *Dis-sentiente*, TUCKER, P. *Pugh v. Jones*, 6 Leigh 290.

Where a party was arrested by the Confederate

authorities for disloyalty to the established government of Virginia at Richmond and kept in confinement till the five years' limitation to appeals had expired, he was still allowed to maintain his appeal. *Wyatt v. Morris*, 2 W. Va. 575.

Where a petition to the court of appeals for a supersedeas was rejected and an order entered accordingly, and afterwards at the same term a motion was made for reconsideration and the court agreed to reconsider, but by inadvertence no entry was made setting aside the order denying the supersedeas, and more than three years afterwards the motion to reconsider was renewed, it was held that the motion could not then be entertained on account of the long delay and because, under the peculiar circumstances of the case, a judgment would have been of no benefit to the plaintiffs in error, though the court said that usually it would correct such a mistake. *Emory v. Erskine*, 7 Leigh 267; *Beasley v. Owen*, 3 H. & M. 449.

Periods Excluded.—The term elapsed from the presentation of the petition till the delivery of the record and petition to the clerk of the appellate court is to be excluded. Code, § 2474; *Acker v. A. & F. R. Co.*, 84 Va. 648, 5 S. E. Rep. 688.

But this delivery to the clerk is the actual receipt of the petition and record by him. The omission of the clerk to examine a box containing the papers, or, if he examined it, his mistake as to its contents, or failure to discover the papers, cannot change the law. Whatever may be the remedy of the party injured against the clerk, the statute of limitations begins to run from the actual receipt of the petition and record by the clerk. *Bull v. Evans*, 96 Va. 1, 80 S. E. Rep. 468.

Under § 17, Acts 1876-7, providing "that the time which shall elapse from the presenting of a petition for an appeal, writ of error, etc., which shall be endorsed thereon by the judge to whom the same shall be first delivered, and the delivery of the record to the clerk of the appellate court, shall be excluded from the computation of the said period of two years." This time will be excluded though at the time of endorsement the judge also endorses the following: "I have taken no action on the record, because no petition accompanied the record." *Frazier v. Frazier*, 77 Va. 775.

War and Stay-Law Period.—In *Sexton v. Crockett*, 23 Gratt. 867, it was held by a divided court that where a decree was rendered on the 10th Oct., 1863, and an appeal was allowed on the 5th Oct., 1871, it was in time, under the two years' limitation applicable at the time the appeal was granted, since the war and stay-law period was to be excluded.

But in *Rogers v. Strother*, 27 Gratt. 417, this was overruled and it was held that § 7, of the Act of March 2, 1866, known as the stay law, and the act amendatory thereof, does not apply to appeals, writs of error, or supersedeas; and therefore an appeal from a final decree made on the 1st of November, 1867, cannot be allowed on the 12th of June, 1871.

Statute Runs over All Supervening Disabilities.—Where the statute of limitations has once begun to run against an appeal, and the party desiring to appeal, assignee in bankruptcy in this case, dies, the period from such death to the qualification of another assignee will not be excluded. *Pace v. Picklin*, 76 Va. 292.

No Relation of Judgment.—In *Acker v. A. & F. R. Co.*, 84 Va. 648, 5 S. E. Rep. 688, the court intimated that the common-law fiction that a judgment ren-

dered on any day of a term operates as if rendered on the first day of the term does not apply in calculating the time elapsed since the date of a judgment, to ascertain whether an appeal is barred.

Pendency of Bill of Review.—The pendency of a bill of review on the sole ground of after-discovered evidence will not prevent an appellant from prosecuting his appeal in the court of appeals from the decree sought to be reviewed, as the questions presented to the two tribunals by the separate proceedings are entirely distinct, and no confusion can arise from their separate determination. *Gillespie v. Allen*, 37 W. Va. 676, 17 S. E. Rep. 184.

But where a party has filed a petition for rehearing or bill of review for error of law in the circuit court, he cannot, while it is pending undetermined, appeal to the court of appeals. *Maxwell v. Martin*, 35 W. Va. 384, 14 S. E. Rep. 7.

The filing of an abortive bill of review will not have the effect of arresting the statute of limitations, so as to extend the period within which an appeal might have been taken from the final decree the review and reversal of which were attempted by such abortive bill. *Kanawha Valley Bank v. Wilson*, 35 W. Va. 36, 13 S. E. Rep. 58.

When Appeal is Granted.—When an appeal is a matter of right it is the giving of the appeal bond which stops the running of the statute of limitations. *Womer v. Ravenswood, etc., R. Co.*, 37 W. Va. 287, 16 S. E. Rep. 488; Code 1891, ch. 50, § 103.

But where the allowance of the appeal is a matter of discretion, it is the presentation of the petition which stops the running of the statute. *Womer v. Ravenswood, etc., R. Co.*, 37 W. Va. 287, 16 S. E. Rep. 488; Code 1891, ch. 135, §§ 1, 2, etc.; *Williamson v. Gayle*, 4 Gratt. 180; *Bank v. Wilson*, 35 W. Va. 36, 13 S. E. Rep. 58; *Ambrouse v. Keller*, 22 Gratt. 769.

The judge's order for a writ of supersedeas is the true commencement of the proceeding in the court of appeals, and therefore, if that be within five years from the date of the judgment, although the bond is not given and writ is not taken out till the five years have elapsed, it will be in time. *Overstreet v. Marshall*, 8 Call 192.

Where the order for a supersedeas was made and the bond executed within a little more than two years after judgment, but the writ itself did not then issue because of the lack of a clerk of the court, and the appellant failed to apply for the writ for more than 15 years after judgment and nearly twelve years after the appointment of a clerk, the writ will be refused. *Anderson v. Lively*, 6 Leigh 77.

But under the Code of 1849, ch. 182, § 17, providing that "no process shall issue on any appeal, writ of error or supersedeas allowed to or from a final judgment, decree or order, if, when the record is delivered to the clerk of the appellate court, there shall have elapsed five years since the date of such final judgment, decree or order; but the appeal, etc., shall be dismissed, whenever it appears that five years have elapsed since the said date before the record is delivered to such clerk or before such bond is given as is required to be given before the appeal, etc., takes effect." It was held in *Yarborough v. Deshazo*, 7 Gratt. 374, that upon an appeal to the court of appeals from a final judgment, decree or order, although the petition may have been preferred and appeal allowed within the time limited yet if the record be not delivered to the clerk of the appellate court, and, where bond is required, if it be not also given within five years from the date of the judgment, the appeal must be dismissed.

The same rule was held applicable in *Otterback v. Alex., etc., R. Co.*, 26 Gratt. 941, under the provision of the Code 1873, ch. 173, § 17, which merely substitutes two years for five as the period of limitation. *Pace v. Picklin*, 76 Va. 292.

This is still the law in Virginia except that one year is substituted for two. Code 1887, § 3474; *Acker v. A. & F. R. Co.*, 84 Va. 648, 5 S. E. Rep. 668.

C. NO INQUIRY INTO MERITS.—The supreme court of appeals cannot enquire into the merits of a case on appeal where more than the statutory period has elapsed since its rendition. *Cocke v. Gilpin*, 1 Rob. 20; *Fleming v. Bolling*, 8 Gratt. 292; *Thorntons v. Fitzhugh*, 4 Leigh 309.

XV. CONCLUSIVENESS OF DECREES OF APPELLATE COURTS.

A. OF COURT OF APPEALS.

1. GENERALLY.—The supreme court of appeals has no power to review its decisions on the merits in any way after the end of terms at which they were rendered. *Griffin v. Cunningham*, 20 Gratt. 81; *Reld v. Strider*, 7 Gratt. 76; *Roanoke St. Ry. Co. v. Hicks (Va.)*, 32 S. E. Rep. 790; *Campbell v. Campbell*, 22 Gratt. 649, 670.

"It is believed, that no case can be found, that decides, where an issue has been tried by a jury and a verdict rendered, and a decree or judgment rendered on the verdict, and the judgment or decree, on writ of error or appeal, affirmed by an appellate court, that such decree or judgment can be reviewed for any errors, committed by the court during the trial of the issue, or at any other time, before the judgment or decree was appealed from." *Henry v. Davis*, 13 W. Va. 230.

"The finality and irreversibility of the judgments and decrees of the court of appeals after the close of the term at which they are rendered is inherent in the very nature and constitution of the tribunal, and cannot be disturbed without deranging the administration of justice, and the introduction of intolerable evils in practice. *Reld v. Strider*, 7 Gratt. 81; *Stuart v. Peyton*, 97 Va. 796, 34 S. E. Rep. 696.

All the decrees of the appellate court are in their nature final, except possibly where that court disposes of only a part of the case at one term, and reserves it for further and final action at another. *Campbell v. Campbell*, 22 Gratt. 649.

2. ON QUESTIONS OF JURISDICTION.—The court of appeals can no more set aside a decree of a former term for error upon a point of jurisdiction, than for error on any other point. *Bank of Virginia v. Craig*, 6 Leigh 399.

JOHNSON, J., said, in *Bank of Virginia v. Craig*, 6 Leigh 399, the rule was, that the court would set aside a decree or judgment of a former term, if it was entered when the party was dead, or when, having retained counsel, he was nevertheless, through any accident or mistake, not heard by his counsel; but it was not competent to the court to set aside any decree of a former term, made *inter partes*.

The court of appeals is by common law, independent of statute law, conclusively presumed to have done everything that was necessary to invest it with full and complete jurisdiction over all the parties. In *Bank of Virginia v. Craig*, 6 Leigh 438, the circuit court of Spotsylvania, rendered a decree in favor of a ward for certain bank stock, against the Bank of Virginia, and in the same decree expressed the opinion that the guardian and his sureties were also liable to the ward for such bank stock, but no de-

creed was then rendered against them. The Bank of Virginia took an appeal from this decree. The sureties of guardian were not parties to this appeal, they were not served with any process issuing from the court of appeals, and neither appeared in person, nor by counsel, and had no opportunity of being heard in the appellate court. The court of appeals reversed the decree against the Bank of Virginia, and entered up a decree against the guardian and his sureties for the value of this stock. At the next term of the court of appeals a motion was made to set aside this decree against the guardian and his sureties, on whom no process from that court had been served, and in lieu of this decree to enter one dismissing the bill as to the Bank of Virginia, and remanding the cause to the circuit court that the sureties might thus have the opportunity to controvert their liability. It was insisted by counsel, that where a decree or judgment is rendered by the court of appeals, either in respect to matters or parties *coram non judge*, it may and ought to be set aside at a subsequent term. But the court overruled the motion on the ground that it could not then set aside a decree entered at a former term, whether it were objectionable on its merits or whether it was prematurely entered, before some of the parties against whom it had been entered had been summoned. *Newman v. Mollohan*, 10 W. Va. 488.

If an appellate court has ever so erroneously decided, that it has jurisdiction of a cause and then proceeds to determine it on its merits, the parties to the cause are bound as *res adjudicata* by the decision of the court, that it has jurisdiction as well as by the decision of the court on the merits. *Renick v. Ludington*, 20 W. Va. 511.

Where persons, not parties to a decree or bound thereby, but whose property was ordered to be sold by said decree, take an appeal, although the appellate court has no right to take jurisdiction of the appeal, if it *does* take jurisdiction and proceeds to determine the cause on its merits, such appellants are bound as *res adjudicata* by the decision of the court that it has jurisdiction. *Renick v. Ludington*, 20 W. Va. 511, 536. But this is not true of persons who do not *appeal*. *Renick v. Ludington*, 20 W. Va. 511, 536.

A writ of error to a joint judgment should be taken in the name of all the joint defendants, if not, the appellate court must see that the requirements of the statute have been complied with, *i. e.* that all the parties in interest have been summoned, including of course the other defendants, who may then appear and assign errors, or refuse and be severed, and then any one or more may prosecute the writ. When the court of appeals has taken jurisdiction of a writ of error obtained by one alone of several joint defendants, it will be presumed that it has seen that the statute was complied with. *Newman v. Mollohan*, 10 W. Va. 488, 498.

3. ON LOWER COURT.—A decision of the court of appeals certified to the lower court is binding on that court as well as on the court of appeals. *Holzeran v. Meisel*, 91 Va. 143, 21 S. E. Rep. 658; *Rosenbaum v. Seddon*, 94 Va. 576, 27 S. E. Rep. 425; *Keck v. Allender*, 43 W. Va. 420, 26 S. E. Rep. 437.

The court of chancery cannot, upon the same facts, correct on motion, or by bill of review, any error, apparent on the face of the proceedings, in a decree which has been affirmed by the court of appeals. *Campbell v. Price*, 8 Munf. 227; *Price v. Campbell*, 5 Call 115; *Mason v. Bridge Co.*, 20 W. Va. 223, 230.

Where a decree has been affirmed by the court of appeals it becomes *res adjudicata* and no error in it can be corrected by rehearing in the court below. *Lore v. Hash*, 80 Va. 277, 15 S. E. Rep. 549.

Where a question of law or fact is once definitely settled and determined by a decree of the court of appeals, and the cause is remanded for further proceedings, a party to said suit cannot, by subsequent pleadings, call in question the conclusiveness of the questions determined by said decree. *Seabright v. Seabright*, 33 W. Va. 152, 10 S. E. Rep. 265; *Koonce v. Doolittle*, 48 W. Va. 592, 37 S. E. Rep. 644.

Upon a former appeal, the special court of appeals, with all the parties interested before it, having decided a question, that judgment is conclusive and this is true though the decree of the court below was reversed because the proceeding was by petition, and the cause was sent back to be regularly prepared and matured. *Corbell v. Zeluff*, 12 Gratt. 226.

Where, upon an appeal from a final decree made upon a report of a commissioner, to which there were various exceptions by the appellant, the appellate court holds that the court below erred in not sustaining one of the appellant's exceptions to the report; and the decree is reversed and the cause remanded for the necessary enquiries to be made in relation to the subject of that exception. *Held*, the decree concludes all other questions. *Deneufville v. Travis*, 5 Gratt. 28; *Massey v. King*, 1 Va. Dec. 63.

Where the decree of the court of appeals holds that an appellant is entitled to his homestead exemption "unless it appears that he was not entitled to it upon other grounds," this does not authorize the other party to set up new grounds of objection to allowing the homestead which might have been preferred at the former hearing but were not. *Sears v. Marshall*, 83 Va. 383, 2 S. E. Rep. 608.

Where the court of appeals has decided against the right of certain persons to become parties, upon remand those persons cannot come into the court below as parties and litigate anew the questions already determined. *Robinson v. Crenshaw*, 84 Va. 348, 5 S. E. Rep. 222.

The circuit court cannot review or make any alteration in the provisions or requirements of a decree of the appellate court certified back for further proceedings in order to a final decree, but such further proceedings may be matter of decision for the first time in the lower, and of review in the appellate court. *Atkinson v. Beckett*, 36 W. Va. 438, 15 S. E. Rep. 179.

Where an instruction given, or a verdict rendered, at the trial in the court below, is, on appeal, pronounced erroneous, it is improper at a subsequent trial, the evidence being the same, to give the same instruction, or to enter up judgment on the same verdict. *Smith v. Snyder*, 82 Va. 614.

Where on appeal a new trial has been granted, it is the duty of the circuit court, at the second trial, to adopt the views set forth by the court of appeals in its opinion, and instruct the jury in accordance therewith, provided the facts are the same and the instructions are asked for. *Chaffin v. Lynch*, 84 Va. 384, 6 S. E. Rep. 474.

Circuit courts are bound to obey the decrees of the court of appeals in all cases. Where, on appeal, the court of appeals prescribes the order in which properties must be sold under decree for sale is made, the circuit court, in its decree of sale, must conform to that prescription; otherwise its decree

will be reversed for such nonconformance. *Strayer v. Long*, 83 Va. 715, 3 S. E. Rep. 372.

When a case is remanded to an inferior court for further proceedings, that court can in no case regard anything which relates to any action which the inferior court may take in the case after it is remanded, as *obiter dictum*. *Swinburn v. Smith*, 15 W. Va. 483.

4. ON REHEARING.—A case decided by the supreme court of appeals at one term of the court, at which no motion or petition is made or filed to rehear it, cannot be reheard by that court upon its merits for the correction of errors of judgment in the final decree or judgment of the appellate court at the former term. *Hall v. Bank of Virginia*, 15 W. Va. 323; *Renick v. Ludington*, 20 W. Va. 511, 533; *Towner v. Lane*, 9 Leigh 262, 279; *Baker v. Glass*, 6 Munf. 212, 218; *Griffin v. Cunningham*, 20 Gratt. 31; *Roanoke St. Ry. Co. v. Hicks (Va.)*, 32 S. E. Rep. 790.

A cause may be reheard, upon a petition presented before the term has passed in which the final decree was pronounced; but not afterwards, except by bill of review. *Hodges v. Davis*, 4 H. & M. 400.

In *Com. v. Beaumarchais*, 3 Call 122, 178, the court had reversed the decree of the lower court, but had refused to make any further decree because they were equally divided as to a certain point, but at a subsequent term, they corrected the decree on the ground that the cause still remained in the court undecided and *yet pending i. e.* interlocutory.

In *Wynn v. Wyatt*, 11 Leigh 586, a judgment of the court of appeals of one term was at the next term thereafter set aside and a rehearing directed, yet it is to be understood that the motion for the rehearing was made at the same term and held under advisement till the next, hence the case is not authority for granting rehearings at a subsequent term. *Reid v. Strider*, 7 Gratt. 76.

In *Campbell v. Campbell*, 23 Gratt. 649, 672, it was held that there might possibly be an interlocutory decree in the court of appeals, but they were extremely rare. The mere fact that the appeal is from an interlocutory decree of the lower court does not make the decree of the court of appeals interlocutory.

Legislative Authorization.—In *Hall v. Bank of Virginia*, 15 W. Va. 323, it was held that ch. 52 of the Act of 1879, providing for the rehearing and review in the supreme court of appeals in causes decided at the special term held in Wheeling in October, November, and December, 1878, did not confer on said court the authority to rehear such causes upon their merits; but merely to correct clerical errors therein, and that the case of *Garrison v. Myers*, 12 W. Va. 330, is not in conflict as it was a mere clerical error that was corrected in that case.

The proviso to § 2 of the Act of March 5, 1870, called the enabling act, which authorized the court of appeals organized under the existing constitution to rehear, and affirm or reverse the decrees made by the military judges at the term, commencing the 11th of January, 1870, the term having ended before the passage of the act, is unconstitutional; and the court has no authority to rehear such cases. *Griffin v. Cunningham*, 20 Gratt. 31.

The act of March 5th, 1870, commonly called the Enabling Act, is a valid act, except the proviso which authorizes the court of appeals to review the decisions of the court of appeals organized under the reconstruction acts. *Teel v. Yancey*, 23 Gratt. 691.

5. ON BILL OF REVIEW.

In Court of Appeals.—Where a decree has been

affirmed by the court of appeals, a bill of review ought not to be granted to reverse it for any errors on the face of the proceedings; but if new matter be produced, which was unknown to the party applying, at the time of the decree, such court may, and, if the evidence warrants it, ought, to grant such bill of review. *McCall v. Graham*, 1 H. & M. 18; *Shepherd v. Chapman*, 2 Va. Dec. 88.

In Lower Court.—When the court of appeals makes a decree, and sends the cause back for further proceedings, there cannot be a bill of review, to correct the decree of the court of appeals for error apparent. *Henry v. Davis*, 13 W. Va. 280.

And by error apparent is meant, such as appears upon the face of the proceedings, and that includes all that was involved in the issue. *Henry v. Davis*, 13 W. Va. 280.

As to the power of the lower court to review decrees of the court of appeals for new matter, see monographic note on "Bills of Review" appended to *Campbell v. Campbell*, 22 Gratt. 649.

6. POWER OF COURT OF EQUITY.—Where a judgment of the circuit court has been affirmed by the court of appeals, such judgment cannot be impeached or set aside by a court of equity, in a suit brought for that purpose, upon any ground of error apparent upon the face of such judgment, or upon the record of the case in which it was rendered. *Armstrong v. Poole*, 30 W. Va. 666, 5 S. E. Rep. 257.

In *Byrne v. Edmonds*, 23 Gratt. 200, the court held that the circuit court as a court of equity had inherent power to correct a decree of the court of appeals which was founded on a merely clerical error of the printer of the record.

In *Price v. Fuqua*, 4 Munf. 68, a new trial was granted in equity, although the judgment had been affirmed in the court of appeals, upon allegations that, relying on the advice of counsel the applicant had failed to offer evidence which he had, that the verdict was rendered upon evidence given in the jury room, and that a receipt had since been found.

But in *Henry v. Davis*, 13 W. Va. 280, *JOHNSON, J.*, said that the ground of granting the new trial in the above case could not have been the erroneous advice of counsel, it might have been on the ground of after-discovered evidence or of the giving of evidence in the jury room, but that the case was so badly reported that the court could not follow it.

7. ON SECOND APPEAL.—It is a settled rule of the court of appeals that a question which has been decided upon a former appeal cannot be reviewed or reversed upon a subsequent appeal in the same cause. *Stuart v. Preston*, 80 Va. 625; *New York Life Ins. Co. v. Clemmitt*, 77 Va. 366; *McCormick v. Wright*, 79 Va. 524; *Bank of Old Dominion v. McVeigh*, 29 Gratt. 546, 553; *Frazier v. Frazier*, 77 Va. 775, 783; *Norfolk, etc., R. Co. v. Mills*, 91 Va. 613, 22 S. E. Rep. 556; *Chahoon's Case*, 21 Gratt. 822; *Alexandria Savings Inst. v. McVeigh*, 84 Va. 41, 43, 3 S. E. Rep. 885; *Hawthorne v. Beckwith*, 89 Va. 786, 17 S. E. Rep. 241; *Osburn v. Throckmorton*, 90 Va. 311, 18 S. E. Rep. 285; *Krise v. Ryan*, 90 Va. 711, 19 S. E. Rep. 783; *Carter v. Hough*, 89 Va. 503, 16 S. E. Rep. 665; *Mason v. Bridge Co.*, 20 W. Va. 223, 230; *Hollingsworth v. Brooks*, 7 W. Va. 559; *Henry v. Davis*, 13 W. Va. 280; *Campbell v. Campbell*, 22 Gratt. 649; *McCullough v. Dashiell*, 85 Va. 37, 6 S. E. Rep. 610; *Miller v. Cook*, 77 Va. 806; *Camden v. Werninger*, 7 W. Va. 528; *Board v. Parsons*, 24 W. Va. 551; *Harmon v. Bowyer*, 15 W. Va. 538; *Wick v. Dawson*, 48 W. Va. 499, 37 S. E. Rep. 639.

A question raised by a second appeal in a case

which was necessarily involved on the former appeal in the same case, and was expressly raised by a petition to rehear the former decree of the appellate court, must be regarded as *res judicata*. *Sims v. Tyrer*, 96 Va. 14, 30 S. E. Rep. 443.

Questions once decided upon an appeal are *res adjudicata* in that case, though only two judges concurred in the decision, such questions can only be reconsidered in another case. *Postlewaite v. Wise*, 17 W. Va. 1.

A decree of an inferior court being affirmed in consequence of an equal division of opinion in the court of appeals, that is a decision which settles the principles of the cause involved in the decree of the inferior court. *Philips v. Williams*, 5 Gratt. 260.

The special court of appeals having decided a case regularly sent to that court, and having reversed the decree of the court below, and sent the cause back for further proceedings, there can afterwards be no complaint of error in the decree of the special court or in the proceedings before that decree. *Bolling v. Lersner*, 26 Gratt. 36.

"The case made for the court of appeals by an appeal from a decree of the court below, whether final or interlocutory, is, as to the court of appeals, a complete case in itself, and the decree of that court therein is final and conclusive between the parties, as well upon the court itself as upon the court below; and the court of appeals can do nothing more in the course of the same litigation, until a new and different appeal is brought up to it from some decree of the court below, rendered in the cause upon subsequent proceedings in that court; and then the court of appeals can only review and reverse that decree without interfering with its own former decree." *Campbell v. Campbell*, 22 Gratt. 649; *Cobbs v. Gilchrist*, 80 Va. 503.

And that though the question does not appear to have been formally raised or considered on the former appeal, if it might have been passed upon on consideration of the record. *Krise v. Ryan*, 90 Va. 711, 19 S. E. Rep. 783; *Stuart v. Heiskell*, 86 Va. 191, 9 S. E. Rep. 984; *Findlay v. Trigg*, 83 Va. 539, 3 S. E. Rep. 142; *Emfinger v. Kenney*, 79 Va. 551; *McCullough v. Dashiell*, 85 Va. 37, 6 S. E. Rep. 610; *Wash., etc., R. Co. v. Cazenove*, 83 Va. 744, 3 S. E. Rep. 483.

The clause of the constitution requiring the court of appeals to "consider and decide every point fairly arising upon the record and give its reason therefor" is merely directory, and a failure to do so does not render any points involved in the issue any the less "*res judicata*" although not mentioned in the opinion of the court. *Henry v. Davis*, 13 W. Va. 280; *Hall v. Bank of Virginia*, 15 W. Va. 323.

The mere fact that a statement of the law by the supreme court of appeals contained in the opinion, is not inserted in the syllabus, required by § 5, art. VIII of the Constitution, to be prefixed to the published report of the case, does not relieve the inferior court from the duty of following such statement. *Swinburn v. Smith*, 15 W. Va. 483.

Failure to Give Relief Equivalent to Adverse Adjudication.—In a suit on a note executed by a trustee of real and personal property, the appellate court reversed so much of the decree as directed payment of the debt from the personal property held in trust, but affirmed that part which ordered a sale of the crop for that purpose, and remanded the cause. *Held*, that the failure to give plaintiff a decree subjecting the rental of the real estate to payment of his debt was an adjudication against such right, which would be adhered to on a second appeal upon

a similar record. *Wooldridge v. Green*, 2 Va. Dec. 461.

Construction of a Will.—So where a will has been construed by the lower court and that construction approved by the court of appeals, the question in *res adjudicata* and cannot be examined on a second appeal. *Hawthorne v. Beckwith*, 89 Va. 786, 17 S. E. Rep. 241.

Judgment or Decree against Persons Who Should Have Been Parties.—The rendition by the court of appeals, of a judgment or decree against persons who should have been appellees is, at common law, equivalent to an affirmation on the record that such parties were before the court, as, without their so being, the court could not have proceeded to decide the case. *Newman v. Mollohan*, 10 W. Va. 488; *McClanahan v. Hockman*, 96 Va. 392, 31 S. E. Rep. 512.

Sufficiency of Declaration.—Where a judgment for the defendants below is reversed and a new trial directed, and there is a second verdict in favor of the plaintiffs, the defendants, on appeal from the second verdict cannot object to the sufficiency of the declaration, the court of appeals, in reversing the former judgment, being presumed to have thought the declaration sufficient, otherwise they would have affirmed it. *Cunningham v. Herndon*, 2 Call 580, 585; *Murdock v. Herndon*, 4 H. & M. 200.

Perfection of Appeal.—If an appeal has been allowed, and the cause decided by the appellate court, without objection by the appellee that the appeal was not perfected in time, the objection cannot afterwards be made in the court below, or in the appellate court when the cause is brought up a second time. *Bolling v. Lersner*, 26 Gratt. 36.

Limitation.—Only those questions which are fairly embraced within the operation of the decision of the court of appeals are *res adjudicata*. *Hollingsworth v. Brooks*, 7 W. Va. 559.

The doctrine has no application to a different question, between different parties. *Frazier v. Frazier*, 77 Va. 775, 784; *Hollingsworth v. Brooks*, 7 W. Va. 559.

In *New York Life Ins. Co. v. Clemmitt*, 77 Va. 366, it was held that a question not passed upon by the court of appeals on a first appeal in the reversal of the judgment of the lower court, may be considered upon a second appeal.

Where a decree fails to recite that the cause was heard on an amended bill, though it appears that it was a part of the record but the decree was altogether in reference to subjects introduced into the cause before the amended bill was filed, the affirmation of such decree by the court of appeals will not bind the defendants to such amended bill as *res adjudicata*. *Renick v. Ludington*, 20 W. Va. 511, 586.

Subsequent Proceedings Alone Brought Up by Second Appeal.—A second appeal brings up only the proceedings in the cause subsequent to the decree of the court of appeals on the former appeal and not the whole cause. *Campbell v. Campbell*, 22 Gratt. 640, 673.

Prior Orders and Decrees.—The decision of the court of appeals is not only final in regard to the decree appealed from, but also in regard to all the prior orders and decrees in the case between the appellants and appellees. An appeal from a decree brings up the whole proceedings in the case prior to the decree; and either party can have any error against him in those proceedings corrected without the necessity of a cross appeal in any case. If a party fail to complain of any such error, and a

decree be made upon the appeal, without correcting or noticing the error, such party will be concluded by the decree from appealing afterwards. *Campbell v. Campbell*, 22 Gratt. 640; *Frazier v. Frazier*, 77 Va. 775; *Woodson v. Leyburn*, 83 Va. 843, 3 S. E. Rep. 873; *Krise v. Ryan*, 90 Va. 711, 19 S. E. Rep. 783.

Taking Additional Evidence.—The fact that additional evidence was taken when the cause went back does not affect the conclusiveness of the decision of the court of appeals. *Turner v. Staples*, 86 Va. 300, 9 S. E. Rep. 1123.

Interlocutory Decrees of Lower Court.—The conclusiveness of the decree of the court of appeals is the same, whether the first appeal was from a final, or interlocutory decree of the court below. *Henry v. Davis*, 13 W. Va. 230; *Mason v. Bridge Co.*, 20 W. Va. 223; *Woodson v. Leyburn*, 83 Va. 843, 3 S. E. Rep. 873; *Lore v. Hash*, 89 Va. 277, 15 S. E. Rep. 549; *Miller v. Cook*, 77 Va. 306; *Campbell v. Campbell*, 22 Gratt. 640.

Reservation in Decree.—But where a reservation is inserted in a decree of the court of appeals, saving to certain parties the power to assert their rights in another proceeding, against another party, they are not concluded by the decree from so asserting their rights, and they will not be confined to matters not adjudicated by that decree. The proper proceeding in such case is by cross bill. *Young v. Cabell*, 37 Gratt. 761.

Decree Affirming Order of Reference.—Where a decree is interlocutory and provides for a reference to a commissioner, an affirmation of such decree does not conclude the parties, but such decree may be modified by exception to the commissioner's report. *Miller v. Cook*, 77 Va. 306.

8. PERSONS BOUND.

Parties "Represented."—Persons interested though not technically parties are concluded by the first appeal, where by the doctrine of representation of parties, it was not necessary to make them parties, or they were not in *esse* or had a common interest with those who did sue. *Hawthorne v. Beckwith*, 89 Va. 786, 17 S. E. Rep. 241.

Persons Not Parties.—If the principles of *res adjudicata*, when applied to the parties to an appeal or to the parties to a cause, necessarily conflict with the rights of third persons, subsequently made parties, to be heard in repelling the facts assumed, or appearing theretofore in the cause, or to be heard upon the matter of law involved, and such a decision so made even by the appellate court, necessarily does injustice and wrong, to persons not parties to the cause, when the appellate court rendered such decision; these principles of *res adjudicata*, however inexorable they may be as a rule, must of necessity yield to the extent of not depriving such third persons, who were not then parties to the cause or appeal of the right to be thus heard, when subsequently made parties, and when heard to the extent of doing such third persons no wrong; but they will yield in such cases, no farther than is absolutely necessary to avoid such wrong and injustice to third persons. *Renick v. Ludington*, 20 W. Va. 511.

Where decrees for the sale of land, and for confirmation of the sale, are made in the absence of some of the joint owners of the land; and upon appeal these decrees are reversed, and the cause sent back that they may be made parties, and have an opportunity to defend their interest, though the decree is in other respects affirmed, these absent owners, when made parties, have a right to except to the sale and its confirmation, and are not precluded by

the affirmance of the decree in other respects than those on which it is reversed. *Crockett v. Sexton*, 22 Gratt. 46.

Married Women.—A married woman when she is a party is as much bound as any one else. *McCulloch v. Dashiell*, 85 Va. 37, 6 S. E. Rep. 610.

Infants.—But an infant is not concluded by an affirmation by the court of appeals of a decree in a proceeding to which she is not a party and was not represented, but in which she is interested, she may file a bill of review to such decree. *Connolly v. Connolly*, 32 Gratt. 657.

B. OF GENERAL COURT.—The general court having upon a writ of error reversed the judgment of the court below, and directed a new trial, that judgment is conclusive, and neither the court below, nor the general court on a second writ of error, can enquire into the correctness of the first decision. *Marshall v. Com.*, 5 Gratt. 693.

XVI. APPEAL BONDS.

A. NOT A CONTRACT.—A supersedeas bond is not a contract within the purview of § 10, art. I of the Federal Constitution, forbidding the impairment of the obligation of contracts. It is simply an obligation imposed by law, it has no independent force apart from the judgment and has no more of the elements of a contract in it than the judgment itself, it is not a mutual agreement, nor is it voluntary on the part of those who sign it, it is executed under a sort of legal duress. The party is compelled under the requirement of the law to execute it or deny himself his legal right to have the judgment reviewed without it. *White v. Crump*, 19 W. Va. 583.

B. DEPENDENT ON JUDGMENT.—The effect of a supersedeas bond is dependent upon the fate of the judgment, without which it has no obligatory force, it has no separate existence, for whenever the judgment ceases to be binding, the bond becomes inoperative for any purpose. So when in an action on a supersedeas bond it is pleaded that the judgment was recovered because of an act done according to the usages of civilized warfare, under § 36, Art. VIII of the Constitution of West Virginia, such judgment is void though affirmed by the court of appeals, such affirmance being before the above section of the constitution was adopted, and consequently the bond is void also. Such proceedings constitute due process of law. *White v. Crump*, 19 W. Va. 583.

C. WHEN REQUIRED.

Executors and Administrators.—The statute requiring bond and security upon appeals although general in terms apply only to persons appealing in their own right, not to executors and administrators. *Shearman v. Christian*, 1 Rand. 393.

Executors and administrators are as much required to give security on appeal as any other appellants where the judgment is against them personally though it should have been against them in their representative capacity. *Pugh v. Jones*, 6 Leigh 299.

In a suit in equity against defendant as executor and in his own right as legatee, there is a decree against him personally; on appeal allowed him from the decree, an appeal bond with surety will be required of him. *Erschine v. Henry*, 6 Leigh 378; *Bull v. Douglas*, 4 Munf. 307. See monographic note on "Executors and Administrators" appended to *Rosser v. Depriest*, 5 Gratt. 6.

Where executors and legatees jointly appeal, the legatees (being in possession of the property in dis-

pute), may be ruled to give security for the prosecution of the appeal. *Sadler v. Green*, 1 H. & M. 31.

Assignee of Bankrupt.—The assignee of a bankrupt is not the representative of a decedent so as to relieve him from the necessity of giving an appeal bond. *Pace v. Ficklin*, 76 Va. 292.

Under Act 1792.—Under the Act of 1792, where a plaintiff in chancery appealed, that court could not require of him any other bond than one in the penalty of twenty pounds. *Braxton v. Morris*, 1 Wash. 880.

Waiver.—The mere marking of his name by the counsel for the defendant in error on the docket of the court as counsel for defendant in error will not amount to a release of the plaintiff in error from his obligation to give the bond required by law. *Otterback v. Alex.*, etc., R. Co., 26 Gratt. 940.

It might amount to a waiver of service of process on his client. *Otterback v. Alex.*, etc., R. Co., 26 Gratt. 940.

Where a supersedeas has been granted and a cause has been docketed for more than six years without objection, it will not be dismissed on motion though the required bond was not given. *Pugh v. Jones*, 6 Leigh 299.

D. TIME TO EXECUTE BOND.—Where an appeal is allowed with unlimited time in which to execute an appeal bond, such appeal is irregular and a motion to docket it will be overruled. *Broaddus v. Turner*, 2 Rand. 5.

Sec. 8 of the act March 15, 1867, which amended § of ch. 182 of the Code of 1860, changing the limitation of the time for presenting a petition for an appeal from, or writ of error or supersedeas to, any final decree or judgment, from five to two years after it was made or rendered, did not amend § 26 of that chapter, which allows five years for perfecting the appeal, by giving bond, etc. And therefore, where a petition for an appeal was presented within two years from the date of the decree it might be perfected in any time within five years from that date. But see now, Code of 1873, ch. 178, § 17; *Bolling v. Lersner*, 26 Gratt. 36.

A party who, on expressing an intention to appeal from an order of the county court made November 18th, and have the case tried *de novo* in the circuit court, is granted until November 17th to give the necessary bond, cannot complain that the court adjourned for the term on November 14th, unless the record shows that he was thereby prevented from giving the required bond. *Sargeant v. Irving*, 3 Va. Dec. 338.

E. FAILURE TO GIVE BOND.—If the appellant fails to give the bond directed to be given by the court, or the judge allowing the appeal or supersedeas, the appellee may have a rule upon him to compel him to give it. *Williamson v. Gayle*, 4 Gratt. 180.

The appeal being allowed, the cause is pending in the court of appeals; and the failure of the appellant to execute the bond directed by the court to be given, on granting the appeal, does not avoid the appeal. *Williamson v. Gayle*, 4 Gratt. 180.

F. SUSPENSION OF DECREE.—At common law, no court could suspend its judgment, but by § 4, ch. 17, Acts 1872-3, the power is given to suspend its judgment, upon the execution by the party desiring to appeal, of a suspending bond, in such cases, and only in such cases as may be taken up to an appellate court by writ of error and supersedeas. *Swinburn v. Smith*, 15 W. Va. 483.

Where, in case of upset bid and conditional set-

ting aside of sale and suspension of decree of sale to a certain period in order to give an upset bidder opportunity to comply with the conditions of resale, he applies to the judge in vacation for an extension of such suspension, in order to give time to apply for appeal and supersedeas, and the judge delays acting on such application till after the period within which compliance was permissible, such action of the judge cannot be corrected by the appellate court. *Yost v. Porter*, 80 Va. 855.

G. OBLIGOR IN BOND.

Attorney.—In *Baltimore, etc., R. Co. v. Vanderwarker*, 19 W. Va. 265, the court said: "The law does not require that the party obtaining an appeal or supersedeas shall himself execute a bond with security; but, that he or some one else for him shall do so."

Where a supersedeas bond has been executed by the appellant's attorney, the benefit of which it has received and enjoyed, it is estopped to deny that a supersedeas was awarded in that case, by a recital of that fact in the bond. *Baltimore, etc., R. Co. v. Vanderwarker*, 19 W. Va. 265.

An appeal bond need not be signed by the plaintiff in error, since it may be given by a stranger. *York v. Free*, 38 W. Va. 336, 18 S. E. Rep. 492.

H. OBLIGEE IN BOND.—Under § 6 and 8, ch. 13, Code 1873, an appeal bond may be made payable to the commonwealth, or to any person injured by a breach of the condition of such bond. *Acker v. A. & F. R. Co.*, 84 Va. 648, 5 S. E. Rep. 688.

I. WHERE APPEAL BOND SHOULD BE GIVEN.

—Where an appeal is taken in court, the appeal bond cannot legally be given in the clerk's office, but should be given in court. *Thomson v. Evans*, 6 Munf. 307.

J. CONDITION OF BOND.

Where Supersedeas Is Awarded.—Where a supersedeas is awarded, but the bond on appeal required by Code 1887, §§ 3470, 3471, is conditioned to pay only costs and damages, and not the debt, the court will, on motion, discharge the supersedeas, but will allow the appeal to remain in force on filing a new bond. *Beid v. Norfolk City R. Co.*, 2 Va. Dec. 86.

Under the Code of 1819, it was held that the penalty of a supersedeas bond was to be fixed by the judge granting it, and was not governed by the law respecting appeals by plaintiffs or demandants. *Smock v. Dade*, 5 Rand. 639.

Where the clerk, in copying a bond, conditioned by order of court "to pay any deficiency in the funds arising from the land sales decreed, to meet and discharge the sums decreed against the appellants," adds a condition "to pay the judgment," these two conditions, in the absence of a clearly manifested intention to the contrary, will be held to mean the same thing *i. e.* to pay the deficiency, *not* to pay the judgment and in addition to indemnify the original purchasers. *Harnsberger v. Yancey*, 33 Gratt. 527.

Where the recital in an appeal bond states that it was given to perfect a writ of error, but the condition adds a further obligation to satisfy the judgment if affirmed or if the writ of error be dismissed, it will be presumed that a supersedeas also was granted in accordance with the condition. *State v. Dotts*, 31 W. Va. 819, 8 S. E. Rep. 301.

Where No Supersedeas Issues.—If a party is unable to give bond and security for the debt, he may have his appeal on giving security for costs only, but the decree will not be superseded. *Erskine v. Henry*, 6 Leigh 373.

Appeal from Decree Dissolving Injunction.—The

penalty of the appeal and supersedeas bond should be sufficient to indemnify and save harmless the surety in the injunction bond. *Cardwell v. Allen*, 28 Gratt. 184.

A party appealing from an order dissolving an injunction can only be required to give security to perform the decree of the inferior court, and to pay the costs and damages awarded in the appellate court, if the decree shall be affirmed. *Quere*, whether, where bond and security have been given to perform the decree of the court below, and further security is required in the appellate court, which the party cannot give, the surety in the first bond is discharged. *M'Kay v. Hite*, 4 Rand. 564.

Injunction to Judgment.—When a party has obtained an injunction from the court of chancery to a judgment at law, which is afterwards dissolved, and he appeals to the court of appeals, he cannot be required to give security for the amount of the judgment enjoined, but only for such costs as may be awarded against him by the court of appeals. *Eppes v. Thurman*, 4 Rand. 384.

Rents and Profits.—Where a decree for the sale of the land is rendered in a chancery suit to enforce judgment *mens on land*, the supersedeas bond does not cover any loss occasioned by the receipt of rents and profits by the debtor during the pendency of the appeal and supersedeas in the court of appeals. *Hutton v. Lockridge*, 27 W. Va. 428; *Beard v. Arbuckle*, 19 W. Va. 145; *Perry v. Horn*, 21 W. Va. 732.

That portion of § 13, chapter 178, of the Code of 1873, prescribing the penalty of an appeal and supersedeas bond, refers only to the damages mentioned in § 24 of the same chapter, and was not intended to cover the rents and profits of real estate in the possession of the appellant who had given a deed of trust thereon to secure a debt fully equal to its value, he having obtained an injunction to prevent the sale of such real estate, which injunction was dissolved, and the bill dismissed; and the penalty of the appeal and supersedeas bond will not be fixed with reference to such "rents and profits." *Cardwell v. Allen*, 28 Gratt. 184.

The word "awarded," in said § 13, ch. 178, Code 1873, refers to the words "damages and costs;" and the word "incurred" to the word "fees" therein, so as to make the meaning the same as if the sentence had been written: "and also to pay all damages and costs which may be awarded against, and all fees which may be incurred by, the appellants or petitioners." *Cardwell v. Allen*, 28 Gratt. 184.

Decree Partly Executed.—Where an interlocutory decree directs the defendant to deliver up slaves to be divided among the plaintiffs, and then there is a final decree against him for the profits; and defendant appeals from both decrees. *Held*, if defendant has complied with the interlocutory decree by delivering the property, he will not be required to give an appeal bond with surety for delivery thereof in case of affirmance; if he has not so complied with it, such appeal bond will be required.

And upon the question, whether defendant has so complied or not, parol evidence, by affidavits, will be received in the appellate court. *Erskine v. Henry*, 6 Leigh 373; *Bull v. Douglas*, 4 Munf. 303.

Dismissal of Appeal.—The omission in the Code of 1869 of the provision in appeal bonds that the obligors should be responsible, if the appeal was dismissed, made no real change in the condition of the bond, since the dismissal is the equivalent of an affirmance, the condition as to which was retained. *Cas-*

anova v. Krensch, 21 W. Va. 720; Perry v. Horn, 21 W. Va. 732.

K. EFFECT ON ATTACHMENT.—Where, upon a decree in favor of an attaching creditor, and an appeal therefrom, the appellant gives an appeal bond, the giving of this bond does not release the attachment. Magill v. Sauer, 20 Gratt. 540.

L. DEFECTIVE BONDS.

Certiorari Instead of Appeal Bond.—Where an appeal is taken from the county court sitting in chancery, and a bond is given, which is in fact a *certiorari*, and not an appeal bond, but no objection is made to the regularity of the bond in the court of chancery, and an appeal is taken to the court of appeals, and in that court, an objection is made, for the first time, to the bond, the objection comes too late; but if it had been made in the court of chancery, that court could only have dismissed the appeal *nisi*, or have laid the party under a rule to give a proper bond, in a reasonable time. Brown v. Matthews, 1 Rand. 462.

So where the clause "all actual damages incurred in consequence of the supersedeas" is omitted from the condition. Virginia Fire & Marine Ins. Co. v. Mfg. Co., 95 Va. 515, 28 S. E. Rep. 888.

Misrecital.—The fact that an appeal bond recites a judgment, not as the judgment of the circuit court of the city of Alexandria but as "a judgment of the circuit court of Alexandria" will not affect the validity of the bond being merely a clerical error, that may be amended by the record. Acker v. A. & F. R. Co., 84 Va. 648, 5 S. E. Rep. 688.

Failure to Waive Homestead.—So an omission to waive the homestead exemption. Acker v. A. & F. R. Co., 84 Va. 648, 5 S. E. Rep. 688.

Bond Executed by Surety Alone.—A bond for prosecuting a writ of supersedeas executed by a surety only, without any principal obligor, is insufficient; and a supersedeas issued thereupon ought to be quashed. Miller v. Blannerhassett, 5 Munf. 197; Rootes v. Holliday, 4 Munf. 323; Day v. Pickett, 4 Munf. 104.

Objection Must Be Made Promptly.—Where it is certified by the lower court that the appellant with his surety, upon the allowance of the appeal, executed the required bond, the appellee cannot, after the lapse of more than five years from the judgment, have the appeal dismissed for any supposed defect in the bond, *e. g.* a misrecital of the amount of the judgment, and so deprive the appellant of his right of appeal altogether. He should have moved promptly to have the appeal dismissed, by not doing so he will be held to have waived the defect. Jackson v. Henderson, 8 Leigh 196; Va. F. & M. Ins. Co. v. N. Y., etc., Co., 95 Va. 515, 28 S. E. Rep. 888.

In the above case the appellant had died and the appeal had been revived in the name of the appellant's administratrix and it was held that the appellee was not even entitled to a rule upon the appellant's administratrix to give further security, which as administratrix she was not required to give; but the court intimated that if the appellant were himself alive the error could be corrected. Jackson v. Henderson, 8 Leigh 196.

M. FILING OF BOND.—The filing of an appeal bond, with the clerk, must be in pursuance of an allowance of the appeal, entered on the record. Burch v. White, 3 Rand. 104.

N. INSUFFICIENCY OF SECURITY.—The appellate court is the sole judge of the sufficiency of the security, after security has been given. Anderson v. Anderson, 2 Call 198.

Section 2486, Code 1887, whereby a circuit judge may in vacation hear and determine upon appeal whether a judgment of the court below is right or wrong, does not authorize the judge in vacation to enquire into the sufficiency of an appeal bond, and to order a new bond, or new or additional security; such order is *coram non judice* and void. Chase v. Miller, 88 Va. 791, 14 S. E. Rep. 545.

Remedy.—The party injured by the insufficiency of an appeal bond has his remedy by action on the official bond of the clerk of the court. Sections 177, 178 and 180. Chase v. Miller, 88 Va. 791, 14 S. E. Rep. 545.

O. RIGHTS OF SURETY.—Where a judgment was rendered for 148 dollars 68 cents damages, with interest and costs, and on the same day an appeal was allowed, and, the judgment being affirmed, damages were recovered against the appellant for retarding the execution, and also costs in the appellate court, and, a *fiert facias* being then issued and returned *nulla bona*, the surety in the appeal bond paid 300 dollars 64 cents in satisfaction of the judgment, and within a year after the affirmation, filed a bill to charge real estate aliened by the debtor between the date of the original judgment and the date of the judgment of affirmation. Held, the surety is to be substituted in the place of the judgment creditor, and to have the benefit of his lien. McClung v. Beirne, 10 Leigh 394.

Abatement of Appeal by Death.—Where defendant appeals from a judgment against him, and the appeal abates by reason of his death and is not revived, the surety on the appeal bond is released. Nelson v. Anderson, 2 Call 266.

P. ACTION ON BOND.—Where the recital in an appeal bond states that it was given to perfect a writ of error, but the condition adds a further obligation to satisfy the judgment if affirmed or the writ of error be dismissed, it will be presumed that a supersedeas also was granted in accordance with the condition. The plaintiff may either allege in his declaration on such a bond that it was given to perfect a writ of error and supersedeas or he may simply set forth the bond and condition, and in the latter case his declaration is not demurrable. The defendant may plead directly that the bond was given to perfect a writ of error only. State v. Dotts, 31 W. Va. 819, 8 S. E. Rep. 391.

In actions on appeal bonds, the court of appeals will not consider either judicial errors, or clerical misprisions, in the court below, occurring in the original suit, and in which there has been an acquiescence by the parties not appealing to correct them. Miller v. M'Luer, Gilmer 338.

XVII. APPEALS FROM INFERIOR TRIBUNALS.

A. IN CIVIL CASES.

1. GENERALLY.—Where the inferior tribunal whose decision is sought to be reviewed has any discretion, the proper method is by *certiorari* and not *mandamus*. Board v. Minturn, 4 W. Va. 300.

It seems that it has ever been the law, that when it is proper to review the proceedings of inferior tribunals, and the law has not provided redress by appeal, writ of error or other process, resort may be had to the writ of *certiorari* to prevent a failure of justice. Morgan v. Ohio, etc., R. Co., 39 W. Va. 17, 19 S. E. Rep. 588; Railway Co. v. Board of Public Works, 28 W. Va. 268.

In Alderson v. Commissioners, 31 W. Va. 632, 8 S. E. Rep. 274, JOHNSON, P. said, § 12, art. 8 of the Constitution of West Virginia, declaring that "the cir-

circuit courts shall have the supervision and control of all proceedings before justices and other inferior tribunals, by mandamus, prohibition and *certiorari*" was a broad declaration that in the state of West Virginia there was no tribunal that was not subject to be legally controlled by the courts.

The mere fact that the word "control" in the clause of the constitution of 1863 giving the circuit courts "supervision and control of all proceedings before justices and other inferior tribunals by mandamus, prohibition and *certiorari*" is omitted from the similar clause in the constitution of 1872 does not deprive the circuit court of jurisdiction to review the judgment of the county court in contested election cases, by *certiorari*. *Dryden v. Swinburne*, 30 W. Va. 89.

Section 12, art. VII of the Constitution of West Virginia 1872, providing that the circuit courts shall have supervision of all proceedings before the county courts and other inferior tribunals by *certiorari*, etc., is restricted in § 29 of same article providing that the county court shall have jurisdiction of all appeals from the judgments of justices, and their decision upon such appeal shall be final in all cases, except in certain specified cases. *Poe v. Machine Works*, 24 W. Va. 517.

By § 2, ch. 153, Acts 1882 W. Va., the remedy by *certiorari* in the circuit court is greatly enlarged, both as to the questions that may be reviewed and the inferior tribunals to which it is made to lie. Whether it is extended to all inferior tribunals, whether executive, ministerial or judicial, was not necessary to the decision of the case since county courts were expressly mentioned. *Chenoweth v. Commissioners*, 26 W. Va. 230.

Notice of Writ.—It is not necessary for the court granting a writ of *certiorari* to give notice to the opposite party or to issue a rule against him to show cause against its being granted, but it is a matter within their discretion, and if they think it unnecessary and not tending to any useful purpose, they need not do so. But the other party, though not a formal party, must be notified of the pending of the proceeding before the court acts upon the writ after its return. *Dryden v. Swinburn*, 15 W. Va. 234.

In *Dryden v. Swinburn*, 15 W. Va. 234, *supra*, the court intimated, though not necessary to the decision, that if the other party was not a formal party, no merely formal objection could be made to the service of such notice, it would only be necessary to show that he had notice.

2. APPEALS FROM JUSTICES.

a. Technical Appeal.

(1) **Generally.**—The defendant may take an appeal as of right from the judgment of a justice, if he tender the required bond within ten days after judgment. *Hubbard v. Yocum*, 30 W. Va. 740, 5 S. E. Rep. 867; *Parsons v. Aultman*, 45 W. Va. 473, 31 S. E. Rep. 685.

The appeal was for a time to the county court, but by ch. 63, Acts 1877, the appeal is restored to the circuit courts. *Hubbard v. Yocum*, 30 W. Va. 740, 5 S. E. Rep. 867.

Though the judgment of a justice is erroneous yet if such error arises, not from want of jurisdiction in the justice, but merely from an erroneous exercise of a conceded jurisdiction, the remedy is only by appeal and not by *certiorari*. *Poe v. Machine Works*, 24 W. Va. 517.

(2) **Where Appeal Is Not Taken within Ten Days.**—It is settled by the decisions in West Virginia that unless

"good cause" appears in the petition for the failure to take the appeal within ten days as prescribed by § 174, ch. 50 of the Code, the appeal must be dismissed by the circuit court as improvidently awarded. § 174, ch. 8, Acts 1881; *Lowther v. Davis*, 33 W. Va. 132, 10 S. E. Rep. 30; *Home Sewing Machine Co. v. Floding*, 27 W. Va. 540.

But it may, and in a proper case should, be granted after the expiration of ten days, and within ninety days after the date of the judgment, when the party otherwise entitled to the writ shall show, by his own oath or otherwise, good cause for his not having applied for such writ within the ten days. *Long v. Ohio River R. Co.*, 35 W. Va. 333, 13 S. E. Rep. 1010; *State v. Larue*, 37 W. Va. 388, 17 S. E. Rep. 397; *Womer v. Ravenswood, etc.*, R. Co., 37 W. Va. 287, 19 S. E. Rep. 488.

Where such writ is not applied for within ten days but within ninety days after the judgment, and the record shows no excuse for not sooner applying, no presumption arises from the mere grant of the writ that good excuse was otherwise shown. The excuse or cause for not applying for the writ within ten days must always appear in writing as part of the record. *Morgan v. Ohio, etc.*, R. Co., 39 W. Va. 17, 19 S. E. Rep. 588.

Where a justice renders judgment on a verdict on one day, and the next day a motion for a new trial is made and overruled, the ten days allowed for a *certiorari* begins to run on the latter day. A motion for a new trial suspends the finality of a judgment already entered, until the date of the denial of the new trial, for the purposes of limitation of a writ of *certiorari* or appeal. *Straley v. Payne*, 43 W. Va. 185, 27 S. E. Rep. 359.

Where a writ of *certiorari* is not taken within ten days after the judgment, the defendant to it will be given the benefit of that defense in the court of appeals, though the record merely shows that the case was heard in the circuit court on the record and proceedings, without showing any motion to quash or dismiss. *Morgan v. Ohio, etc.*, R. Co., 39 W. Va. 17, 19 S. E. Rep. 588.

But a judgment on a *certiorari* granted more than ten days after a judgment is not void so that it may be vacated at any time, however erroneous it is. *Morgan v. Ohio River R. Co.*, 39 W. Va. 17, 19 S. E. Rep. 588.

No Relation to Beginning of Term.—Although judgments and decrees relate back to the first day of the term at which they were rendered, yet there is an exception where the case was not ready for hearing on the first day of the term, so that even if the rule applied to a petition to the circuit court for a writ of *certiorari*, such a case would come within the exception, where on the first day of the term it was not in a condition to be heard, there being in fact no such case until the petition was filed. Hence the decision in such a case will not relate back to the first day of the term of the circuit court so as to bring the presentation of the petition within the ten days' limit. *Womer v. Ravenswood, etc.*, R. Co., 37 W. Va. 287, 16 S. E. Rep. 488.

(3) What Constitutes "Good Cause."

Generally.—When the party has neglected to avail himself of his absolute right to an appeal within ten days, he can only obtain the new trial within ninety days upon showing such cause as would entitle him to a new trial; the facts shown to warrant the granting of the appeal after the expiration of the ten days must show fraud, accident, surprise or some adventitious circumstances beyond the con-

trol of the party. *Home S. M. Co. v. Floding*, 27 W. Va. 540; *Ruffner v. Love*, 24 W. Va. 181; *Hubbard v. Yocum*, 30 W. Va. 740, 5 S. E. Rep. 867; *Powell v. Miller*, 41 W. Va. 371, 23 S. E. Rep. 557.

Where a party desires to appeal from the judgment of a justice which has been rendered against him, goes to the justice's office within ten days after the date of such judgment, and informs the justice that he wishes to take an appeal, and the justice, being engaged at the time, promises him to prepare a bond, and bring it to his place of business for execution, and such party pays no further attention to the matter until after ten days have expired, the justice failing to comply with his promise within the ten days, these facts, stated in a petition to the judge of the circuit court in vacation, are not sufficient cause for granting an appeal, as prescribed by statute, within ninety days after the date of said judgment. *Powell v. Miller*, 41 W. Va. 371, 23 S. E. Rep. 557.

Negligence of Justice.—If a party to a judgment files a good and sufficient bond in the office of the justice who rendered the judgment within ten days thereafter, with the person in charge of the office during the temporary absence of the justice, he is entitled to his appeal as a matter of right, and no act of negligence on the part of the justice can deprive him of the same. *Holmes v. Yoke*, 48 W. Va. 267, 37 S. E. Rep. 545.

Refusal by Justice to Grant Appeal.—Where the petition stated that he applied to the justice for an appeal within the ten days, but the justice refused to grant it, this was held "good cause" for the failure. *Lowther v. Davis*, 33 W. Va. 132, 10 S. E. Rep. 20; *Clark v. West Virginia, etc., R. Co.*, 50 W. Va. 1, 40 S. E. Rep. 351.

Where a justice who has no jurisdiction of the case tries it, and renders judgment, if such justice refuses to set aside such judgment and rehear such case, an appeal will lie from his judgment to the circuit court, as in other cases, and, if he refuse to grant the same within ten days, the circuit court of the county, or judge thereof in vacation, may grant the same on application. *Parsons v. Aultman*, 45 W. Va. 473, 31 S. E. Rep. 935.

Recovery of Judgment without the Knowledge of Defendant.—If a plaintiff in an action before a justice agrees with the defendant to dismiss it or abandon it, but afterwards, without the knowledge of the defendant, obtains judgment against the defendant, the defendant first discovering such judgment after ten days from its date, this constitutes good cause for obtaining an appeal from a circuit court within ninety days after the judgment. *McCormick v. Short*, 49 W. Va. 1, 37 S. E. Rep. 769.

But the fact that he did not know a judgment had been rendered against him, when he had been served with process is not "good cause." *Hubbard v. Yocum*, 30 W. Va. 740, 5 S. E. Rep. 867.

Ignorance of the Law.—Mere ignorance of what the law required of him is not "good cause." *Home Sewing Machine Co. v. Floding*, 27 W. Va. 540.

Nor is it material that the party desiring to appeal was a nonresident. *Hubbard v. Yocum*, 30 W. Va. 740, 5 S. E. Rep. 867.

Erroneous Advice of Counsel.—Erroneous advice of counsel is not "good cause." *Ruffner v. Love*, 24 W. Va. 181.

Miscarriage of Letter.—So the miscarriage of a letter is no excuse where enough time elapsed to arouse suspicion that it had miscarried, before the expiration of the ten days. *Hubbard v. Yocum*, 30 W. Va. 740, 5 S. E. Rep. 867.

How Shown.

Must Be in Writing.—Such "good cause" is to be shown by a written application, sworn to by the applicant or some one else and by affidavits or other written proofs filed with the application. *Hubbard v. Yocum*, 30 W. Va. 740, 5 S. E. Rep. 867.

If a petition for an appeal from the judgment of a justice states facts showing good cause for not having taken an appeal within ten days, and is verified by affidavit, and an appeal is granted, that appeal cannot be dismissed as improvidently granted merely because proof of such cause for not taking the appeal sooner is not made by affidavit or other proof independent of the petition and separate from it. *McCormick v. Short*, 49 W. Va. 1, 37 S. E. Rep. 769.

Must Be Ex Parte.—The "good cause" is to be shown to the court *ex parte*, the other party cannot contest the fact in the circuit court; his only remedy is by appeal. *Hubbard v. Yocum*, 30 W. Va. 740, 5 S. E. Rep. 867.

Where Appeal Is Not Taken within Ninety Days.—If an application be not made to the circuit court within ninety days from the rendition of the judgment of a justice, in no case can he grant an appeal, and if he grant one, it must be dismissed as improvidently granted. *Home Sewing Machine Co. v. Floding*, 27 W. Va. 540; *State v. Larue*, 37 W. Va. 328, 17 S. E. Rep. 397.

Refusal to Grant Appeal.—Mandamus is not a proper remedy when a justice refuses to grant an appeal from his decision, since the party aggrieved has an adequate remedy by petition to the circuit court or judge. *Lowther v. Davis*, 33 W. Va. 132, 10 S. E. Rep. 20.

(4) Effect of Appeal.—Where the effect of the appeal is to transfer the action to an appellate court in which the case is to be tried *de novo*, and the controversy is to be settled by a judgment in such court regardless of the judgment appealed from, the appeal operates not only to suspend the judgment of the justice or inferior tribunal, but vacates and sets it aside, so that it cannot be used as evidence or as the foundation of an action in any court. An appeal in such case is very different in its effect from a proceeding, which seeks to review a judgment by a writ of error. In the latter case the judgment is merely suspended, but in the former the judgment is vacated and made ineffectual for any purpose, the judgment in legal construction no longer remains in force and cannot be the foundation of a new action. *Evans v. Taylor*, 38 W. Va. 184.

An appeal from the judgment of a justice, which, in the appellate court, is tried *de novo*, is a continuation of the same suit, so that the liability of the obligor in a detinue bond continues until the appeal is decided. *Bratt v. Marum*, 24 W. Va. 652.

(5) Equivalent to Appearance in Appellate Court.—An appeal by a party to a case in the justice's court operates as a general appearance in the appellate court, and gives that court jurisdiction of the person of the appellant, and as a general rule the irregularities in the proceedings before the justice are waived by an appeal. *Thorn v. Thorn*, 47 W. Va. 4, 34 S. E. Rep. 759.

(6) Dismissal of Appeal.—Where a party appeals to the circuit court from a judgment rendered against him by a justice, he cannot, on his own motion, have his appeal dismissed, and the judgment of the justice affirmed, over the objection of the appellee. *Watson v. Hurry*, 47 W. Va. 809, 35 S. E. Rep. 830.

Lack of Jurisdiction in Justice.—Where a justice has no jurisdiction of a civil action, neither has a circuit court on appeal, though such circuit court would have original jurisdiction in the case, and therefore such court must dismiss the action for want of jurisdiction. *Richmond v. Henderson*, 48 W. Va. 389, 37 S. E. Rep. 664.

Title to Property Involved.—Where an appeal is taken from a judgment of a justice in an action of unlawful detainer, and it appears by answer filed that the title to property is involved, the circuit court will dismiss the action. *Watson v. Watson*, 45 W. Va. 290, 31 S. E. Rep. 989.

b. *Certiorari*.

(1) **Generally.**—The judges of the superior courts, within their respective jurisdictions, may award a *certiorari* to remove proceedings on an inquest of a riot, taken before the justices. *Mackaboy v. Com.*, 3 Va. Cas. 298.

By § 2, ch. 110, Amend. Code passed in 1882, the circuit court is given power to review by *certiorari* every case before a justice except where the judgment does not exceed \$15, exclusive of interest and costs. This statute was held constitutional. *Fouse v. Vandervort*, 30 W. Va. 327, 4 S. E. Rep. 298; *Bee v. Seaman*, 36 W. Va. 381, 15 S. E. Rep. 173.

Under the West Virginia statute, the writ of *certiorari* lies after judgment of the justice; and, upon the hearing in the circuit court, such court will review the judgment of the justice upon the merits, determining all questions arising on the law and the evidence, and render such judgment or make such order upon the whole matter as law and justice may require. *Bee v. Seaman*, 36 W. Va. 381, 15 S. E. Rep. 173.

The statutory remedy of *certiorari* to judgments of justices in civil cases is merely a form of appeal. *Parsons v. Aultman*, 45 W. Va. 473, 31 S. E. Rep. 985.

The two have therefore become, so far as applied to the review of civil cases before justices, synonymous terms, except that the *certiorari* appeal is granted as a matter of sound discretion, and the appeal *certiorari* is granted as a matter of right. *Parsons v. Aultman*, 45 W. Va. 473, 31 S. E. Rep. 985. The remedy by writ of *certiorari*, given by ch. 110 of the Code, to review the judgment of a justice, is not given as a matter of right, but is awarded by the court, or judge, for cause, on proper case shown. *Harrow v. Ohio River R. Co.*, 38 W. Va. 711, 18 S. E. Rep. 926.

The writ of *certiorari*, when awarded in civil cases before justices, under §§ 2, 8, ch. 110, Code, is an appellate process, designed to affect the ends of justice; and the circuit court has a large discretion in awarding the same, reviewing judgments, and granting new trials thereunder, and, unless such discretion is plainly abused, the court of appeals cannot interfere therewith. *Michaelson v. Cautley*, 46 W. Va. 533, 32 S. E. Rep. 170.

Where a cause is removed after verdict and judgment from a justice's court on a writ of *certiorari* to the circuit court, under the third section of chapter 133 of the Acts of 1882, upon the hearing, such circuit court will, where there is a certificate of the evidence incorporated in a bill of exceptions signed by the justice, review the judgment of the justice upon the merits, and if of opinion to reverse the judgment will direct a new trial before a jury, unless neither party requires a jury. *Natural Gas. Co. v. Healy*, 23 W. Va. 102, 10 S. E. Rep. 56.

Upon the presentation to the circuit court of a petition for a writ of *certiorari* to remove into said

court the proceedings in a civil action before a justice, an agreement between the parties that said petitioner's application for said writ should be argued and discussed by them before said circuit court as if the writ of *certiorari* had been in fact issued, and due return had been made thereto, the record, proceedings and judgment in said civil action before said justice having been transmitted to and removed into the circuit court in pursuance of such agreement, will not bring the case before the circuit court for review on its merits, but brings up the transcript for the purpose of determining whether the application should be granted. *State v. Larue*, 37 W. Va. 828, 17 S. E. Rep. 307.

(2) **Form of Writ.**—Where no objection is made to the form of a writ of *certiorari* in the circuit court, it is too late to object in the court of appeals. *Burke v. Supervisors*, 4 W. Va. 371.

(3) **Motion to Quash.**—In a proper case the writ may, on motion, be superseded before its return, as on the ground that it was improvidently awarded; and by motion to quash, it may be quashed on any proper ground after the return. The language of the motion is not material, so that it gives notice of the thing asked to be done; nor the language of the order of the court, if it properly directs that it be done. *Long v. Ohio River R. Co.*, 35 W. Va. 833, 13 S. E. Rep. 1010.

(4) **The Record.**—When a writ of *certiorari* under the statute is awarded to a justice to review his judgment, in order to respond to the exigency of the writ, he must certify and send the record as the writ finds it. As the record is when the writ reaches him, so it must be certified and sent. It is then too late to make contemplated or intended certificates of facts and bills of exception parts of such record, but it must be sent up as it is, without increase or diminution. *Bee v. Seaman*, 36 W. Va. 381, 15 S. E. Rep. 173.

(5) **Proceedings after Reversal.**—Under the West Virginia statute, the writ lies after judgment, and the circuit court, after reversing the judgment complained of, retains it for final disposition, if the amount in controversy is more than \$15. *Long v. Ohio River R. Co.*, 35 W. Va. 833, 13 S. E. Rep. 1010.

(6) **Amendment of Summons.**—Upon a writ of *certiorari* from a judgment of a justice, the circuit court may allow the return on the summons issued by the justice to be amended. *McClure-Mable Lumber Co. v. Brooks*, 46 W. Va. 732, 34 S. E. Rep. 921.

(7) **Return to Writ.**—Before hearing a case, matter, or proceeding removed by *certiorari* from an inferior tribunal, the circuit court should require a formal legal return thereto to be made by the officers to whom the same is directed, unless such return is waived by the parties to such case, matter, or proceeding. *Cushwa v. Lamar*, 45 W. Va. 826, 32 S. E. Rep. 10.

Generally the return to the writ is conclusive and no extrinsic evidence will be received either to support or overthrow the proceeding which is sought to be reviewed. *Poe v. Machine Works*, 24 W. Va. 517.

Defective Return.—The fact that the return of the writ of *certiorari* is made by one of the justices of the county court and not by the president is no ground for the dismissal of the case by the circuit court, but that court should order a new writ to be served on the president and require him to make a return. *Bd. of Ed. v. Hopkins*, 19 W. Va. 84.

(8) **Petition for Writ.**—The petition for the writ should disclose a proper case upon its face, and when issued it may be dismissed without a hearing.

when improvidently awarded. *Long v. Ohio River R. Co.*, 35 W. Va. 333, 13 S. E. Rep. 1010.

Must Be Presented within Ten Days.—In applying to the circuit court for a writ of *certiorari* to the judgment of a justice, under ch. 110 of the Code of West Virginia, the general rule is that the petitioner must present his petition within ten days after the judgment complained of is rendered, according to the analogy of appeals in § 164, ch. 50 of the Code. *Long v. Ohio River R. Co.*, 35 W. Va. 333, 13 S. E. Rep. 1010; *State v. Larue*, 37 W. Va. 323, 17 S. E. Rep. 307; *Morgan v. Ohio River R. Co.*, 30 W. Va. 17, 19 S. E. Rep. 568; *Womer v. Ravenswood, etc.*, R. Co., 37 W. Va. 287, 16 S. E. Rep. 498; *Bee v. Seaman*, 36 W. Va. 381, 15 S. E. Rep. 173.

Where the petition for, and the writ of *certiorari* to, the judgment of a justice shows that it was not applied for within ten days after the judgment was entered, it should not be granted, unless good cause be shown why the writ was not applied for within ten days; and, if so issued after the time without such showing, it should be quashed as improvidently awarded. *Arnold v. Lewis County Court*, 38 W. Va. 142, 18 S. E. Rep. 476.

Waiver of Objection.—The defendant in a writ of *certiorari* to a justice's decision does not waive the objection that it was not taken within ten days, by appearing to the writ, without a motion to quash or dismiss, or even by consenting to a continuance. *Morgan v. Ohio River R. Co.*, 30 W. Va. 17, 19 S. E. Rep. 568.

(9) **Showing Good Cause.**—It was held in *Morgan v. Ohio River R. Co.*, 30 W. Va. 17, 19 S. E. Rep. 568, that the "good cause" must be shown by written evidence on a writ of *certiorari* from a justice as well as on an appeal.

As to what constitutes "good cause," see *supra*, "Appeal from Justice."

c. Jurisdictional Amount.
in Virginia.

Under Rev. Code 1819.—Where there was a judgment of a justice of the peace, affirmed by the county court, for debt, principal, interest, damages and costs not amounting to \$3 dollars 33 cents; it was held that the circuit court had no appellate jurisdiction to review such judgment, by *certiorari* or otherwise. *Hay v. Pistor*, 2 Leigh 707.

Under Code 1887.—Under § 2947 of the Code Va. 1887, there can be no appeal from the judgment of a justice, unless the matter in controversy, exclusive of interest and costs, is of greater amount or value than ten dollars. *Norfolk, etc.*, R. Co. v. *Clark*, 92 Va. 118, 22 S. E. Rep. 867.

In West Virginia.—Where a justice in a suit involving a matter merely pecuniary not exceeding \$15, has jurisdiction of the subject-matter and of the person, and renders a *bona fide* judgment on the merits clearly wrong, but within the scope of his legitimate powers, the circuit court will not, upon a writ of *certiorari* issued in the exercise of its original supervisory jurisdiction conferred by the constitution, review and reverse such judgment, but will dismiss the writ, as improvidently awarded. *Wilson v. West Virginia, C. & P. Ry. Co.*, 38 W. Va. 212, 18 S. E. Rep. 577.

Costs.—Under Code 1887, § 2947, costs are not to be computed as a part of the matter in controversy in determining the right of appeal from a judgment of a justice of the peace. *Shafer v. Chesapeake, etc.*, R. Co., 2 Va. Dec. 252.

Trial by Jury.—On the trial of an appeal, in the circuit court, from the judgment of a justice, where

the amount in controversy exceeds \$30, if required by either party, a jury of twelve men will be selected and impanelled to try the case in like manner as other juries are selected and impanelled in said court. *Lovings v. Norfolk & W. Ry. Co.*, 47 W. Va. 583, 25 S. E. Rep. 962.

Section 160, ch. 50 of the Code of West Virginia, in so far only as it authorizes a jury of six men to try in the circuit court, appeals from judgments of justices, is unconstitutional and void. *Lovings v. Norfolk & W. Ry. Co.*, 47 W. Va. 582, 25 S. E. Rep. 962.

d. Cases Tried by Jury.—No fact tried in a civil action by a jury of six persons before a justice can be retried *de novo* by the circuit court, or otherwise than according to the rules of the common law. *Hall v. Wadsworth*, 30 W. Va. 55, 8 S. E. Rep. 29.

Where a case has been tried by a jury of six before a justice as provided by § 13, art. III of the Constitution of W. Va., no appeal can be taken to the circuit court, the same section declaring that "No fact tried by a jury shall be otherwise re-examined, in any case, than according to the rules of the common law"; hence, no provision having been made for allowing a writ of error in such cases, such a judgment cannot be reviewed in any way. *Barlow v. Daniels*, 35 W. Va. 512; *Barker v. Walton*, 31 W. Va. 468, 7 S. E. Rep. 453.

It makes no difference that the defendant makes no defense before the justice. *Hickman v. Railroad Co.*, 30 W. Va. 296, 4 S. E. Rep. 654; *Vandervort v. Fouse*, 30 W. Va. 326, 4 S. E. Rep. 660.

Hence a mandamus will not lie to compel him to grant an appeal. *Woodford v. Hull*, 31 W. Va. 470, 7 S. E. Rep. 450.

But in *Richmond v. Henderson*, 48 W. Va. 380, 37 S. E. Rep. 653, this was overruled, and it was held that an appeal lies from the judgment of a justice rendered upon the verdict of a jury of six, just as in cases tried by him without a jury, and the writ of *certiorari* does not lie in such case.

Where a party, against whom a judgment was rendered by a justice of the peace on the verdict of a jury, obtained a writ of *certiorari*, and removed the same into the circuit court to be reviewed, before the decision of the case of *Richmond v. Henderson*, 48 W. Va. 380, 37 S. E. Rep. 653, and said judgment was affirmed by the circuit court, and a writ of error awarded by the court of appeals, before said decision of *Richmond v. Henderson*, and the plaintiff in error has asked that said *certiorari* be treated as an appeal, the judgment of the circuit court will be reversed, and the case remanded, with directions to treat it as being in said circuit court on appeal, and proceed with it accordingly. *Harbert v. Monongahela River R. Co.*, 50 W. Va. 233, 40 S. E. Rep. 377.

e. Harmless Error.—If there has been a full and fair trial on the merits of the controversy in a civil action commenced before a justice, the judgment will not be reversed for mere technical errors, not prejudicial to the fairness of such trial. *Furbee v. Shay*, 46 W. Va. 736, 34 S. E. Rep. 746.

When there is no note in the record of the filing of a complaint or answer in an action originating before a justice, but there is copied into the record both a complaint by the plaintiff and an answer by the defendant, signed by them respectively, with which the evidence of the parties adduced on the trial is entirely consistent, and the record shows there was a full and fair trial, the appellate court will presume that the pleadings were so made up. *Griffin v. Haight*, 45 W. Va. 460, 31 S. E. Rep. 957.

Where a party after obtaining an appeal from a judgment of a justice, appeared in the circuit court and moved the court to quash the return on the process in the justice's court on the ground that it did not appear that the person who served the process was a special constable, and, on the motion being overruled, defended the suit and had a fair trial, it was held that the circuit court did not err. *Johnson v. McCoy*, 33 W. Va. 552, 9 S. E. Rep. 887.

Although the jury, upon an appeal to the circuit court from a justice of the peace, were sworn "to try the issue joined" and not "to try whether he unlawfully withheld the premises in controversy," where it appears that the case was tried on the merits without objection and no injustice was done to the plaintiff in error, the judgment will not be reversed for such technicality. *Chancey v. Smith*, 25 W. Va. 404.

3. APPEALS FROM COUNTY COURT.—Wherever the action of the county court is *judicial* in its nature, it is reviewable by the circuit court by *certiorari*. *Poteet v. County of Cabell*, 30 W. Va. 58, 3 S. E. Rep. 97.

But where the power conferred on the county courts is not judicial, but legislative, or executive, neither the circuit court nor the supreme court of appeals can review the final order of the county court in such cases. *Poteet v. County of Cabell*, 30 W. Va. 58, 3 S. E. Rep. 97.

The addition to §§ 10, 12, ch. 47, Code 1873, allowing appeals to the circuit courts where the decision complained of is upon an order made by the county court or the judge thereof, has no application to orders made by the county court when composed of justices of the peace under the old constitution. *Dinwiddie County v. Stuart*, 28 Gratt. 528.

Condemnation Proceedings.—The circuit court has jurisdiction to award a writ of supersedeas to the judgment of a county court in a proceeding under § 15 of the act incorporating the Chesapeake & Ohio Canal Company to condemn lands. *Ches., etc., Canal Co. v. Hoyer*, 2 Gratt. 511.

Order Granting Appeal from Justice.—The order of a county court granting an appeal from the judgment of a justice is reviewable both in the circuit court and in the court of appeals. *Ruffner v. Love*, 34 W. Va. 181.

Cases Removed from Justice's Court.—Where a warrant is brought before a justice upon a claim exceeding twenty dollars, and upon the application of the defendant before trial, it is removed to the county court, an appeal lies to the circuit court, from the judgment of the county court in the case. *Carter v. Kelly*, 28 Gratt. 787.

Contested Election Cases.—But the statute of 1872 being silent as to the cases in which a writ of error or supersedeas may be awarded to the judgment of a county court, the common-law rule is in force and the review must be by *certiorari*, in such cases as by the common law would only be reviewed in that manner, *e. g.* cases of contested election cases under the provision of ch. 118, Acts 1872-3. *Dryden v. Swinburn*, 15 W. Va. 234; *Fowler v. Thompson*, 23 W. Va. 106; *Dryden v. Swinburne*, 20 W. Va. 80.

Settlement of Sheriff's Account.—Although the settlement of a sheriff's account before commissioners, when confirmed by the county court, under Acts W. Va. 1872-3, ch. 198, § 2, is only *prima facie* correct and hence is not *final*, yet it may be reviewed in the circuit court by *certiorari*, since by § 3, ch. 15, of the same acts, the circuit courts are *expressly*

given power to supervise *all* proceedings before the county court, and this proceeding is not excepted. *Bd. of Ed. v. Hopkins*, 19 W. Va. 84; *Cunningham v. Squires*, 2 W. Va. 422.

Relocation of County Seats.—The action of the county court in ascertaining and declaring the result of a vote on the question of the relocation of a county seat is reviewable by the circuit court by *certiorari*. *Poteet v. County of Cabell*, 30 W. Va. 58, 3 S. E. Rep. 97.

Refusal to Record Instrument of Emancipation.—A county court refuses to admit an instrument of emancipation of slaves to probate and record. *Held*, the circuit court cannot review this judgment, by way of appeal, writ of error or supersedeas. *Mann v. Givens*, 2 Leigh 762.

Criminal Cases.—A writ of error from a superior court lies to a judgment of a county court imposing a fine for contempt of said county court. *Stokeley v. Com.*, 1 Va. Cas. 330.

Where Appeal is Taken Also.—If the superior court of chancery grants a *certiorari* to remove a cause, and the county court proceeds to a decree, upon an appeal from that decree, the superior court of chancery may hear the appeal and *certiorari* together, and make the proper decree upon the whole cause. *Anthony v. Oldacre*, 4 Call 480.

Jurisdictional Amount.—The Rev. Code, vol. 1, ch. 66, limited appeals from the county courts to the district courts to such personal actions as were of the value of ten pounds, leaving the right as at common law in real and mixed actions. *Wingfield v. Crenshaw*, 3 H. & M. 245.

In *Clapham v. Lewis*, 1 Va. Cas. 182, a writ of supersedeas was held to have been properly granted by a circuit court to the judgment of a county court, although the *principal* exclusive of the *interest* for which the judgment was rendered, was less than the prescribed amount giving jurisdiction.

The question arose under § 55 of the district court law, 1 Rev. Code, p. 83, which authorizes a supersedeas, where the value of the judgment is \$33.33.

4. APPEALS FROM DECISION OF MAYOR.—No writ of error will lie to a judgment by the mayor of a city, proceeding as an *ex officio* justice of the peace, in the summary mode authorized by statute in case of the violation of a city ordinance. Acts 1881, ch. 8, §§ 231-3, such proceedings not being according to the course of the common law. *Ridgway v. Hinton*, 25 W. Va. 554.

5. APPEALS FROM DECISION OF RECORDER.—Where municipal courts and other inferior courts which have no juries are established, the right of trial by jury must be retained by granting appeals to courts where trial by jury may be had. Nor can this right of appeal be clogged by unreasonable restrictions, which would operate as a substantial denial of the right of trial by jury, though it may be limited as to time, and reasonable security may be required for appearance or for the payment of the fine, if affirmed by the higher court. *Jelly v. Dils*, 27 W. Va. 207.

6. APPEALS FROM DECISION OF CITY COUNCIL.—*Certiorari* is the proper remedy to review the action of a city council under § 28, ch. 47, Code W. Va., in declaring the running of a "merry-go-round" a nuisance, the statute giving no appeal in such cases. *Davis v. Davis*, 40 W. Va. 464, 21 S. E. Rep. 906.

7. APPEAL FROM DECISION OF BOARD OF SUPERVISORS.—An appeal from a decision of the board of supervisors of a county, rejecting a claim arising under an order of a county court, made in 1862, is

properly taken to the county court of the county. *Dinwiddie County v. Stuart*, 28 Gratt. 526.

8. **APPEAL FROM DECISION OF COUNTY COMMISSIONERS.**—So where the county commissioners are convened as a returning board to ascertain the result of an election, no provision being made for a review of their proceedings by motion, appeal, writ of error or supersedeas, if its decisions cannot be reviewed by *certiorari* they cannot be reviewed at all. The appeal allowed from a final order of the county court in a contested election case, is another and different case. *Chenoweth v. Commissioners*, 26 W. Va. 230.

The rulings of the commissioners of a county sitting as a board of canvassers, after an election, to ascertain the result thereof in the county, are subject to review by the circuit court on writ of *certiorari*. *Alderson v. Commissioners*, 31 W. Va. 633, 8 S. E. Rep. 274.

Any candidate voted for at an election has the right, by himself or attorney, to be present at the counting of the votes, and request the commissioners to give him a bill of exceptions to their rulings against him; and he thus becomes a party to the proceedings, and has the right to have the rulings of such commissioners reviewed on *certiorari*. *Alderson v. Commissioners*, 31 W. Va. 633, 8 S. E. Rep. 274.

9. **APPEAL FROM CORPORATION COURT.**—Corporation and hustings courts are of co-ordinate dignity with circuit courts, by virtue of art. VI, § 14, Constitution of Virginia, and no right of appeal from the former to the latter can be conferred by the legislature. Section 5 of the act, approved March 6, 1890 (Acts 1889-90, p. 197) as amended by an act passed March 7, 1900 (Acts 1899-1900, p. 1202), attempting to confer such right of appeal is therefore unconstitutional, and the court of appeals will, by writ of prohibition, prevent the circuit courts from entertaining such appeals. *Watson v. Blackstone*, 98 Va. 618, 38 S. E. Rep. 939.

10. **APPEAL FROM AUDITOR.**—Appeals from the auditor are not confined to pleadings, as in ordinary cases; and therefore, for the sake of justice, new evidence is received, in the court of appeals, to show that the acts required by the opinion of the court, have been performed by the petitioners. *Com. v. Banks*, 4 Call 338.

An appeal lies, in all cases from the decision of the auditor, to the high court of chancery or to the Richmond district court according to the nature of the case; in matters of account, a technical appeal, in all other cases, a petition. *Com. v. Beaumarchais*, 3 Call 122; *Attorney General v. Turpin*, 3 H. & M. 548; *Com. v. Bank*, 2 Rob. 737.

11. REVIEW IN APPELLATE COURT.

a. *Generally.*—Where a record and judgment of a justice is removed and returned to the circuit court on writ of *certiorari* issued under chapter 110 of the Code (Ed. 1891), it is the duty of the clerk, upon receiving it, to file and docket the case in the same manner that other cases are docketed, and upon the hearing, the circuit court should review such judgment upon the merits, determine all questions arising on the law and the evidence, and render such judgment or make such order upon the whole matter as law and justice may require; and it is error in the court to have the case tried by a jury without having first reviewed such judgment. *Arnold v. Lewis County Court*, 38 W. Va. 142, 18 S. E. Rep. 476.

Now, by the West Virginia statute in every case before a justice, the record or proceeding may af-

ter a judgment or final order therein be removed by a writ of *certiorari* to the circuit court of the county in which such judgment was rendered, except where the amount in controversy, exclusive of interest and costs, does not exceed \$15. Upon the hearing, such circuit court shall, in addition to determining such questions as might have been determined upon a *certiorari*, as the law heretofore was, review such judgment of the justice upon the merits, determining all questions arising on the law and evidence, and render such judgment or make such order upon the whole matter as law and justice may require; and to enable it to do this the methods of procedure in the circuit court are made to apply to the proceedings before the justice; that is, the justice shall, upon request of either party, in a civil case, matter, or proceeding, certify the evidence, if any, which may have been heard, and sign bills of exception, setting forth any rulings or orders which may not otherwise appear of record. Such certificate of evidence and bills of exceptions shall be a part of the record, and as such be removed and returned to the circuit court. Then the circuit court will confirm the judgment of the justice, if, upon the whole matter, law and justice may require it, but, if not, reverse it, and set it and the verdict of the jury aside, grant a new trial, or make such other order as the case may require. But if the judgment of the justice and verdict of the jury are set aside, the case shall be retained in the circuit court, and disposed of as if originally brought therein. Here the writ comes back to its original use and purpose as it was in like cases at common law; having first answered the additional purpose of appeal in jury cases, under chapter 50. *Bee v. Seaman*, 36 W. Va. 381, 15 S. E. Rep. 173.

b. *Errors Correctible.*—The general rule was, that upon *certiorari* to an inferior court, the court from which the writ issues will only inquire into errors and defects which go to the jurisdiction of the court below, and for all other errors and irregularities the party must resort to his remedy by appeal or writ of error. But in West Virginia, if the inferior tribunal proceeds in a summary manner and not according to the course of the common law, and there is no remedy by appeal or writ of error, then the courts will consider other than jurisdictional questions. *Poe v. Machine Works*, 24 W. Va. 517; *Chenoweth v. Commissioners*, 26 W. Va. 230.

Prior to the enactment of § 2, ch. 110, Code 1887, although the appellate court could review all questions of jurisdiction and regularity of proceeding and decide all questions of law and fact and render such judgment, in case of reversal, as the lower court ought to have rendered, it was doubtful whether it could consider evidence and reverse findings of fact by jury or court, but now the statute provides for embodying in the record the evidence and all questions passed upon in the lower court and requires the appellate court to pass on all questions arising on law and evidence and render such judgment as the lower court should have done without remanding. *Morgan v. Ohio River R. Co.*, 39 W. Va. 17, 19 S. E. Rep. 588.

The appellate court in cases brought before them by *certiorari* may review and correct the errors of the inferior court, not only when these errors are errors on questions of jurisdiction, power and authority of the inferior tribunal, or on questions of the regularity of the proceedings, but also when there were any errors of law in their proceedings or any action taken by them on erroneous princ-

ples or in the absence of all evidence to justify it. *Dryden v. Swinburne*, 20 W. Va. 89.

In *Dryden v. Swinburne*, 15 W. Va. 234, GREEN, P., said: "Reason and authority both sustain the position that when a case is brought before a superior court by *certiorari* from the judgment of an inferior court of record, the judgment of the superior court should not be confined simply to an affirmance or reversal of the decision of the inferior court of record but in such case the superior court ought in cases of a reversal of an inferior court, either to remand the cause to be further proceeded with or enter such judgment as the court below ought to have done in a case brought before it by a writ of error. And § 26, ch. 17, Acts 1872-3 W. Va., does not apply, since that chapter applies only to writs of error and not to writs of *certiorari*." *Fowler v. Thompson*, 23 W. Va. 106.

c. Informal Plea.—In an action commenced before a justice, and taken by appeal to the circuit court if the defendant files an informal plea which sets up a valid defense to the action, the circuit court should not deny him the benefit of his defense when the plea is such that a person of common understanding may know what is intended by it. *Jones v. Browne*, 32 W. Va. 444, 9 S. E. Rep. 873.

d. Amendment of Pleading.—If a party during trial of an appeal from a justice is entitled to amend his pleadings, that right cannot be made to depend solely on whether the adverse party is then ready to proceed with the trial. If such amendment would be a surprise to the other party, a continuance will obviate that objection. *Powell v. Love*, 36 W. Va. 96, 14 S. E. Rep. 406.

If an appeal is taken, new or amended pleadings in writing may, if substantial justice requires it, be filed in the circuit court, or the case may be tried on the pleadings before the justice or, when oral, on the brief note of their contents on the justice's docket. But whether written pleadings be filed before the justice or in the circuit court, they need not be of any particular form but must be such as to enable a person of common understanding to know what was intended. *Poole v. Dilworth*, 26 W. Va. 363.

e. New Evidence in Superior Court.—Although, in controversies concerning mills, wills, roads, the probate of wills, and granting of administrations, the superior court of law, to which an appeal is taken from the county or corporation court, may hear new evidence upon questions submitted to its review by the record, it ought not to receive any evidence, but that of the record itself, to prove what questions were in fact tried in the court below. *Bohn v. Sheppard*, 4 Munf. 403.

f. Where Judgment Is Reversed.

In Virginia.—Where a superior court reverses the judgment of a lower court it cannot retain the cause for further proceedings without the consent of parties, but must send the cause back to the lower court. *Janey v. Blake*, 8 Leigh 88.

In bastardy proceedings, the county court having decided in favor of a putative father, and the overseers of the poor having spread the facts upon the record by an exception, and taken an appeal to the circuit court, that court, upon reversing the judgment of the county court, should not send the cause back for a new trial, but should render a judgment in favor of the overseers of the poor for the amount appearing to be due, but without interest. *Willard v. Overseers of the Poor of Wood County*, 9 Gratt. 126.

If the county court disregard the instruction of the district court, the latter court ought, upon the second appeal, to retain the cause for trial before themselves, and not send it back to the county court. *Fine v. Cockshut*, 6 Call 16.

In *Smith v. Hutchinson*, 78 Va. 683, where the circuit court remanded a case to the county court instead of retaining it, in violation of § 25, ch. 173, Code 1873 providing that "When any judgment, decree or order of a county court is reversed or affirmed, the cause shall not be remanded to said court for further proceedings, but shall be retained in the circuit court, and there proceeded in, unless by consent of the parties, or for good cause shown, the appellate court direct otherwise," the court said: "We do not decide that the circuit court should, where a cause is remanded for trial in the county court, spread in its order at large the character of the cause shown for so doing, for to do so would in many cases be inconvenient, and would unnecessarily cumber the record. It is necessary and proper, however, that the judgment in all such cases show either that it was done for good cause shown, or else by agreement of the parties." Such judgment will be reversed on appeal to the court of appeals. *Pettit v. Cowherd*, 83 Va. 20, 1 S. E. Rep. 392; *Thompson v. Carpenter*, 88 Va. 702, 14 S. E. Rep. 181.

Where the circuit court has reversed the order of the county court and remanded the case for further proceedings and adjourned, the circuit court has no jurisdiction afterwards to set aside the former order and dispose of the case on its merits on the ground that it should have retained the cause, §§ 3451-2 being applicable only to judgments by default or decree upon bill taken for confessed and cases of mistake, misrecital or miscalculation, not to the error committed in this case, of remanding the cause, when it should have retained and disposed of it. *Thompson v. Carpenter*, 88 Va. 702, 14 S. E. Rep. 181.

In West Virginia.—Where a cause is brought before a superior court by a writ of error the superior court is not confined to a simple affirmance or reversal of the decision of the inferior court of record, but in a case of a reversal of the judgment of an inferior court, it ought either to remand the cause to be further proceeded with or enter such judgment as the court below ought to have entered, except that by § 22, ch. 17, Acts 1872-3, where any judgment of the county court is reversed or affirmed, the cause shall not be remanded to that court, but shall be retained in the circuit court and be proceeded with there, but this has no application to a case reversed on a writ of *certiorari*. *Dryden v. Swinburn*, 15 W. Va. 234.

The circuit court, having obtained jurisdiction by writ of error, the statute authorizes it to retain the case, and there proceed in it, unless, by consent of the parties, or for good cause shown, the appellate court directs otherwise. *State v. Kyle*, 8 W. Va. 711.

The circuit court may in a proper case, if justice require it, set the verdict of a jury aside, and award a new trial, and when the judgment of the justice is set aside the case is not sent back, but must be retained in the circuit court, and disposed of as if originally brought therein. *Bee v. Seaman*, 36 W. Va. 381, 15 S. E. Rep. 173.

Before the Acts of 1882, ch. 153, upon reversal under a writ of *certiorari*, the court could simply reverse and remand the case to the lower court to enter a proper judgment or itself render proper judgment, but by that act the appellate court is re-

the affirmance of the decree in other respects than those on which it is reversed. *Crockett v. Sexton*, 20 Gratt. 46.

Married Women.—A married woman when she is a party is as much bound as any one else. *McCullough v. Dashiell*, 85 Va. 37, 6 S. E. Rep. 610.

Infants.—But an infant is not concluded by an affirmation by the court of appeals of a decree in a proceeding to which she is not a party and was not represented, but in which she is interested, she may file a bill of review to such decree. *Connolly v. Connolly*, 32 Gratt. 687.

B. OF GENERAL COURT.—The general court having upon a writ of error reversed the judgment of the court below, and directed a new trial, that judgment is conclusive, and neither the court below, nor the general court on a second writ of error, can enquire into the correctness of the first decision. *Marshall v. Com.*, 5 Gratt. 693.

XVI. APPEAL BONDS.

A. NOT A CONTRACT.—A supersedeas bond is not a contract within the purview of § 10, art. I of the Federal Constitution, forbidding the impairment of the obligation of contracts. It is simply an obligation imposed by law, it has no independent force apart from the judgment and has no more of the elements of a contract in it than the judgment itself, it is not a mutual agreement, nor is it voluntary on the part of those who sign it, it is executed under a sort of legal duress. The party is compelled under the requirement of the law to execute it or deny himself his legal right to have the judgment reviewed without it. *White v. Crump*, 19 W. Va. 583.

B. DEPENDENT ON JUDGMENT.—The effect of a supersedeas bond is dependent upon the fate of the judgment, without which it has no obligatory force, it has no separate existence, for whenever the judgment ceases to be binding, the bond becomes inoperative for any purpose. So when in an action on a supersedeas bond it is pleaded that the judgment was recovered because of an act done according to the usages of civilized warfare, under § 35, Art. VIII of the Constitution of West Virginia, such judgment is void though affirmed by the court of appeals, such affirmance being before the above section of the constitution was adopted, and consequently the bond is void also. Such proceedings constitute due process of law. *White v. Crump*, 19 W. Va. 583.

C. WHEN REQUIRED.

Executors and Administrators.—The statute requiring bond and security upon appeals although general in terms apply only to persons appealing in their own right, not to executors and administrators. *Shearman v. Christian*, 1 Rand. 393.

Executors and administrators are as much required to give security on appeal as any other appellants where the judgment is against them personally though it should have been against them in their representative capacity. *Pugh v. Jones*, 6 Leigh 299.

In a suit in equity against defendant as executor and in his own right as legatee, there is a decree against him personally; on appeal allowed him from the decree, an appeal bond with surety will be required of him. *Erskine v. Henry*, 6 Leigh 378; *Bull v. Douglas*, 4 Munf. 307. See monographic note on "Executors and Administrators" appended to *Rosser v. Depriest*, 5 Gratt. 6.

Where executors and legatees jointly appeal, the legatees (being in possession of the property in dis-

pute), may be ruled to give security for the prosecution of the appeal. *Sadler v. Green*, 1 H. & M. 28.

Assignee of Bankrupt.—The assignee of a bankrupt is not the representative of a decedent so as to relieve him from the necessity of giving an appeal bond. *Face v. Ficklin*, 76 Va. 292.

Under Act 1792.—Under the Act of 1792, where a plaintiff in chancery appealed, that court could not require of him any other bond than one in the penalty of twenty pounds. *Braxton v. Morris*, 1 Wash. 380.

Waiver.—The mere marking of his name by the counsel for the defendant in error on the docket of the court as counsel for defendant in error will not amount to a release of the plaintiff in error from his obligation to give the bond required by law. *Otterback v. Alex.*, etc., R. Co., 26 Gratt. 940.

It might amount to a waiver of service of process on his client. *Otterback v. Alex.*, etc., R. Co., 26 Gratt. 940.

Where a supersedeas has been granted and a cause has been docketed for more than six years without objection, it will not be dismissed on motion though the required bond was not given. *Pugh v. Jones*, 6 Leigh 299.

D. TIME TO EXECUTE BOND.—Where an appeal is allowed with unlimited time in which to execute an appeal bond, such appeal is irregular and a motion to docket it will be overruled. *Broadbent v. Turner*, 2 Rand. 5.

Sec. 3 of the act March 15, 1867, which amended § 3 of ch. 182 of the Code of 1860, changing the limitation of the time for presenting a petition for an appeal from, or writ of error or supersedeas to, any final decree or judgment, from five to two years after it was made or rendered, did not amend § 26 of that chapter, which allows five years for perfecting the appeal, by giving bond, etc. And therefore, where a petition for an appeal was presented within two years from the date of the decree it might be perfected in any time within five years from that date. But see now, Code of 1873, ch. 173, § 17; *Bolling v. Lersner*, 26 Gratt. 36.

A party who, on expressing an intention to appeal from an order of the county court made November 18th, and have the case tried *de novo* in the circuit court, is granted until November 17th to give the necessary bond, cannot complain that the court adjourned for the term on November 14th, unless the record shows that he was thereby prevented from giving the required bond. *Sargeant v. Irving*, 3 Va. Dec. 338.

E. FAILURE TO GIVE BOND.—If the appellant fails to give the bond directed to be given by the court, or the judge allowing the appeal or supersedeas, the appellee may have a rule upon him to compel him to give it. *Williamson v. Gayle*, 4 Gratt. 180.

The appeal being allowed, the cause is pending in the court of appeals; and the failure of the appellant to execute the bond directed by the court to be given, on granting the appeal, does not avoid the appeal. *Williamson v. Gayle*, 4 Gratt. 180.

F. SUSPENSION OF DECREE.—At common law, no court could suspend its judgment, but by § 4, ch. 17, Acts 1872-3, the power is given to suspend its judgment, upon the execution by the party desiring to appeal, of a suspending bond, in such cases, and only in such cases as may be taken up to an appellate court by writ of error and supersedeas. *Swinburn v. Smith*, 15 W. Va. 483.

Where, in case of upset bid and conditional set-

ting aside of sale and suspension of decree of sale to a certain period in order to give an upset bidder opportunity to comply with the conditions of resale, he applies to the judge in vacation for an extension of such suspension, in order to give time to apply for appeal and supersedeas, and the judge delays acting on such application till after the period within which compliance was permissible, such action of the judge cannot be corrected by the appellate court. *Yost v. Porter*, 80 Va. 856.

G. OBLIGOR IN BOND.

Attorney.—In *Baltimore, etc., R. Co. v. Vanderwarker*, 19 W. Va. 235, the court said: "The law does not require that the party obtaining an appeal or supersedeas shall himself execute a bond with security; but, that he or some one else for him shall do so."

Where a supersedeas bond has been executed by the appellant's attorney, the benefit of which it has received and enjoyed, it is estopped to deny that a supersedeas was awarded in that case, by a recital of that fact in the bond. *Baltimore, etc., R. Co. v. Vanderwarker*, 19 W. Va. 235.

An appeal bond need not be signed by the plaintiff in error, since it may be given by a stranger. *York v. Free*, 38 W. Va. 336, 18 S. E. Rep. 492.

H. OBLIGEE IN BOND.—Under § 6 and 8, ch. 12, Code 1873, an appeal bond may be made payable to the commonwealth, or to any person injured by a breach of the condition of such bond. *Acker v. A. & F. R. Co.*, 84 Va. 648, 5 S. E. Rep. 688.

I. WHERE APPEAL BOND SHOULD BE GIVEN.

—Where an appeal is taken in court, the appeal bond cannot legally be given in the clerk's office, but should be given in court. *Thomson v. Evans*, 6 Munf. 307.

J. CONDITION OF BOND.

Where Supersedeas is Awarded.—Where a supersedeas is awarded, but the bond on appeal required by Code 1887, §§ 3470, 3471, is conditioned to pay only costs and damages, and not the debt, the court will, on motion, discharge the supersedeas, but will allow the appeal to remain in force on filing a new bond. *Reld v. Norfolk City R. Co.*, 2 Va. Dec. 86.

Under the Code of 1819, it was held that the penalty of a supersedeas bond was to be fixed by the judge granting it, and was not governed by the law respecting appeals by plaintiffs or demandants. *Smock v. Dade*, 5 Rand. 639.

Where the clerk, in copying a bond, conditioned by order of court "to pay any deficiency in the funds arising from the land sales decreed, to meet and discharge the sums decreed against the appellants," adds a condition "to pay the judgment," these two conditions, in the absence of a clearly manifested intention to the contrary, will be held to mean the same thing i. e. to pay the deficiency, *not* to pay the judgment and in addition to indemnify the original purchasers. *Harnsberger v. Yancey*, 38 Gratt. 537.

Where the recital in an appeal bond states that it was given to perfect a writ of error, but the condition adds a further obligation to satisfy the judgment if affirmed or if the writ of error be dismissed, it will be presumed that a supersedeas also was granted in accordance with the condition. *State v. Dotts*, 31 W. Va. 819, 8 S. E. Rep. 391.

Where No Supersedeas Issues.—If a party is unable to give bond and security for the debt, he may have his appeal on giving security for costs only, but the decree will not be superseded. *Erskine v. Henry*, 6 Leigh 378.

Appeal from Decree Dissolving Injunction.—The

penalty of the appeal and supersedeas bond should be sufficient to indemnify and save harmless the surety in the injunction bond. *Cardwell v. Allen*, 28 Gratt. 184.

A party appealing from an order dissolving an injunction can only be required to give security to perform the decree of the inferior court, and to pay the costs and damages awarded in the appellate court, if the decree shall be affirmed. *Quere*, whether, where bond and security have been given to perform the decree of the court below, and further security is required in the appellate court, which the party cannot give, the surety in the first bond is discharged. *M'Kay v. Hite*, 4 Rand. 564.

Injunction to Judgment.—When a party has obtained an injunction from the court of chancery to a judgment at law, which is afterwards dissolved, and he appeals to the court of appeals, he cannot be required to give security for the amount of the judgment enjoined, but only for such costs as may be awarded against him by the court of appeals. *Eppes v. Thurman*, 4 Rand. 384.

Rents and Profits.—Where a decree for the sale of the land is rendered in a chancery suit to enforce judgment liens on land, the supersedeas bond does not cover any loss occasioned by the receipt of rents and profits by the debtor during the pendency of the appeal and supersedeas in the court of appeals. *Hutton v. Lockridge*, 27 W. Va. 428; *Beard v. Arbuckle*, 19 W. Va. 145; *Perry v. Horn*, 21 W. Va. 732.

That portion of § 13, chapter 178, of the Code of 1873, prescribing the penalty of an appeal and supersedeas bond, refers only to the damages mentioned in § 24 of the same chapter, and was not intended to cover the rents and profits of real estate in the possession of the appellant who had given a deed of trust thereon to secure a debt fully equal to its value, he having obtained an injunction to prevent the sale of such real estate, which injunction was dissolved, and the bill dismissed; and the penalty of the appeal and supersedeas bond will not be fixed with reference to such "rents and profits." *Cardwell v. Allen*, 28 Gratt. 184.

The word "awarded," in said § 13, ch. 178, Code 1873, refers to the words "damages and costs;" and the word "incurred" to the word "fees" therein, so as to make the meaning the same as if the sentence had been written; "and also to pay all damages and costs which may be awarded against, and all fees which may be incurred by, the appellants or petitioners." *Cardwell v. Allen*, 28 Gratt. 184.

Decree Partly Executed.—Where an interlocutory decree directs the defendant to deliver up slaves to be divided among the plaintiffs, and then there is a final decree against him for the profits; and defendant appeals from both decrees. *Held*, if defendant has complied with the interlocutory decree by delivering the property, he will not be required to give an appeal bond with surety for delivery thereof in case of affirmance; if he has not so complied with it, such appeal bond will be required.

And upon the question, whether defendant has so complied or not, parol evidence, by affidavits, will be received in the appellate court. *Erskine v. Henry*, 6 Leigh 378; *Bull v. Douglas*, 4 Munf. 308.

Dismissal of Appeal.—The omission in the Code of 1869 of the provision in appeal bonds that the obligors should be responsible, if the appeal was dismissed, made no real change in the condition of the bond, since the dismissal is the equivalent of an affirmance, the condition as to which was retained. *Cas-*

anova v. Kreusch, 21 W. Va. 720; Perry v. Horn, 21 W. Va. 723.

K. EFFECT ON ATTACHMENT.—Where, upon a decree in favor of an attaching creditor, and an appeal therefrom, the appellant gives an appeal bond, the giving of this bond does not release the attachment. *Magill v. Sauer*, 20 Gratt. 540.

L. DEFECTIVE BONDS.

Certiorari Instead of Appeal Bond.—Where an appeal is taken from the county court sitting in chancery, and a bond is given, which is in fact a *certiorari*, and not an appeal bond, but no objection is made to the regularity of the bond in the court of chancery, and an appeal is taken to the court of appeals, and in that court, an objection is made, for the first time, to the bond, the objection comes too late; but if it had been made in the court of chancery, that court could only have dismissed the appeal *nisi*, or have laid the party under a rule to give a proper bond, in a reasonable time. *Brown v. Matthews*, 1 Rand. 462.

So where the clause "all actual damages incurred in consequence of the supersedeas" is omitted from the condition. *Virginia Fire & Marine Ins. Co. v. Mfg. Co.*, 95 Va. 515, 28 S. E. Rep. 888.

Misrecital.—The fact that an appeal bond recites a judgment, not as the judgment of the circuit court of the city of Alexandria but as "a judgment of the circuit court of Alexandria" will not affect the validity of the bond being merely a clerical error, that may be amended by the record. *Acker v. A. & F. R. Co.*, 84 Va. 648, 5 S. E. Rep. 688.

Failure to Waive Homestead.—So an omission to waive the homestead exemption. *Acker v. A. & F. R. Co.*, 84 Va. 648, 5 S. E. Rep. 688.

Bond Executed by Surety Alone.—A bond for prosecuting a writ of supersedeas executed by a surety only, without any principal obligor, is insufficient; and a supersedeas issued thereupon ought to be quashed. *Miller v. Blannerhassett*, 5 Munf. 197; *Rootes v. Holliday*, 4 Munf. 823; *Day v. Pickett*, 4 Munf. 104.

Objection Must Be Made Promptly.—Where it is certified by the lower court that the appellant with his surety, upon the allowance of the appeal, executed the required bond, the appellee cannot, after the lapse of more than five years from the judgment, have the appeal dismissed for any supposed defect in the bond, *e. g.* a misrecital of the amount of the judgment, and so deprive the appellant of his right of appeal altogether. He should have moved promptly to have the appeal dismissed, by not doing so he will be held to have waived the defect. *Jackson v. Henderson*, 3 Leigh 196; *Va. F. & M. Ins. Co. v. N. Y., etc., Co.*, 95 Va. 515, 28 S. E. Rep. 888.

In the above case the appellant had died and the appeal had been revived in the name of the appellant's administratrix and it was held that the appellee was not even entitled to a rule upon the appellant's administratrix to give further security, which as administratrix she was not required to give; but the court intimated that if the appellant were himself alive the error could be corrected. *Jackson v. Henderson*, 3 Leigh 196.

M. FILING OF BOND.—The filing of an appeal bond, with the clerk, must be in pursuance of an allowance of the appeal, entered on the record. *Burch v. White*, 3 Rand. 104.

N. INSUFFICIENCY OF SECURITY.—The appellate court is the sole judge of the sufficiency of the security, after security has been given. *Anderson v. Anderson*, 2 Call 198.

Section 3436, Code 1887, whereby a circuit judge may in vacation hear and determine upon appeal whether a judgment of the court below is right or wrong, does not authorize the judge in vacation to enquire into the sufficiency of an appeal bond, and to order a new bond, or new or additional security; such order is *coram non judice* and void. *Chase v. Miller*, 88 Va. 791, 14 S. E. Rep. 545.

Remedy.—The party injured by the insufficiency of an appeal bond has his remedy by action on the official bond of the clerk of the court. Sections 177, 178 and 180. *Chase v. Miller*, 88 Va. 791, 14 S. E. Rep. 545.

O. RIGHTS OF SURETY.—Where a judgment was rendered for 148 dollars 68 cents damages, with interest and costs, and on the same day an appeal was allowed, and, the judgment being affirmed, damages were recovered against the appellant for retarding the execution, and also costs in the appellate court, and, a *seri facias* being then issued and returned *nulla bona*, the surety in the appeal bond paid 308 dollars 64 cents in satisfaction of the judgment, and within a year after the affirmance, filed a bill to charge real estate aliened by the debtor between the date of the original judgment and the date of the judgment of affirmance. *Held*, the surety is to be substituted in the place of the judgment creditor, and to have the benefit of his lien. *McClung v. Belrne*, 10 Leigh 394.

Abatement of Appeal by Death.—Where defendant appeals from a judgment against him, and the appeal abates by reason of his death and is not revived, the surety on the appeal bond is released. *Nelson v. Anderson*, 2 Call 286.

P. ACTION ON BOND.—Where the recital in an appeal bond states that it was given to perfect a writ of error, but the condition adds a further obligation to satisfy the judgment if affirmed or the writ of error be dismissed, it will be presumed that a supersedeas also was granted in accordance with the condition. The plaintiff may either allege in his declaration on such a bond that it was given to perfect a writ of error and supersedeas or he may simply set forth the bond and condition, and in the latter case his declaration is not demurrable. The defendant may plead directly that the bond was given to perfect a writ of error only. *State v. Dotts*, 81 W. Va. 819, 8 S. E. Rep. 391.

In actions on appeal bonds, the court of appeals will not consider either judicial errors, or clerical misprisions, in the court below, occurring in the original suit, and in which there has been an acquiescence by the parties not appealing to correct them. *Miller v. M'Luer*, Gilmer 338.

XVII. APPEALS FROM INFERIOR TRIBUNALS.

A. IN CIVIL CASES.

1. **GENERALLY.**—Where the inferior tribunal whose decision is sought to be reviewed has any discretion, the proper method is by *certiorari* and not *mandamus*. *Board v. Minturn*, 4 W. Va. 300.

It seems that it has ever been the law, that when it is proper to review the proceedings of inferior tribunals, and the law has not provided redress by appeal, writ of error or other process, resort may be had to the writ of *certiorari* to prevent a failure of justice. *Morgan v. Ohio, etc., R. Co.*, 30 W. Va. 17, 19 S. E. Rep. 588; *Railway Co. v. Board of Public Works*, 28 W. Va. 268.

In *Alderson v. Commissioners*, 31 W. Va. 633, 8 S. E. Rep. 274, *JOHNSON, P.*, said, § 12, art. 8 of the Constitution of West Virginia, declaring that "the cir-

cult courts shall have the supervision and control of all proceedings before justices and other inferior tribunals, by mandamus, prohibition and *certiorari*" was a broad declaration that in the state of West Virginia there was no tribunal that was not subject to be legally controlled by the courts.

The mere fact that the word "control" in the clause of the constitution of 1863 giving the circuit courts "supervision and control of all proceedings before justices and other inferior tribunals by mandamus, prohibition and *certiorari*" is omitted from the similar clause in the constitution of 1872 does not deprive the circuit court of jurisdiction to review the judgment of the county court in contested election cases, by *certiorari*. *Dryden v. Swinburne*, 30 W. Va. 80.

Section 12, art. VII of the Constitution of West Virginia 1872, providing that the circuit courts shall have supervision of all proceedings before the county courts and other inferior tribunals by *certiorari*, etc., is restricted in § 29 of same article providing that the county court shall have jurisdiction of all appeals from the judgments of justices, and their decision upon such appeal shall be final in all cases, except in certain specified cases. *Poe v. Machine Works*, 24 W. Va. 517.

By § 2, ch. 153, Acts 1882 W. Va., the remedy by *certiorari* in the circuit court is greatly enlarged, both as to the questions that may be reviewed and the inferior tribunals to which it is made to lie. Whether it is extended to all inferior tribunals, whether executive, ministerial or judicial, was not necessary to the decision of the case since county courts were expressly mentioned. *Chenoweth v. Commissioners*, 26 W. Va. 230.

Notice of Writ.—It is not necessary for the court granting a writ of *certiorari* to give notice to the opposite party or to issue a rule against him to show cause against its being granted, but it is a matter within their discretion, and if they think it unnecessary and not tending to any useful purpose, they need not do so. But the other party, though not a formal party, must be notified of the pending of the proceeding before the court acts upon the writ after its return. *Dryden v. Swinburn*, 15 W. Va. 234.

In *Dryden v. Swinburn*, 15 W. Va. 234, *supra*, the court intimated, though not necessary to the decision, that if the other party was not a formal party, no merely formal objection could be made to the service of such notice, it would only be necessary to show that he had notice.

2. APPEALS FROM JUSTICES.

a. Technical Appeal.

(1) **Generally.**—The defendant may take an appeal as of right from the judgment of a justice, if he tender the required bond within ten days after judgment. *Hubbard v. Yocum*, 30 W. Va. 740, 5 S. E. Rep. 367; *Parsons v. Aultman*, 45 W. Va. 473, 31 S. E. Rep. 985.

The appeal was for a time to the county court, but by ch. 63, Acts 1877, the appeal is restored to the circuit courts. *Hubbard v. Yocum*, 30 W. Va. 740, 5 S. E. Rep. 367.

Though the judgment of a justice is erroneous yet if such error arises, not from want of jurisdiction in the justice, but merely from an erroneous exercise of a conceded jurisdiction, the remedy is only by appeal and not by *certiorari*. *Poe v. Machine Works*, 24 W. Va. 517.

(2) **Where Appeal is Not Taken within Ten Days.**—It is settled by the decisions in West Virginia that unless

"good cause" appears in the petition for the failure to take the appeal within ten days as prescribed by § 174, ch. 50 of the Code, the appeal must be dismissed by the circuit court as improvidently awarded. § 174, ch. 8, Acts 1881; *Lowther v. Davis*, 33 W. Va. 132, 10 S. E. Rep. 20; *Home Sewing Machine Co. v. Floding*, 27 W. Va. 540.

But it may, and in a proper case should, be granted after the expiration of ten days, and within ninety days after the date of the judgment, when the party otherwise entitled to the writ shall show, by his own oath or otherwise, good cause for his not having applied for such writ within the ten days. *Long v. Ohio River R. Co.*, 35 W. Va. 333, 18 S. E. Rep. 1010; *State v. Larue*, 37 W. Va. 838, 17 S. E. Rep. 397; *Womer v. Ravenswood, etc., R. Co.*, 37 W. Va. 287, 19 S. E. Rep. 488.

Where such writ is not applied for within ten days but within ninety days after the judgment, and the record shows no excuse for not sooner applying, no presumption arises from the mere grant of the writ that good excuse was otherwise shown. The excuse or cause for not applying for the writ within ten days must always appear in writing as part of the record. *Morgan v. Ohio, etc., R. Co.*, 30 W. Va. 17, 19 S. E. Rep. 588.

Where a justice renders judgment on a verdict on one day, and the next day a motion for a new trial is made and overruled, the ten days allowed for a *certiorari* begins to run on the latter day. A motion for a new trial suspends the finality of a judgment already entered, until the date of the denial of the new trial, for the purposes of limitation of a writ of *certiorari* or appeal. *Straley v. Payne*, 43 W. Va. 185, 27 S. E. Rep. 359.

Where a writ of *certiorari* is not taken within ten days after the judgment, the defendant to it will be given the benefit of that defense in the court of appeals, though the record merely shows that the case was heard in the circuit court on the record and proceedings, without showing any motion to quash or dismiss. *Morgan v. Ohio, etc., R. Co.*, 30 W. Va. 17, 19 S. E. Rep. 588.

But a judgment on a *certiorari* granted more than ten days after a judgment is not void so that it may be vacated at any time, however erroneous it is. *Morgan v. Ohio River R. Co.*, 30 W. Va. 17, 19 S. E. Rep. 588.

No Relation to Beginning of Term.—Although judgments and decrees relate back to the first day of the term at which they were rendered, yet there is an exception where the case was not ready for hearing on the first day of the term, so that even if the rule applied to a petition to the circuit court for a writ of *certiorari*, such a case would come within the exception, where on the first day of the term it was not in a condition to be heard, there being in fact no such case until the petition was filed. Hence the decision in such a case will not relate back to the first day of the term of the circuit court so as to bring the presentation of the petition within the ten days' limit. *Womer v. Ravenswood, etc., R. Co.*, 37 W. Va. 287, 16 S. E. Rep. 488.

(3) What Constitutes "Good Cause."

Generally.—When the party has neglected to avail himself of his absolute right to an appeal within ten days, he can only obtain the new trial within ninety days upon showing such cause as would entitle him to a new trial; the facts shown to warrant the granting of the appeal after the expiration of the ten days must show fraud, accident, surprise or some adventitious circumstances beyond the con-

trol of the party. *Home S. M. Co. v. Floding*, 27 W. Va. 540; *Ruffner v. Love*, 24 W. Va. 181; *Hubbard v. Yocum*, 30 W. Va. 740, 5 S. E. Rep. 867; *Powell v. Miller*, 41 W. Va. 371, 23 S. E. Rep. 557.

Where a party desires to appeal from the judgment of a justice which has been rendered against him, goes to the justice's office within ten days after the date of such judgment, and informs the justice that he wishes to take an appeal, and the justice, being engaged at the time, promises him to prepare a bond, and bring it to his place of business for execution, and such party pays no further attention to the matter until after ten days have expired, the justice failing to comply with his promise within the ten days, these facts, stated in a petition to the judge of the circuit court in vacation, are not sufficient cause for granting an appeal, as prescribed by statute, within ninety days after the date of said judgment. *Powell v. Miller*, 41 W. Va. 371, 23 S. E. Rep. 557.

Negligence of Justice.—If a party to a judgment files a good and sufficient bond in the office of the justice who rendered the judgment within ten days thereafter, with the person in charge of the office during the temporary absence of the justice, he is entitled to his appeal as a matter of right, and no act of negligence on the part of the justice can deprive him of the same. *Holmes v. Yoke*, 48 W. Va. 267, 37 S. E. Rep. 545.

Refusal by Justice to Grant Appeal.—Where the petition stated that he applied to the justice for an appeal within the ten days, but the justice refused to grant it, this was held "good cause" for the failure. *Lowther v. Davis*, 33 W. Va. 182, 10 S. E. Rep. 20; *Clark v. West Virginia, etc., R. Co.*, 50 W. Va. 1, 40 S. E. Rep. 351.

Where a justice who has no jurisdiction of the case tries it, and renders judgment, if such justice refuses to set aside such judgment and rehear such case, an appeal will lie from his judgment to the circuit court, as in other cases, and, if he refuse to grant the same within ten days, the circuit court of the county, or judge thereof in vacation, may grant the same on application. *Parsons v. Aultman*, 45 W. Va. 473, 31 S. E. Rep. 935.

Recovery of Judgment without the Knowledge of Defendant.—If a plaintiff in an action before a justice agrees with the defendant to dismiss it or abandon it, but afterwards, without the knowledge of the defendant, obtains judgment against the defendant, the defendant first discovering such judgment after ten days from its date, this constitutes good cause for obtaining an appeal from a circuit court within ninety days after the judgment. *McCormick v. Short*, 49 W. Va. 1, 37 S. E. Rep. 769.

But the fact that he did not know a judgment had been rendered against him, when he had been served with process is not "good cause." *Hubbard v. Yocum*, 30 W. Va. 740, 5 S. E. Rep. 867.

Ignorance of the Law.—Mere ignorance of what the law required of him is not "good cause." *Home Sewing Machine Co. v. Floding*, 27 W. Va. 540.

Nor is it material that the party desiring to appeal was a nonresident. *Hubbard v. Yocum*, 30 W. Va. 740, 5 S. E. Rep. 867.

Erroneous Advice of Counsel.—Erroneous advice of counsel is not "good cause." *Ruffner v. Love*, 24 W. Va. 181.

Miscarriage of Letter.—So the miscarriage of a letter is no excuse where enough time elapsed to arouse suspicion that it had miscarried, before the expiration of the ten days. *Hubbard v. Yocum*, 30 W. Va. 740, 5 S. E. Rep. 867.

How Shown.

Must Be in Writing.—Such "good cause" is to be shown by a written application, sworn to by the applicant or some one else and by affidavits or other written proofs filed with the application. *Hubbard v. Yocum*, 30 W. Va. 740, 5 S. E. Rep. 867.

If a petition for an appeal from the judgment of a justice states facts showing good cause for not having taken an appeal within ten days, and is verified by affidavit, and an appeal is granted, that appeal cannot be dismissed as improvidently granted merely because proof of such cause for not taking the appeal sooner is not made by affidavit or other proof independent of the petition and separate from it. *McCormick v. Short*, 49 W. Va. 1, 37 S. E. Rep. 769.

Must Be Ex Parte.—The "good cause" is to be shown to the court *ex parte*, the other party cannot contest the fact in the circuit court; his only remedy is by appeal. *Hubbard v. Yocum*, 30 W. Va. 740, 5 S. E. Rep. 867.

Where Appeal Is Not Taken within Ninety Days.—If an application be not made to the circuit court within ninety days from the rendition of the judgment of a justice, in no case can he grant an appeal, and if he grant one, it must be dismissed as improvidently granted. *Home Sewing Machine Co. v. Floding*, 27 W. Va. 540; *State v. Larue*, 37 W. Va. 828, 17 S. E. Rep. 897.

Refusal to Grant Appeal.—Mandamus is not a proper remedy when a justice refuses to grant an appeal from his decision, since the party aggrieved has an adequate remedy by petition to the circuit court or judge. *Lowther v. Davis*, 33 W. Va. 182, 10 S. E. Rep. 20.

(4) Effect of Appeal.—Where the effect of the appeal is to transfer the action to an appellate court in which the case is to be tried *de novo*, and the controversy is to be settled by a judgment in such court regardless of the judgment appealed from, the appeal operates not only to suspend the judgment of the justice or inferior tribunal, but vacates and sets it aside, so that it cannot be used as evidence or as the foundation of an action in any court. An appeal in such case is very different in its effect from a proceeding, which seeks to review a judgment by a writ of error. In the latter case the judgment is merely suspended, but in the former the judgment is vacated and made ineffectual for any purpose, the judgment in legal construction no longer remains in force and cannot be the foundation of a new action. *Evans v. Taylor*, 28 W. Va. 184.

An appeal from the judgment of a justice, which, in the appellate court, is tried *de novo*, is a continuation of the same suit, so that the liability of the obligor in a detinue bond continues until the appeal is decided. *Bratt v. Marum*, 24 W. Va. 653.

(5) Equivalent to Appearance in Appellate Court.—An appeal by a party to a case in the justice's court operates as a general appearance in the appellate court, and gives that court jurisdiction of the person of the appellant, and as a general rule the irregularities in the proceedings before the justice are waived by an appeal. *Thorn v. Thorn*, 47 W. Va. 4, 34 S. E. Rep. 759.

(6) Dismissal of Appeal.—Where a party appeals to the circuit court from a judgment rendered against him by a justice, he cannot, on his own motion, have his appeal dismissed, and the judgment of the justice affirmed, over the objection of the appellee. *Watson v. Hurry*, 47 W. Va. 809, 35 S. E. Rep. 880.

Lack of Jurisdiction in Justice.—Where a justice has no jurisdiction of a civil action, neither has a circuit court on appeal, though such circuit court would have original jurisdiction in the case, and therefore such court must dismiss the action for want of jurisdiction. *Richmond v. Henderson*, 48 W. Va. 389, 37 S. E. Rep. 654.

Title to Property Involved.—Where an appeal is taken from a judgment of a justice in an action of unlawful detainer, and it appears by answer filed that the title to property is involved, the circuit court will dismiss the action. *Watson v. Watson*, 45 W. Va. 290, 31 S. E. Rep. 989.

b. *Certiorari*.

(1) **Generally.**—The judges of the superior courts, within their respective jurisdictions, may award a *certiorari* to remove proceedings on an inquest of a riot, taken before the justices. *Mackaboy v. Com.*, 3 Va. Cas. 268.

By § 2, ch. 110, Amend. Code passed in 1882, the circuit court is given power to review by *certiorari* every case before a justice except where the judgment does not exceed \$15, exclusive of interest and costs. This statute was held constitutional. *Fouse v. Vandervort*, 30 W. Va. 327, 4 S. E. Rep. 298; *Bee v. Seaman*, 36 W. Va. 381, 15 S. E. Rep. 173.

Under the West Virginia statute, the writ of *certiorari* lies after judgment of the justice; and, upon the hearing in the circuit court, such court will review the judgment of the justice upon the merits, determining all questions arising on the law and the evidence, and render such judgment or make such order upon the whole matter as law and justice may require. *Bee v. Seaman*, 36 W. Va. 381, 15 S. E. Rep. 173.

The statutory remedy of *certiorari* to judgments of justices in civil cases is merely a form of appeal. *Parsons v. Aultman*, 45 W. Va. 473, 31 S. E. Rep. 985.

The two have therefore become, so far as applied to the review of civil cases before justices, synonymous terms, except that the *certiorari* appeal is granted as a matter of sound discretion, and the appeal *certiorari* is granted as a matter of right. *Parsons v. Aultman*, 45 W. Va. 473, 31 S. E. Rep. 985.

The remedy by writ of *certiorari*, given by ch. 110 of the Code, to review the judgment of a justice, is not given as a matter of right, but is awarded by the court, or judge, for cause, on proper case shown. *Harrow v. Ohio River R. Co.*, 38 W. Va. 711, 18 S. E. Rep. 926.

The writ of *certiorari*, when awarded in civil cases before justices, under §§ 2, 3, ch. 110, Code, is an appellate process, designed to affect the ends of justice; and the circuit court has a large discretion in awarding the same, reviewing judgments, and granting new trials thereunder, and, unless such discretion is plainly abused, the court of appeals cannot interfere therewith. *Michaelson v. Cautley*, 45 W. Va. 583, 33 S. E. Rep. 170.

Where a cause is removed after verdict and judgment from a justice's court on a writ of *certiorari* to the circuit court, under the third section of chapter 153 of the Acts of 1882, upon the hearing, such circuit court will, where there is a certificate of the evidence incorporated in a bill of exceptions signed by the justice, review the judgment of the justice upon the merits, and if of opinion to reverse the judgment will direct a new trial before a jury, unless neither party requires a jury. *Natural Gas. Co. v. Healy*, 33 W. Va. 102, 10 S. E. Rep. 56.

Upon the presentation to the circuit court of a petition for a writ of *certiorari* to remove into said

court the proceedings in a civil action before a justice, an agreement between the parties that said petitioner's application for said writ should be argued and discussed by them before said circuit court as if the writ of *certiorari* had been in fact issued, and due return had been made thereto, the record, proceedings and judgment in said civil action before said justice having been transmitted to and removed into the circuit court in pursuance of such agreement, will not bring the case before the circuit court for review on its merits, but brings up the transcript for the purpose of determining whether the application should be granted. *State v. Larue*, 37 W. Va. 328, 17 S. E. Rep. 397.

(2) **Form of Writ.**—Where no objection is made to the form of a writ of *certiorari* in the circuit court, it is too late to object in the court of appeals. *Burke v. Supervisors*, 4 W. Va. 371.

(3) **Motion to Quash.**—In a proper case the writ may, on motion, be superseded before its return, as on the ground that it was improvidently awarded; and by motion to quash, it may be quashed on any proper ground after the return. The language of the motion is not material, so that it gives notice of the thing asked to be done; nor the language of the order of the court, if it properly directs that it be done. *Long v. Ohio River R. Co.*, 35 W. Va. 333, 13 S. E. Rep. 1010.

(4) **The Record.**—When a writ of *certiorari* under the statute is awarded to a justice to review his judgment, in order to respond to the exigency of the writ, he must certify and send the record as the writ finds it. As the record is when the writ reaches him, so it must be certified and sent. It is then too late to make contemplated or intended certificates of facts and bills of exception parts of such record, but it must be sent up as it is, without increase or diminution. *Bee v. Seaman*, 36 W. Va. 381, 15 S. E. Rep. 173.

(5) **Proceedings after Reversal.**—Under the West Virginia statute, the writ lies after judgment, and the circuit court, after reversing the judgment complained of, retains it for final disposition, if the amount in controversy is more than \$15. *Long v. Ohio River R. Co.*, 35 W. Va. 333, 13 S. E. Rep. 1010.

(6) **Amendment of Summons.**—Upon a writ of *certiorari* from a judgment of a justice, the circuit court may allow the return on the summons issued by the justice to be amended. *McClure-Mable Lumber Co. v. Brooks*, 46 W. Va. 732, 34 S. E. Rep. 921.

(7) **Return to Writ.**—Before hearing a case, matter, or proceeding removed by *certiorari* from an inferior tribunal, the circuit court should require a formal legal return thereto to be made by the officers to whom the same is directed, unless such return is waived by the parties to such case, matter, or proceeding. *Cushwa v. Lamar*, 45 W. Va. 326, 33 S. E. Rep. 10.

Generally the return to the writ is conclusive and no extrinsic evidence will be received either to support or overthrow the proceeding which is sought to be reviewed. *Poe v. Machine Works*, 24 W. Va. 517.

Defective Return.—The fact that the return of the writ of *certiorari* is made by one of the justices of the county court and not by the president is no ground for the dismissal of the case by the circuit court, but that court should order a new writ to be served on the president and require him to make a return. *Bd. of Ed. v. Hopkins*, 19 W. Va. 84.

(8) **Petition for Writ.**—The petition for the writ should disclose a proper case upon its face, and when issued it may be dismissed without a hearing.

when improvidently awarded. *Long v. Ohio River R. Co.*, 35 W. Va. 333, 13 S. E. Rep. 1010.

Must Be Presented within Ten Days.—In applying to the circuit court for a writ of *certiorari* to the judgment of a justice, under ch. 110 of the Code of West Virginia, the general rule is that the petitioner must present his petition within ten days after the judgment complained of is rendered, according to the analogy of appeals in § 164, ch. 50 of the Code. *Long v. Ohio River R. Co.*, 35 W. Va. 333, 13 S. E. Rep. 1010; *State v. Larue*, 37 W. Va. 328, 17 S. E. Rep. 397; *Morgan v. Ohio River R. Co.*, 39 W. Va. 17, 19 S. E. Rep. 588; *Womer v. Ravenswood, etc.*, R. Co., 37 W. Va. 267, 16 S. E. Rep. 488; *Bee v. Seaman*, 36 W. Va. 381, 15 S. E. Rep. 173.

Where the petition for, and the writ of *certiorari* to, the judgment of a justice shows that it was not applied for within ten days after the judgment was entered, it should not be granted, unless good cause be shown why the writ was not applied for within ten days; and, if so issued after the time without such showing, it should be quashed as improvidently awarded. *Arnold v. Lewis County Court*, 38 W. Va. 142, 18 S. E. Rep. 476.

Waiver of Objection.—The defendant in a writ of *certiorari* to a justice's decision does not waive the objection that it was not taken within ten days, by appearing to the writ, without a motion to quash or dismiss, or even by consenting to a continuance. *Morgan v. Ohio River R. Co.*, 39 W. Va. 17, 19 S. E. Rep. 588.

(9) **Showing Good Cause.**—It was held in *Morgan v. Ohio River R. Co.*, 39 W. Va. 17, 19 S. E. Rep. 588, that the "good cause" must be shown by written evidence on a writ of *certiorari* from a justice as well as on an appeal.

As to what constitutes "good cause," see *supra*, "Appeal from Justice."

c. *Jurisdictional Amount.*
In Virginia.

Under Rev. Code 1819.—Where there was a judgment of a justice of the peace, affirmed by the county court, for debt, principal, interest, damages and costs not amounting to \$3 dollars 33 cents; it was held that the circuit court had no appellate jurisdiction to review such judgment, by *certiorari* or otherwise. *Hay v. Pistor*, 2 Leigh 707.

Under Code 1887.—Under § 2947 of the Code Va. 1887, there can be no appeal from the judgment of a justice, unless the matter in controversy, exclusive of interest and costs, is of greater amount or value than ten dollars. *Norfolk, etc., R. Co. v. Clark*, 92 Va. 118, 22 S. E. Rep. 867.

In West Virginia.—Where a justice in a suit involving a matter merely pecuniary not exceeding \$15, has jurisdiction of the subject-matter and of the person, and renders a *bona fide* judgment on the merits clearly wrong, but within the scope of his legitimate powers, the circuit court will not, upon a writ of *certiorari* issued in the exercise of its original supervisory jurisdiction conferred by the constitution, review and reverse such judgment, but will dismiss the writ, as improvidently awarded. *Wilson v. West Virginia, C. & P. Ry. Co.*, 38 W. Va. 212, 18 S. E. Rep. 577.

Costs.—Under Code 1887, § 2947, costs are not to be computed as a part of the matter in controversy in determining the right of appeal from a judgment of a justice of the peace. *Shafer v. Chesapeake, etc., R. Co.*, 2 Va. Dec. 252.

Trial by Jury.—On the trial of an appeal, in the circuit court, from the judgment of a justice, where

the amount in controversy exceeds \$20, if required by either party, a jury of twelve men will be selected and impanelled to try the case in like manner as other juries are selected and impanelled in said court. *Lovings v. Norfolk & W. Ry. Co.*, 47 W. Va. 582, 35 S. E. Rep. 902.

Section 169, ch. 50 of the Code of West Virginia, in so far only as it authorizes a jury of six men to try in the circuit court, appeals from judgments of justices, is unconstitutional and void. *Lovings v. Norfolk & W. Ry. Co.*, 47 W. Va. 582, 35 S. E. Rep. 902.

d. **Cases Tried by Jury.**—No fact tried in a civil action by a jury of six persons before a justice can be retried *de novo* by the circuit court, or otherwise than according to the rules of the common law. *Hall v. Wadsworth*, 30 W. Va. 55, 2 S. E. Rep. 20.

Where a case has been tried by a jury of six before a justice as provided by § 13, art. III of the Constitution of W. Va., no appeal can be taken to the circuit court, the same section declaring that "No fact tried by a jury shall be otherwise re-examined, in any case, than according to the rules of the common law"; hence, no provision having been made for allowing a writ of error in such cases, such a judgment cannot be reviewed in any way. *Barlow v. Daniels*, 35 W. Va. 512; *Barker v. Walton*, 31 W. Va. 468, 7 S. E. Rep. 482.

It makes no difference that the defendant makes no defense before the justice. *Hickman v. Railroad Co.*, 30 W. Va. 296, 4 S. E. Rep. 654; *Vandervort v. Fouse*, 30 W. Va. 326, 4 S. E. Rep. 660.

Hence a mandamus will not lie to compel him to grant an appeal. *Woodford v. Hull*, 31 W. Va. 470, 7 S. E. Rep. 450.

But in *Richmond v. Henderson*, 48 W. Va. 389, 37 S. E. Rep. 653, this was overruled, and it was held that an appeal lies from the judgment of a justice rendered upon the verdict of a jury of six, just as in cases tried by him without a jury, and the writ of *certiorari* does not lie in such case.

Where a party, against whom a judgment was rendered by a justice of the peace on the verdict of a jury, obtained a writ of *certiorari*, and removed the same into the circuit court to be reviewed, before the decision of the case of *Richmond v. Henderson*, 48 W. Va. 389, 37 S. E. Rep. 653, and said judgment was affirmed by the circuit court, and a writ of error awarded by the court of appeals, before said decision of *Richmond v. Henderson*, and the plaintiff in error has asked that said *certiorari* be treated as an appeal, the judgment of the circuit court will be reversed, and the case remanded, with directions to treat it as being in said circuit court on appeal, and proceed with it accordingly. *Harbert v. Monongahela River R. Co.*, 50 W. Va. 233, 40 S. E. Rep. 377.

e. **Harmless Error.**—If there has been a full and fair trial on the merits of the controversy in a civil action commenced before a justice, the judgment will not be reversed for mere technical errors, not prejudicial to the fairness of such trial. *Furbee v. Shay*, 46 W. Va. 786, 34 S. E. Rep. 746.

When there is no note in the record of the filing of a complaint or answer in an action originating before a justice, but there is copied into the record both a complaint by the plaintiff and an answer by the defendant, signed by them respectively, with which the evidence of the parties adduced on the trial is entirely consistent, and the record shows there was a full and fair trial, the appellate court will presume that the pleadings were so made up. *Griffin v. Haight*, 45 W. Va. 460, 31 S. E. Rep. 967.

Where a party after obtaining an appeal from a judgment of a justice, appeared in the circuit court and moved the court to quash the return on the process in the justice's court on the ground that it did not appear that the person who served the process was a special constable, and, on the motion being overruled, defended the suit and had a fair trial, it was held that the circuit court did not err. *Johnson v. McCoy*, 33 W. Va. 552, 9 S. E. Rep. 887.

Although the jury, upon an appeal to the circuit court from a justice of the peace, were sworn "to try the issue joined" and not "to try whether he unlawfully withheld the premises in controversy," where it appears that the case was tried on the merits without objection and no injustice was done to the plaintiff in error, the judgment will not be reversed for such technicality. *Chancey v. Smith*, 25 W. Va. 404.

2. APPEALS FROM COUNTY COURT.—Wherever the action of the county court is *judicial* in its nature, it is reviewable by the circuit court by *certiorari*. *Poteet v. County of Cabell*, 30 W. Va. 58, 3 S. E. Rep. 97.

But where the power conferred on the county courts is not judicial, but legislative, or executive, neither the circuit court nor the supreme court of appeals can review the final order of the county court in such cases. *Poteet v. County of Cabell*, 30 W. Va. 58, 3 S. E. Rep. 97.

The addition to §§ 10, 12, ch. 47, Code 1873, allowing appeals to the circuit courts where the decision complained of is upon an order made by the county court or the *judge thereof*, has no application to orders made by the county court when composed of justices of the peace under the old constitution. *Dinwiddie County v. Stuart*, 28 Gratt. 526.

Condemnation Proceedings.—The circuit court has jurisdiction toward a writ of supersedeas to the judgment of a county court in a proceeding under § 15 of the act incorporating the Chesapeake & Ohio Canal Company to condemn lands. *Ches., etc., Canal Co. v. Hoyer*, 2 Gratt. 511.

Order Granting Appeal from Justice.—The order of a county court granting an appeal from the judgment of a justice is reviewable both in the circuit court and in the court of appeals. *Ruffner v. Love*, 24 W. Va. 181.

Cases Removed from Justice's Court.—Where a warrant is brought before a justice upon a claim exceeding twenty dollars, and upon the application of the defendant before trial, it is removed to the county court, an appeal lies to the circuit court, from the judgment of the county court in the case. *Carter v. Kelly*, 28 Gratt. 787.

Contested Election Cases.—But the statute of 1873 being silent as to the cases in which a writ of error or supersedeas may be awarded to the judgment of a county court, the common-law rule is in force and the reviewal must be by *certiorari*, in such cases as by the common law would only be reviewed in that manner, *i. e.* cases of contested election cases under the provision of ch. 118, Acts 1872-3. *Dryden v. Swinburn*, 15 W. Va. 234; *Fowler v. Thompson*, 22 W. Va. 106; *Dryden v. Swinburne*, 20 W. Va. 89.

Settlement of Sheriff's Account.—Although the settlement of a sheriff's account before commissioners, when confirmed by the county court, under Acts W. Va. 1873-3, ch. 196, § 2, is only *prima facie* correct and hence is not final, yet it may be reviewed in the circuit court by *certiorari*, since by § 3, ch. 15 of the same acts, the circuit courts are expressly

given power to supervise all proceedings before the county court, and this proceeding is not excepted. *Bd. of Ed. v. Hopkins*, 19 W. Va. 84; *Cunningham v. Squires*, 2 W. Va. 422.

Relocation of County Seats.—The action of the county court in ascertaining and declaring the result of a vote on the question of the relocation of a county seat is reviewable by the circuit court by *certiorari*. *Poteet v. County of Cabell*, 30 W. Va. 58, 3 S. E. Rep. 97.

Refusal to Record Instrument of Emancipation.—A county court refuses to admit an instrument of emancipation of slaves to probate and record. *Held*, the circuit court cannot review this judgment, by way of appeal, writ of error or supersedeas. *Mann v. Givens*, 2 Leigh 762.

Criminal Cases.—A writ of error from a superior court lies to a judgment of a county court imposing a fine for contempt of said county court. *Stokeley v. Com.*, 1 Va. Cas. 330.

Where Appeal is Taken Alike.—If the superior court of chancery grants a *certiorari* to remove a cause, and the county court proceeds to a decree, upon an appeal from that decree, the superior court of chancery may hear the appeal and *certiorari* together, and make the proper decree upon the whole cause. *Anthony v. Oldacre*, 4 Call 499.

Jurisdictional Amount.—The Rev. Code, vol. 1, ch. 66, limited appeals from the county courts to the district courts to such personal actions as were of the value of ten pounds, leaving the right as at common law in real and mixed actions. *Wingfield v. Crenshaw*, 3 H. & M. 245.

In *Clapham v. Lewis*, 1 Va. Cas. 182, a writ of supersedeas was held to have been properly granted by a circuit court to the judgment of a county court, although the *principal* exclusive of the *interest* for which the judgment was rendered, was less than the prescribed amount giving jurisdiction.

The question arose under § 56 of the district court law. 1 Rev. Code, p. 82, which authorizes a supersedeas, where the value of the judgment is \$33.33.

4. APPEALS FROM DECISION OF MAYOR.—No writ of error will lie to a judgment by the mayor of a city, proceeding as an *ex officio* justice of the peace, in the summary mode authorized by statute in case of the violation of a city ordinance. Acts 1881, ch. 8, §§ 231-3, such proceedings not being according to the course of the common law. *Ridgway v. Hinton*, 25 W. Va. 554.

5. APPEALS FROM DECISION OF RECORDER.—Where municipal courts and other inferior courts which have no juries are established, the right of trial by jury must be retained by granting appeals to courts where trial by jury may be had. Nor can this right of appeal be clogged by unreasonable restrictions, which would operate as a substantial denial of the right of trial by jury, though it may be limited as to time, and reasonable security may be required for appearance or for the payment of the fine, if affirmed by the higher court. *Jelly v. Dils*, 27 W. Va. 267.

6. APPEALS FROM DECISION OF CITY COUNCIL.—*Certiorari* is the proper remedy to review the action of a city council under § 28, ch. 47, Code W. Va., in declaring the running of a "merry-go-round" a nuisance, the statute giving no appeal in such cases. *Davis v. Davis*, 40 W. Va. 464, 21 S. E. Rep. 906.

7. APPEAL FROM DECISION OF BOARD OF SUPERVISORS.—An appeal from a decision of the board of supervisors of a county, rejecting a claim arising under an order of a county court, made in 1862, is

properly taken to the county court of the county. *Dinwiddie County v. Stuart*, 28 Gratt. 523.

8. **APPEAL FROM DECISION OF COUNTY COMMISSIONERS.**—So where the county commissioners are convened as a returning board to ascertain the result of an election, no provision being made for a review of their proceedings by motion, appeal, writ of error or supersedeas, if its decisions cannot be reviewed by *certiorari* they cannot be reviewed at all. The appeal allowed from a final order of the county court in a contested election case, is another and different case. *Chenoweth v. Commissioners*, 26 W. Va. 230.

The rulings of the commissioners of a county sitting as a board of canvassers, after an election, to ascertain the result thereof in the county, are subject to review by the circuit court on writ of *certiorari*. *Alderson v. Commissioners*, 31 W. Va. 633, 8 S. E. Rep. 274.

Any candidate voted for at an election has the right, by himself or attorney, to be present at the counting of the votes, and request the commissioners to give him a bill of exceptions to their rulings against him; and he thus becomes a party to the proceedings, and has the right to have the rulings of such commissioners reviewed on *certiorari*. *Alderson v. Commissioners*, 31 W. Va. 633, 8 S. E. Rep. 274.

9. **APPEAL FROM CORPORATION COURT.**—Corporation and hustings courts are of co-ordinate dignity with circuit courts, by virtue of art. VI, § 14, Constitution of Virginia, and no right of appeal from the former to the latter can be conferred by the legislature. Section 5 of the act, approved March 6, 1890 (Acts 1889-90, p. 197) as amended by an act passed March 7, 1900 (Acts 1899-1900, p. 1202), attempting to confer such right of appeal is therefore unconstitutional, and the court of appeals will, by writ of prohibition, prevent the circuit courts from entertaining such appeals. *Watson v. Blackstone*, 98 Va. 618, 38 S. E. Rep. 939.

10. **APPEAL FROM AUDITOR.**—Appeals from the auditor are not confined to pleadings, as in ordinary cases; and therefore, for the sake of justice, new evidence is received, in the court of appeals, to show that the acts required by the opinion of the court, have been performed by the petitioners. *Com. v. Banks*, 4 Call 338.

An appeal lies, in all cases from the decision of the auditor, to the high court of chancery or to the Richmond district court according to the nature of the case; in matters of account, a technical appeal, in all other cases, a petition. *Com. v. Beaumarchais*, 3 Call 122; *Attorney General v. Turpin*, 3 H. & M. 548; *Com. v. Bank*, 2 Rob. 737.

11. REVIEW IN APPELLATE COURT.

a. *Generally.*—Where a record and judgment of a justice is removed and returned to the circuit court on writ of *certiorari* issued under chapter 110 of the Code (Ed. 1891), it is the duty of the clerk, upon receiving it, to file and docket the case in the same manner that other cases are docketed, and upon the hearing, the circuit court should review such judgment upon the merits, determine all questions arising on the law and the evidence, and render such judgment or make such order upon the whole matter as law and justice may require; and it is error in the court to have the case tried by a jury without having first reviewed such judgment. *Arnold v. Lewis County Court*, 38 W. Va. 142, 18 S. E. Rep. 476.

Now, by the West Virginia statute in every case before a justice, the record or proceeding may af-

ter a judgment or final order therein be removed by a writ of *certiorari* to the circuit court of the county in which such judgment was rendered, except where the amount in controversy, exclusive of interest and costs, does not exceed \$15. Upon the hearing, such circuit court shall, in addition to determining such questions as might have been determined upon a *certiorari*, as the law heretofore was, review such judgment of the justice upon the merits, determining all questions arising on the law and evidence, and render such judgment or make such order upon the whole matter as law and justice may require; and to enable it to do this the methods of procedure in the circuit court are made to apply to the proceedings before the justice; that is, the justice shall, upon request of either party, in a civil case, matter, or proceeding, certify the evidence, if any, which may have been heard, and sign bills of exception, setting forth any rulings or orders which may not otherwise appear of record. Such certificate of evidence and bills of exceptions shall be a part of the record, and as such be removed and returned to the circuit court. Then the circuit court will confirm the judgment of the justice, if, upon the whole matter, law and justice may require it, but, if not, reverse it, and set it and the verdict of the jury aside, grant a new trial, or make such other order as the case may require. But if the judgment of the justice and verdict of the jury are set aside, the case shall be retained in the circuit court, and disposed of as if originally brought therein. Here the writ comes back to its original use and purpose as it was in like cases at common law: having first answered the additional purpose of appeal in jury cases, under chapter 50. *Bee v. Seaman*, 36 W. Va. 381, 15 S. E. Rep. 173.

b. *Errors Correctible.*—The general rule was, that, upon *certiorari* to an inferior court, the court from which the writ issues will only inquire into errors and defects which go to the jurisdiction of the court below, and for all other errors and irregularities the party must resort to his remedy by appeal or writ of error. But in West Virginia, if the inferior tribunal proceeds in a summary manner and not according to the course of the common law, and there is no remedy by appeal or writ of error, then the courts will consider other than jurisdictional questions. *Poe v. Machine Works*, 24 W. Va. 517; *Chenoweth v. Commissioners*, 26 W. Va. 230.

Prior to the enactment of § 2, ch. 110, Code 1887, although the appellate court could review all questions of jurisdiction and regularity of proceeding and decide all questions of law and fact and render such judgment, in case of reversal, as the lower court ought to have rendered, it was doubtful whether it could consider evidence and reverse findings of fact by jury or court, but now the statute provides for embodying in the record the evidence and all questions passed upon in the lower court and requires the appellate court to pass on all questions arising on law and evidence and render such judgment as the lower court should have done without remanding. *Morgan v. Ohio River R. Co.*, 39 W. Va. 17, 19 S. E. Rep. 598.

The appellate court in cases brought before them by *certiorari* may review and correct the errors of the inferior court, not only when these errors are errors on questions of jurisdiction, power and authority of the inferior tribunal, or on questions of the regularity of the proceedings, but also when there were any errors of law in their proceedings or any action taken by them on erroneous princ-

ples or in the absence of all evidence to justify it. *Dryden v. Swinburne*, 20 W. Va. 89.

In *Dryden v. Swinburne*, 15 W. Va. 234, GREEN, P., said: "Reason and authority both sustain the position that when a case is brought before a superior court by *certiorari* from the judgment of an inferior court of record, the judgment of the superior court should not be confined simply to an affirmance or reversal of the decision of the inferior court of record but in such case the superior court ought in cases of a reversal of an inferior court, either to remand the cause to be further proceeded with or enter such judgment as the court below ought to have done in a case brought before it by a writ of error. And § 26, ch. 17, Acts 1872-3 W. Va., does not apply, since that chapter applies only to writs of error and not to writs of *certiorari*." *Fowler v. Thompson*, 23 W. Va. 106.

c. Informal Plea.—In an action commenced before a justice, and taken by appeal to the circuit court if the defendant files an informal plea which sets up a valid defense to the action, the circuit court should not deny him the benefit of his defense when the plea is such that a person of common understanding may know what is intended by it. *Jones v. Browne*, 32 W. Va. 444, 9 S. E. Rep. 873.

d. Amendment of Pleading.—If a party during trial of an appeal from a justice is entitled to amend his pleadings, that right cannot be made to depend solely on whether the adverse party is then ready to proceed with the trial. If such amendment would be a surprise to the other party, a continuance will obviate that objection. *Powell v. Love*, 26 W. Va. 96, 14 S. E. Rep. 406.

If an appeal is taken, new or amended pleadings in writing may, if substantial justice requires it, be filed in the circuit court, or the case may be tried on the pleadings before the justice or, when oral, on the brief note of their contents on the justice's docket. But whether written pleadings be filed before the justice or in the circuit court, they need not be of any particular form but must be such as to enable a person of common understanding to know what was intended. *Poole v. Dilworth*, 26 W. Va. 563.

e. New Evidence in Superior Court.—Although, in controversies concerning mills, wills, roads, the probate of wills, and granting of administrations, the superior court of law, to which an appeal is taken from the county or corporation court, may hear new evidence upon questions submitted to its review by the record, it ought not to receive any evidence, but that of the record itself, to prove what questions were in fact tried in the court below. *Bohn v. Sheppard*, 4 Munf. 408.

f. Where Judgment Is Reversed.

In Virginia.—Where a superior court reverses the judgment of a lower court it cannot retain the cause for further proceedings without the consent of parties, but must send the cause back to the lower court. *Janey v. Blake*, 8 Leigh 88.

In bastardy proceedings, the county court having decided in favor of a putative father, and the overseers of the poor having spread the facts upon the record by an exception, and taken an appeal to the circuit court, that court, upon reversing the judgment of the county court, should not send the cause back for a new trial, but should render a judgment in favor of the overseers of the poor for the amount appearing to be due, but without interest. *Willard v. Overseers of the Poor of Wood County*, 9 Gratt. 120.

If the county court disregard the instruction of the district court, the latter court ought, upon the second appeal, to retain the cause for trial before themselves, and not send it back to the county court. *Fine v. Cockshut*, 6 Call 16.

In *Smith v. Hutchinson*, 78 Va. 683, where the circuit court remanded a case to the county court instead of retaining it, in violation of § 25, ch. 178, Code 1873 providing that "When any judgment, decree or order of a county court is reversed or affirmed, the cause shall not be remanded to said court for further proceedings, but shall be retained in the circuit court, and there proceeded in, unless by consent of the parties, or for good cause shown, the appellate court direct otherwise," the court said: "We do not decide that the circuit court should, where a cause is remanded for trial in the county court, spread in its order at large the character of the cause shown for so doing, for to do so would in many cases be inconvenient, and would unnecessarily cumber the record. It is necessary and proper, however, that the judgment in all such cases show either that it was done for good cause shown, or else by agreement of the parties." Such judgment will be reversed on appeal to the court of appeals. *Pettit v. Cowherd*, 83 Va. 20, 1 S. E. Rep. 392; *Thompson v. Carpenter*, 88 Va. 702, 14 S. E. Rep. 181.

Where the circuit court has reversed the order of the county court and remanded the case for further proceedings and adjourned, the circuit court has no jurisdiction afterwards to set aside the former order and dispose of the case on its merits on the ground that it should have retained the cause, §§ 3451-2 being applicable only to judgments by default or decree upon bill taken for confessed and cases of mistake, misrecital or miscalculation, not to the error committed in this case, of remanding the cause, when it should have retained and disposed of it. *Thompson v. Carpenter*, 88 Va. 702, 14 S. E. Rep. 181.

In West Virginia.—Where a cause is brought before a superior court by a writ of error the superior court is not confined to a simple affirmance or reversal of the decision of the inferior court of record, but in a case of a reversal of the judgment of an inferior court, it ought either to remand the cause to be further proceeded with or enter such judgment as the court below ought to have entered, except that by § 22, ch. 17, Acts 1872-3, where any judgment of the county court is reversed or affirmed, the cause shall not be remanded to that court, but shall be retained in the circuit court and be proceeded with there, but this has no application to a case reversed on a writ of *certiorari*. *Dryden v. Swinburne*, 15 W. Va. 234.

The circuit court, having obtained jurisdiction by writ of error, the statute authorizes it to retain the case, and there proceed in it, unless, by consent of the parties, or for good cause shown, the appellate court directs otherwise. *State v. Kyle*, 8 W. Va. 711.

The circuit court may in a proper case, if justice require it, set the verdict of a jury aside, and award a new trial, and when the judgment of the justice is set aside the case is not sent back, but must be retained in the circuit court, and disposed of as if originally brought therein. *Bee v. Seaman*, 36 W. Va. 381, 15 S. E. Rep. 173.

Before the Acts of 1882, ch. 158, upon reversal under a writ of *certiorari*, the court could simply reverse and remand the case to the lower court to enter a proper judgment or itself render proper judgment, but by that act the appellate court is re-

quired to render judgment without remanding, and, by the act of 1889, if the *certiorari* is from a justice's judgment and the amount in controversy exceed \$15, if the judgment of the justice is set aside, the cause must be tried *de novo* in the appellate court. Prior to that statute there could be no new trial in the appellate court, but where further proceedings were necessary beyond what a judgment rendered on the record could effect, the cause had to be remanded. But none of these changes render the judgment of reversal any less final. *Morgan v. Ohio River R. Co.*, 39 W. Va. 17, 19 S. E. Rep. 588.

In *Meeks v. Windon*, 10 W. Va. 180, the court of appeals, while declining to decide whether § 12, art. VIII of the Constitution of West Virginia giving the circuit courts supervision of all proceedings before the county courts, by *certiorari*, etc., gave the circuit courts power to correct errors appearing on the face of the record, in spite of § 29 of same article making the judgment of the county court final on all appeals from justices except in certain excepted cases, and only made such judgment final on the merits, held that at any rate it had no jurisdiction where no such error is made to appear by the applicant for the writ of *certiorari*, and a writ of prohibition will be granted to the circuit judge prohibiting him from proceeding with the writ of *certiorari*.

12. REVIEW OF ACTION OR CIRCUIT COURT.—Writ of error is the proper method of bringing the action of the circuit court in refusing a writ of *certiorari* to a judgment of a justice, before the supreme court of appeals for review. *Fouse v. Vandervort*, 30 W. Va. 327, 4 S. E. Rep. 298.

A writ of error lies from the supreme court of appeals to the order of a judge of a circuit court improperly refusing an appeal from the judgment of a justice of the peace. *Clark v. West Virginia Cent. & P. Ry. Co.*, 50 W. Va. 1, 40 S. E. Rep. 351.

The court of appeals has appellate jurisdiction in all cases of *certiorari* awarded by the circuit court in review of matters and proceedings pending before or determined by a municipal council. *Cushwa v. Lamar*, 45 W. Va. 326, 32 S. E. Rep. 10.

A writ of error lies to the order of the circuit court reversing the judgment of a justice, and setting aside the verdict of a jury on which such judgment is founded, and directing a trial *de novo*. Such writ will not be sustained by the court of appeals unless the circuit court has plainly erred, but the judgment will be affirmed. *Cleavenger v. Rohrbach*, 46 W. Va. 148, 32 S. E. Rep. 1016.

Error Must Appear by the Record.—On appeal from a justice, when a motion is made by the appellee to dismiss the appeal because improvidently awarded, and the motion is overruled, the appellate court cannot review such ruling, unless it was objected to and exception taken when the ruling was made, or the point saved, and a bill of exceptions duly taken, showing the ruling complained of, or unless the error appears upon the record. *Hines v. Board of Education of Springfield Dist.*, 49 W. Va. 426, 38 S. E. Rep. 560.

B. IN CRIMINAL CASES.

1. GENERALLY.—It is only by the common-law writ of error, and not by appeal or supersedeas, that the judgment of an inferior court upon a presentment for a misdemeanor can be reviewed and reversed by a superior court; and the writ of error may issue without regard to costs or the value of the judgment, and without the assent of the commonwealth's attorney. *Temple v. Com.*, 1 Va. Cas. 163.

2. APPEALS FROM JUSTICE.—It is error in a county

court to reverse the judgment of a justice and remand the case to the justice to be tried by him; and any subsequent trial of the case by the justice is null and void. *Read v. Com.*, 24 Gratt. 618.

Where, in such case, the justice again tries and convicts the accused, and he again appeals to the county court, the proceedings before the justice on the second trial being null, the accused is in the county court upon the first appeal, and is to be tried by a jury as if the case had originated in that court. *Read v. Com.*, 24 Gratt. 618.

The accused having been tried by a jury in the county court, and found guilty and sentenced, the errors in the proceedings of the justice on his second trial cannot affect the judgment of the county court. *Read v. Com.*, 24 Gratt. 618.

When to Be Taken.—Appeals from the decisions of justices of the peace in misdemeanor cases must be taken at the time of the rendition of the judgment appealed from. They cannot be taken afterwards. *Combs v. Com.*, 95 Va. 88, 27 S. E. Rep. 817.

Endorsement of "Appeal" on Warrant.—Where a person convicted of petit larceny before a justice moved the county court to review the judgment, and an endorsement on warrant showed that the witnesses had been recognized to appear before the county court, and after trial and conviction in the county court, the defendant objects that there is no indorsement of "appeal" on the warrant by the justice. *Held*, the objection comes too late. *Harrison's Case*, 81 Va. 491.

3. APPEAL FROM DECISION OF MAYOR.—The provision allowing appeals from the judgment of the mayor of Moundsville, § 9, ch. 60, Acts W. Va. 1886, where the fine exceeds five dollars, or imprisonment is imposed, gives an appeal of right and supplies the requirement of a jury trial in such cases. *Moundsville v. Fountain*, 27 W. Va. 182, 205.

XVIII. APPEALS OF RIGHT.

A. CONTROVERSIES CONCERNING ROADS.

The law authorizing appeals as of right from orders of the county courts in controversies concerning roads, is applicable only to a controversy concerning the establishment of a road, and not to a collateral controversy concerning the damages occasioned by a road already established; and in such collateral controversy, the order of the county court can be revised by the circuit court only by means of a writ of supersedeas. *Hancock v. R. & P. R. Co.*, 3 Gratt. 328.

An order overruling a motion to quash the report of a commission of freeholders appointed on the application of a turnpike company to assess the damages caused by the opening of a road, is not an order in a "controversy concerning a road" within the meaning of the Act April 16, 1831, Sess. Acts, p. 50, giving appeals as of right to the circuit courts from the orders of county courts in controversies concerning mills, roads and the like, so that an appeal will lie from it as of right. *Hill v. Salem Turnpike Co.*, 1 Rob. 268.

In *Jeter v. Board*, 27 Gratt. 910, the court said that an appeal lay as of right from an interlocutory order of a county court in a controversy concerning the establishment of a road, but also held that in that case the judgment was final.

But in *Richmond, etc., R. Co. v. Johnson*, 90 Va. 282, 38 S. E. Rep. 195, it was held, expressly overruling the above case, that § 3453 of the Code, which gives an appeal of right to any person who thinks himself aggrieved by an order in a controversy concerning a roadway refers to a final order only, and

that an order appointing commissioners to ascertain a just compensation is not a final order and no appeal lies therefrom.

B. CONTROVERSIES CONCERNING WHARVES.

—Where an application for leave to establish a wharf is dismissed, the applicant may appeal under §1, ch. 178, Code 1873, as of right, to the circuit court during the term at which said order was made, on giving bond as required by law and may have the case heard *de novo* in that court or he may bring his case up under §2 of the same chapter, upon a writ of error for errors assigned, but in the latter case he is confined to the record to show error and if none appears the judgment of the lower court will be presumed to have been right. The rule in the court of appeals will be the same, so that if the circuit court erroneously reversed the judgment of the county court, its judgment must be in turn reversed and that of the county court affirmed. *Neale v. Farinholt*, 79 Va. 54.

And though it was entered in the judgment of the county court, by consent of parties that instead of the evidence before the county court being reduced to writing that either party might produce oral or documentary evidence before the circuit court, while this may allow them to introduce such evidence, it will not alter the rule that error must appear in the record, though such agreement result in a waiver of errors. *Neale v. Farinholt*, 79 Va. 54.

In such a case on appeal by the defendant, it is his right and duty to begin; the judgment of the county court being *prima facie* right. *Mitchell v. Thorne*, 21 Gratt. 164.

C. CONTROVERSIES CONCERNING MILLS.—An appeal was allowed in all cases concerning mills from the decision of the county court. 1 Rev. Code, ch. 66, §53; *Wingfield v. Crenshaw*, 3 H. & M. 245.

If a supersedeas be granted to an order of an inferior court, giving leave to build a mill, the superior court is not confined to errors apparent on the face of the record. *Lee v. Turberville*, 12 Wash. 162.

D. APPOINTMENT OR QUALIFICATION OF PERSONAL REPRESENTATIVES.—To the judgment of a county court refusing to permit a person named as executor in a will, to qualify as such without giving security, an appeal, demandable as of right, lies to the circuit court. *Fairfax v. Fairfax*, 7 Gratt. 36.

The act, Supp. Rev. Code, ch. 109, § 30, p. 145, authorizes appeals as of right from the county to the superior courts, in the case of a sentence or order made under § 41 of the act concerning wills, intestacy and distributions, 1 Rev. Code, ch. 104, p. 385, revoking, whether absolutely or conditionally, for any of the causes in that section mentioned, the powers of the executor or administrator, with a view to the appointment in his stead of an administrator *de bonis non*, or the committing the estate to the sheriff. *Atkinson v. Christian*, 3 Gratt. 428.

E. JUDGMENT ON FORTHCOMING BOND.—Where a county court overrules a motion for award of execution on a forthcoming bond, and the circuit court reverses this judgment and awards execution, an appeal lies from such judgment of the circuit court, as of right; aliter, where circuit court affirms judgment of county court awarding execution, or itself give original judgment awarding execution, on such bond. *Anderson v. Leitch*, 1 Leigh 462.

F. REMEDY FOR REFUSAL.—If the district court refuse to grant a supersedeas to a judgment of the county court concerning a road, and enter the refusal on record, the court of appeals will not grant a mandamus, but will award a supersedeas to the order of the district court. *Mayo v. Clarke*, 2 Call 389.

XIX. APPEALS TO SUPREME COURT OF UNITED STATES.

In *Hunter v. Martin*, 4 Munf. 1, it was held that the court of appeals of Virginia will consider whether a mandate issued by the supreme court of the United States directing the former court to enter a judgment reversing one which it had before pronounced, be authorized by the constitution or not, and being of opinion that such mandate was not so authorized, will disobey it, and it was also held that so much of § 26 of the act of Congress passed September 24, 1789, entitled "an act to establish the judicial courts of the United States" as extended the appellate jurisdiction of the supreme court of the United States, to judgment pronounced by the supreme court of a state, is not warranted by the constitution.

Where a decision of a circuit court, affirmed by the supreme court of appeals of West Virginia, is reversed by the supreme court of the United States, the supreme court of appeals will reverse its decision as well as that of the circuit court, in compliance with the mandate of the supreme court of the United States and will remand the cause to the circuit court to be proceeded with in accordance with said mandate. *Peerce v. Carskadon*, 6 W. Va. 283.

Creel v. Brown.

August, 1842, Lewisburg.

(Absent BROOKE, J.)

Pleading—Demurrer—Misjoinder of Counts.—Where one of the counts in a declaration is in case for a tort, and another in assumpsit, a general demurrer to the declaration for such misjoinder ought to be sustained.

Appellate Practice—Defective Declaration—Demurrer—Reversal.—There being a demurrer to a declaration, and an issue in fact, a verdict is found for the plaintiff, and it does not appear that any judgment was given on the demurrer, otherwise than by implication from the fact that final judgment was given for the plaintiff after the verdict. The

***Demurrer—Misjoinder of Causes.**—See monographic note on "Demurrers" appended to *Com. v. Jackson*, 2 Va. Cas. 501.

†**Appellate Practice—Demurrer to Declaration—Judgment Reversed.**—See foot-notes to *Strange v. Floyd*, 9 Gratt. 474; *Hamtramck v. Selden*, 12 Gratt. 28.

In *Hamtramck v. Selden*, 12 Gratt. 32, it is said: "I think the court erred in sustaining the general demurrer to the pleas filed, and that the judgment should be reversed. And under the authority of *Creel v. Brown*, 1 Rob. 265, *Strange v. Floyd*, 9 Gratt. 474, and other cases in this court, the cause should be remanded with instructions to overrule the demurrer, and render judgment for the defendants below on their pleas, unless the plaintiffs below should ask leave to withdraw their demurrer and reply; which, if asked for, should be granted."

The principal case is cited in this connection in *Strange v. Floyd*, 9 Gratt. 476; *Reid v. Field*, 88 Va.

court of appeals is of opinion that the demurrer ought to have been sustained. **Held**, the judgment must be reversed, the verdict set aside, and the cause remanded to the circuit court, that it may proceed to judgment on the demurrer, unless the plaintiff shall, on leave obtained in that court, amend his declaration; and if the declaration be amended, for such further proceedings as may in that case be proper.

In an action in the circuit court of Wood county, by William Brown against Bushrod W. Creel, the declaration contained two counts, of which one was in case for a tort, and the other in assumpsit. The defendant demurred generally to the declaration, in which demurrer the plaintiff
266 joined; and issues in fact were *also joined, upon the plea of not guilty to one count, and non assumpsit to the other. On the issues in fact, a verdict was found for the plaintiff; and then a motion for a new trial being made and overruled, it was considered by the court that the plaintiff recover against the defendant the damages assessed by the jury, and the costs.

On the petition of the defendant, a super-seedeas was awarded.

Fisher, for plaintiff in error.

William A. Harrison, for defendant in error.

STANARD, J., delivered the following as the opinion of the court:

It appears to the court that the issue in fact was tried before any judgment on the demurrer to the declaration, and it does not appear that any judgment was given by the court on the demurrer, otherwise than by implication from the fact that final judgment was given after the verdict. Though, according to the decision of this court in the cases of *Green v. Dulany*, 2 Munf. 518, and *Jones v. Stevenson*, 5 Munf. 7, it was irregular to try the issue of fact before judgment on the demurrer, yet if it appeared that the demurrer ought to have been overruled, and so no inconvenience had ensued from that irregularity, it would not be sufficient cause to reverse the judgment. But as it appears to this court, that by reason of the misjoinder of action, (one of the counts in the declaration being in case as for a tort, and the other in assumpsit) the demurrer ought to have been sustained; and as the plaintiff might (had the right judgment on the demurrer in the court below preceded the trial of the issue) have cured the defect in the declaration by amendment, and from that benefit the irregularity of first trying the issue in fact would have precluded him, the objec-

tion founded on this irregularity
267 *becomes substantial, and ought to prevail, so far as to entitle him to have the cause placed in the court below in the position it would have occupied had the irregularity not occurred. The court is therefore of opinion that the judgment be reversed with costs, the verdict set aside, and a new trial of the issue in fact awarded; and that the cause be remanded to the circuit superior court, that it may proceed to judgment on the demurrer, unless the plaintiff should, on leave obtained in that court, amend his declaration; and if the declaration be amended, for such further proceedings as may be proper on the present pleadings, and such other pleadings as may be offered by either party and admitted by the court.

Chapman &c. v. Wilson & Co.

August, 1842, Lewisburg.

(Absent BROOKE, J.)

Partnership—Issue as to Existence of—Evidence—Competency.—In assumpsit against S. B. & C. as partners under the firm of S. & Co. for goods sold, the question being whether B. and C. were partners of S. by whom the goods were purchased, and B. and C. appearing to have had a storehouse in another town, a witness was asked whether he saw boxes of goods marked S. & Co. at the storehouse of B. and C. The defendants objected to the question, but the circuit court permitted it to be answered, and the defendants excepted. **Held**, the evidence had a connexion, though very slight, with the matter in controversy, and though it might have been of very little weight, it was not error to permit it to go to the jury as a link in the chain of circumstances.

Same—Same—Same—Same.—A second bill of exceptions stated that the defendants asked a witness whether he was present at a settlement made between S. B. and C. of their accounts relative to their mercantile transactions, after goods had been furnished the first by the two last? whether he knew for what certain bonds then executed by S. to *B. and C. were given? and whether 20 per cent. on the amount stated to be due was not included in said bonds? The plaintiffs objected to the question, on the ground that the acts and declarations of the defendants could not be given in evidence for them, and the court sustained the objection. **Held**, the evidence was properly rejected; the bill of exceptions not shewing the time of the transaction between the defendants, nor suggesting any connexion between the fact which the evidence was offered to prove, and the matter in controversy, nor stating anything from which such connexion could be inferred.

Same—Same—Same—Same.—A third bill of exceptions stated, that the plaintiffs asked a witness if he had heard S. say what representations he had made to the plaintiffs at the time he purchased the goods from them, as to the existence of a partnership between himself and the other defendants. **Held**, the evidence was properly admissible to prove that the plaintiffs intended to sell to, and S. intended to purchase for, a partnership, but was no proof against B. and C. that

34, 1 S. E. Rep. 395. See also. *Cromer v. Cromer*, 29 Gratt. 286; 1 Va. Law. Reg. 900.

Demurrer to Special Plea—Failure to Pass upon.—Failure of the court to pass upon demurrer to one special plea, and motion to exclude another special plea, affords no ground for reversing the judgment, if these pleas presented no bar to the action. *Peshine v. Shepperson*, 17 Gratt. 480, 94 Am. Dec. 468, citing the principal case.

they were the partners. That evidence, however, was not regularly admissible, even for this limited purpose, until the plaintiffs had offered evidence tending to shew that there was a partnership between S. B. and C. which authorized S. to purchase on the credit of the three.

Same—Same—Instructions*—What Does Not Constitute Partnership.—A fourth bill of exceptions stated, that the court was asked by the defendants to give the jury the following instructions: 1. If the jury shall believe from the evidence, that in June 1832, S. bought of B. and C. \$1000 worth of goods, to commence merchandizing with on Brush creek, and that S. was to pay B. and C. for said goods 20 per cent. upon the cost thereof, or a portion of the profits of the same, to be left to the election of B. and C. and that in September succeeding the purchase, and before all the \$1000 worth of goods had been received by S., B. and C. did elect to take the 20 per cent., and that when the goods were sold and delivered, they were charged by B. and C. to S., and the business upon Brush creek conducted, not only to the time of the election, but afterwards, in the name of S., then the said contract is not in law a partnership. 2. If the jury shall believe from the evidence, that the election by B. and C. under the contract with S. of June 1832, was made in September thereafter, and was to take the 20 per cent., and that the same was previous to the purchase of goods by S. of the plaintiffs, and that the plaintiffs at the time of giving the credit to S. did not know of the said contract made in June 1832, then they ought to find for the defendants. **HOLD**, the instructions so asked correctly expound the law of the case stated therein, and the circuit court erred in refusing to give them.

269 ***Same—Same—Same—Limited Partnership—**

Notice of Dissolution.—The fourth bill of exceptions further shewed that the circuit court, instead of the instructions so asked, gave the following: "If the jury shall believe from the evidence, that B. and C. entered into a contract with S. by which they agreed to furnish him with 1000 dollars worth of goods for the purpose of merchandizing on Brush creek, for which, by said contract, they were entitled to demand from S. either an advance of 20 per cent. or to take a portion of the profits arising from the sale thereof, and that the said goods or a portion thereof were furnished to S. who traded thereon previous to the said election being made, it constituted B. and C. partners of S. until such period as they have made their said election and given notice thereof to the world, and responsible for his contracts in relation to said business." **HOLD**, the instruction so given was wrong in this, that though the case stated might have created a temporary partnership until election, it was limited to the sale of the goods furnished and to the profits thereof, and did not extend to purchases and sales of other

***Instructions Erroneous—Judgment Reversed.**—The principal case is cited in *Strader v. Goff*, 6 W. Va. 264, to the point that when an instruction given and excepted to, is apparently erroneous, the judgment must be reversed, though it be not shown whether it prejudiced the party who excepted or not. See *foot-note* to *Colvin v. Menefee*, 11 Gratt. 37, and *monographic note* on "Instructions" appended to *Womack v. Circle*, 29 Gratt. 192.

goods, and the dissolution of such partnership was effectual in respect to all who may have had actual notice, though such notice may not have been given to the world, or even publicly.

Appellate Court—Refusal to Give Instruction—Review.

—Where a court refuses to give an instruction asked, and its opinion is excepted to, if the bill of exceptions does not state that evidence was offered tending to prove the case supposed by the instruction, and the court has simply declined to give the instruction, such refusal may perhaps be justified, on the ground that the case was merely hypothetical, and the instruction asked on an abstract question. But if the court not only declines to give the instruction asked, but proceeds to give another in lieu thereof, the inference is a reasonable one, that there was evidence tending to prove the case supposed, and the appellate court will not only enquire whether the law is correctly expounded in the instruction given, but will also enquire whether it is correctly stated in the instruction asked.

John S. Wilson and Bernard Peyton, merchants and partners trading under the firm and style of John S. Wilson & Co. brought an action of assumpsit in the circuit court of Giles against French C. Smith, Augustus A. Chapman and Andrew Beirne, as merchants and partners trading under the firm and style of French C. Smith & Co. for goods, wares and merchandize alleged to have been sold by the plaintiffs

270 to the defendants. The *defendants Chapman and Smith severally pleaded non assumpsit, upon which pleas issues were joined. At the trial, five bills of exceptions were filed to opinions given by the court.

The first bill of exceptions stated, that the plaintiffs, to support the issue on their part, introduced first as a witness Samuel Peck, and after several other questions to the witness, he was asked whether he saw boxes of goods marked French C. Smith & Co. at the storehouse of Beirne & Chapman (the partners in which firm were the defendants Andrew P. Beirne and Augustus A. Chapman) in Parisburg. To the answering of this question the defendants objected; but the court, being of opinion that it was a circumstance which, taken in connexion with others, was proper for the consideration of the jury in deciding the question of partnership, overruled the objection, and permitted the question to be asked.

The second bill of exceptions stated, that the defendants introduced James M'Clagherty as a witness, and asked him whether he was present at a settlement made between French C. Smith, Andrew P. Beirne and Augustus A. Chapman of their accounts relative to their mercantile transactions, after goods had been furnished the first by the two last? whether he knew for what certain bonds then executed by Smith to Beirne & Chapman were given? and whether 20 per cent. on the amount stated to be due was not included in said bonds? The plaintiffs objected to the question, on the ground that the acts and declarations

of the defendants could not be given in evidence for them; and the court sustained the objection.

The third bill of exceptions stated, that the plaintiffs introduced a witness, and asked him if he had heard French C. Smith say, what representations he had made to the plaintiffs, at the time he purchased the goods from them, as to the existence of a partnership between himself and the

other defendants? and the defendants
271 *objected to this question being answered, on the ground that the declarations of Smith after the purchase was made were not evidence of what took place at the time of the purchase, and on the further ground that his declarations were no evidence against his codefendants; but the court permitted the question to be asked, instructing the jury that said declarations of Smith were no evidence against his codefendants, unless they should be of opinion that a partnership was proved independently thereof, nor were they evidence for the purpose of establishing such partnership; and the defendants excepted, both to the admission of the evidence and to the opinion of the court accompanying it.

The fourth bill of exceptions stated, that the court was asked by the defendants' counsel to give to the jury the following instructions:

1. If the jury shall believe, from the evidence in the cause, that in the month of June 1832, French C. Smith, one of the defendants, bought of Andrew P. Beirne and Augustus A. Chapman 1000 dollars worth of goods, to commence merchandizing with on Brush creek, and that the said Smith was to pay said Beirne & Chapman for the said goods the sum of 20 per cent. upon the prime cost of the goods, or a portion of the profits of the same, to be left to the election of the said Beirne & Chapman, and that in the month of September succeeding the purchase of the same by Smith, and before all the 1000 dollars worth of goods had been received by the said Smith, the said Beirne & Chapman did elect to take the 20 per cent. and that when the goods were sold and delivered they were charged by said Beirne & Chapman to said French C. Smith, and the business upon Brush creek conducted, not only to the time of the election but afterwards, in the name of French C. Smith, then the said contract is not in law a partnership.

2dly. If the jury shall believe, from the evidence, that the election by Beirne
272 & Chapman, under the contract *with Smith of June 1832, was made in September thereafter, and was to take the 20 per cent. and that the same was previous to the purchase of goods by Smith of the plaintiffs, and that the plaintiffs, at the time of giving the credit to Smith, did not know of the said contract made as aforesaid in June 1832, then they ought to find for the defendants.

The court refused to give the instructions so asked, and instead thereof gave the following:

If the jury shall believe, from the evidence, that the defendants Augustus A. Chapman and Andrew P. Beirne entered into a contract with the defendant French C. Smith, by which they agreed to furnish him with 1000 dollars worth of goods for the purpose of merchandizing on Brush creek, for which, by said contract, they were entitled to demand from the said French C. Smith either an advance of 20 per cent. or to take a portion of the profits arising from the sale thereof, and that the said goods or a portion thereof were furnished to the said French C. Smith, who traded thereon previous to the said election being made, it constituted the said Augustus A. Chapman and Andrew P. Beirne partners of the said French C. Smith until such period as they may have made their said election and given notice thereof to the world, and responsible for his contracts in relation to said business.

The fifth bill of exceptions stated, that the defendants moved the court to instruct the jury,

1. That if they shall believe, from the evidence, that in June 1832 the defendant French C. Smith purchased by private contract of Andrew P. Beirne and Augustus A. Chapman 1000 dollars worth of goods to commence a mercantile business on Brush creek, and that the said Smith was to pay to the said Beirne & Chapman 20 per cent. upon the prime cost of the goods so sold, or a portion of the profits, at the election of the said Beirne & Chapman, and that in the month of September thereafter,

273 *before all the said goods were delivered to said Smith, the said Beirne & Chapman did elect to take the 20 per cent. and that the goods when sold were charged by the said Beirne & Chapman to the said French C. Smith, and the business on Brush creek, both before and after the said election, was conducted in the name of French C. Smith, then the said contract was not in law a partnership.

2dly. That if the jury shall believe that French C. Smith, in the month of June 1832, purchased of Andrew P. Beirne and Augustus A. Chapman 1000 dollars worth of goods to merchandize on Brush creek, for which the said Smith was to pay to the said Beirne & Chapman 20 per cent. on the prime cost of said goods or a part of the profits, and that said contract was a private and not a public contract, and that the said Beirne & Chapman, in the month of September 1832, and previous to the delivery of all the goods, did elect to take the 20 per cent. and that in the months of February and June thereafter French C. Smith purchased the goods of the plaintiffs, they the said plaintiffs not knowing of the existence of the contract of June 1832, then they ought to find for the defendants. If the jury shall believe, from the evidence in the cause, that the contract of June 1832, referred to in the foregoing instructions, was a private one, and that the election was made in September thereafter, no notice of such election was necessary.

The court gave these instructions, but further instructed the jury that if they should be of opinion that the said Augustus A. Chapman and Andrew P. Beirne, after the delivery of a portion of the said goods, and before they had made their election, represented themselves as partners, and acted as such, then they are in law partners of the said French C. Smith (even though the contract aforesaid may have been private), and responsible for his contracts, until such time as they shall
274 *have given public notice of their having made such election and ceased to be partners.

The jury found a verdict for the plaintiffs for 1183 dollars 58 cents damages, with interest from the 25th of April 1834 till paid; and judgment was rendered for the same, with costs.

On the petition of the defendants Chapman and Beirne, a supersedeas was awarded.

M'Comas, for plaintiffs in error. We cannot well conceive any circumstance with which the evidence mentioned in the first bill of exceptions could be connected, that would make that evidence of partnership.

II. The testimony mentioned in the second bill of exceptions was a link in the chain of evidence, and ought to have been admitted.

III. It is difficult to conceive for what purpose the evidence mentioned in the third bill of exceptions could have been received, unless to prove partnership. Yet the jury must have supposed it was to prove something.

IV. and V. Upon the question whether the contract supposed by the instructions asked constituted a partnership, the authorities will first be examined that are relied on upon the other side. The principle established by the case *Ex parte Hamper*, 17 Ves. 404, and laid down in *Gow on Partn.* 15, and 3 Kent's Comm. 32, is, that a person who has a specific interest in the profits themselves, as profits, is a partner. In *Weaver v. Tapscott*, 9 Leigh 424; *Cary on Partnership* 8, 10, 14; *Waugh v. Carver*, 2 H. Black. 235, and *Smith on Mercantile Law* 3, it is laid down, that a share of the profits constitutes a partnership, and that when there is no community of profits there is no partnership. The question then is, whether in this case there was a community of profits? Was there ever a time,

after the contract by Beirne & Chapman with Smith, in which *the two
275 former had a specific interest in the profits? Until they made their election, there was no such interest; and after their election, there could be none. Had Beirne & Chapman elected to take a part of the profits, their election might have related back to the delivery of the goods. And if it would so have related back, an election to take the 20 per cent. must equally relate back. No case has been found in which a contract like this has been held to create a partnership. Here the credit was not even given during the time that the right of election existed.

But if any partnership existed, what kind of partnership was it? A partnership may be general, or limited to a particular branch of business or particular object. 3 Kent's Comm. 30; *Willet v. Chambers*, Cowp. 814; *Gow on Partn.* 7; *Montague on Partn.* 9; *Ensign v. Wands*, 1 Johns. Ch. Rep. 171; *Livingston v. Roosevelt*, 4 Johns. Rep. 251. Here the partnership was limited to the sale of a 1000 dollars worth of goods, and the only interest which Beirne & Chapman could have in the concern was a portion of the profits arising from the sale of those goods. Such a partnership could not authorize Smith to purchase goods upon the joint credit of himself and Beirne & Chapman. Moreover, if there was a partnership, whether general or limited, Beirne & Chapman were only dormant partners, and not liable for the contracts of Smith made after they had retired from the concern, whether notice was given of the dissolution or not. 3 Kent's Comm. 68; *Armstrong v. Hussey*, 12 Serg. & Rawle 315. It is said in *Evans v. Drummond*, 4 Esp. N. P. Cas. 89, that "if the acting partner represents the dormant partner as a partner even after the dissolution, the dormant partner will be bound, unless he gives notice of the dissolution." But Kent, with this case before him, lays down the law differently. And the doctrine is also questioned by *Starkie*; 3 Starkie on Evid. 1080. His reason
276 is conclusive, *to wit, that the moment the partnership ceases, the right to bind ceases.

The court manifestly erred in instructing the jury that Beirne & Chapman were liable until public notice was given of the dissolution. A person dealing with a firm, who has notice of its dissolution, cannot hold the partner bound who has retired, although there may have been no public notice of such dissolution.

It will not do to argue that the instructions asked for and given were mere abstractions. The appellate court cannot presume that instructions given by the court below were inapplicable to the case. There is a great difference between an instruction refused and one given. An erroneous instruction, even upon an abstract question, might mislead the jury.

Peyton, for defendants in error. Where a partnership is denied, creditors of the firm, not being privy to or in possession of the partnership agreement, can only establish the partnership by circumstances. If it can be shewn that the defendants suffered their connexion as partners to be known, or suffered their names to be used as partners, this is conclusive. *Roscoe on Evid.* 212. Now Beirne & Chapman (two of the alleged partners in the firm of French C. Smith & Co.) having a store at Parisburg, the fact of goods being boxed or in boxes at the store last mentioned for French C. Smith & Co. would be a circumstance to lead the public to conclude that they were partners. It must be born in mind, that though in point of fact persons are not part-

ners, yet if they so represent themselves, and thus credit is gotten, they are liable. *De Berkorn v. Smith*, 1 Esp. N. P. C. 29; *Kell v. Nainby*, 10 Barn. & Cress. 20; 21 Eng. Com. Law Rep. 17; *Gurdon v. Robson*, 2 Camp. 302; *Waugh v. Carver*, 2 H. Black. 235.

II. It is supposed by the second bill of exceptions that goods had been furnished one defendant by the two others, and that after such goods were furnished, 277 *the three defendants had a settlement of their mercantile accounts; and the object seems to be, to prove that in that settlement 20 per cent. was added to the amount due for the goods furnished. But what goods were furnished, when, and for what purpose, is unexplained. What this settlement embraced, whether the whole mercantile dealings of the parties, or the goods furnished; and for what purpose the 20 per cent. was included, whether as an agreed profit, or as an advance upon the sale of the goods furnished, is equally unexplained. The evidence was of transactions to which the plaintiffs were strangers, and by which, if true, they could not be affected. The only legitimate purpose for which it could be offered was to prove a dissolution of the concern. A partnership formed by parol may, it is true, be dissolved by parol. *Rackstraw v. Imber*, 1 Holt 368; 3 Eng. Com. Law Rep. 132. But though a partnership may be dissolved as it regards the partners themselves, their liability to creditors may still continue. And as this consequence can only be obviated by notice, the evidence offered, without evidence of notice, was altogether irrelevant and of course inadmissible. All persons dealing with a concern rely upon the united credit of all its members. Therefore when a dissolution takes place, justice requires that the world should be fully apprized of the fact. Those having dealings with the concern must have particular, and the world general notice. *Godfrey v. Turnbull*, 1 Esp. N. P. C. 371; *Parkin v. Carruthers*, 3 Esp. N. P. C. 248; *Fox v. Hambury*, Cowp. 445. Though a partner whose name does not appear in the firm is only liable for goods furnished during the time that he is actually a partner, yet if he be known to be a dormant partner, though his name does not appear in the firm, the usual notice of dissolution is necessary to avoid liability. *Cary on Partn.* 187; *Evans v. Drummond*, 4 Esp. N. P. C. 89.

278 *III. It was competent to the plaintiffs to prove that French C. Smith bought the goods not upon his own credit, but upon the credit of the defendants. The declarations of Smith on this point were conclusive, and his admission that such declarations were made was equally conclusive. The defendants *Beirne & Chapman*, it is admitted, were not bound by these representations unless they were partners; and the court instructed the jury that the declarations of Smith were inadmissible to establish the partnership. This opinion of the court, thus limited, seems to be cor-

rect. *Cary on Partn.* 139; *Evans v. Drummond*, 4 Esp. N. P. C. 89; *Parkin v. Carruthers*, 3 Esp. N. P. C. 248; *Gow on Partn.* 273.

IV. What constitutes a partnership between individuals contracting together, is one question; but what constitutes a partnership as to third persons, is another and different question. The first species of partnership is the result of a contract inter se. The latter species may be created without contract. For the law is, that he who lends his credit to a firm, or holds himself out as a partner, is liable for the engagements of the partnership with third persons, though he may not be interested in the capital or profits. *Alderson v. Clay*, 1 Starkie 405; 2 Eng. Com. Law Rep. 445; *Smith on Mercantile Law*, p. 6; *Ex parte Hamper*, 17 Ves. 404; *Waugh v. Carver*, 2 H. Black. 235; *Weaver v. Tapscott*, 9 Leigh 424. In this case, *Beirne & Chapman* have held themselves out to the world as partners in the store on Brush creek, have furnished the capital in goods, and have reserved to themselves an election to take a portion of the profits. This election, by the terms of the contract, could not be made until the goods were sold: for, until that period, it was not in the power of *Beirne & Chapman* to make the election with a proper regard to their own interests. After the sale, they could see from the books whether it was to their interest to take the 20 per cent. or a portion of the profits.

279 Any variation *of this contract, made in September, after the business was commenced by the defendants and before a sale of the goods, and not made known to creditors, could not screen the defendants from their liability as partners to third persons. *Cary on Partn.* 8, 10, 14; *Alderson v. Pope*, 1 Camp. 404; *Ex parte Hamper*, 17 Ves. 404; *Godfrey v. Turnbull*, 1 Esp. N. P. C. 371, and the cases cited on the second point.

But it is argued that the defendants were associated for a limited purpose or branch of business, viz. for vending the goods sold by *Beirne & Chapman* to *Smith*. In answer to this we say, there was nothing that could apprise the public that this was a limited partnership. The public saw *Smith* commencing mercantile business upon Brush creek. They saw that the goods to be vended were in part procured from *Beirne & Chapman*; that *Beirne & Chapman* were interested in the store, and were, at their election, to receive a portion of the profits. How was the public to know that this trading was limited to the vending of the goods gotten from *Beirne & Chapman*? If they could know this, still, might not occasional additions to the stock be indispensably necessary to effect a sale of the original 1000 dollars worth of goods bought of *Beirne & Chapman*? If so, the subsequent purchase from the appellees would have been within the scope of this limited partnership.

The appellees therefore insist that the instruction given by the circuit court is

free from error; that the contract constituted the appellants partners previous to election, and subsequent thereto (no notice being given thereof) as it regarded third persons.

Neither did the court err in refusing to give the instructions asked. The court was clearly right in refusing to give the first instruction asked. For there was clearly a partnership, between the contract of sale in June 1832, and the period of election in September *1832. The store was opened, and a part of the goods sold. The election in September, if it amounted to any thing, must have been a dissolution. For the election was not made according to the contract of June 1832; that contract only authorizing election when the goods were sold. *Gow on Partn. 15; Grace v. Smith, 2 W. Black. 998; Ex parte Hamper, 17 Ves. 404; Fromont v. Coup-land, 2 Bingh. 170; 9 Eng. Com. Law Rep. 366; Purviance v. M'Clintee, 6 Serg. & Rawle 259; 3 Kent's Comm. 32.*

The same principles and authorities shew that the second instruction asked was properly refused. This instruction seems to proceed upon the ground that partners are not liable to creditors who are ignorant of the terms of the partnership contract; a contract rarely, if ever, known to creditors in any case. A partnership is often created by construction of law; as where one person engages jointly with another in a transaction, either as agent or otherwise, and has an interest in the profits. As frauds might be practised if such agreements bound third persons, and the law will protect third persons against frauds, it has therefore declared all persons entering into such agreements liable to the world as partners. *Cary on Partn. 8, 9, 10. Whoever shares in the profits of a concern is a partner as it regards the public. Waugh v. Carver, 2 H. Black. 235. Where a merchant employs a broker to purchase goods, and it is agreed between them that the broker shall receive a portion of the profits as a recompense for his trouble, they are partners as it regards third persons. Smith v. Watson, 2 Barn. & Cress. 401; 9 Eng. Com. Law Rep. 122; Reid v. Hollinshead, 4 Barn. & Cress. 867; 10 Eng. Com. Law Rep. 460; Ex parte Hamper, 17 Ves. 404.*

It is moreover apparent that the judge of the circuit court considered, that the facts supposed by the instructions asked did not correspond strictly with the facts proved. That the goods purchased in June 1832 were in part immediately delivered, and the store opened upon Brush creek, and the sales going on before the election made, are facts kept out of view, though not expressly negatived. And the instruction of the judge seems to have been given with a view of bringing to the consideration of the jury those facts, and the law arising thereon. His object was to prevent the jury from being misled by a plausible but incorrect statement of facts.

V. The same object seems to have influenced the judge in giving the instruction

mentioned in the fifth bill of exceptions. The instructions appearing by this bill to have been asked only vary from those appearing by the fourth bill to have been asked, in this, that in the instructions last asked the contract of June 1832 is represented as a private contract, unknown to the plaintiffs when they extended credit to Smith. The judge having heard evidence going to prove that both Beirne and Chapman, from the time of the contract in June 1832 till the period of their election in September, had publicly represented themselves and acted as the partners of Smith in the store upon Brush creek, considered it his duty, while he gave the instructions last asked, to bring to the consideration of the jury a state of facts entitling the plaintiffs to recover notwithstanding those instructions.

All of the exceptions are liable to the following observations: 1. In none of them is the evidence set forth, so as to enable an appellate court to ascertain whether the verdict was rendered under the influence of any opinion excepted to. 2. When the defendants excepted to the admission or exclusion of evidence, they should have taken care to state such a case as would shew the relevancy of the evidence excluded, or the irrelevancy of the evidence admitted, because

it is always incumbent on a party seeking to reverse a judgment *to shew that there is error. *Rowt's adm'x v. Kyle's adm'r, 1 Leigh 216.*— 3. There is no statement of the facts proved, to enable the court to ascertain whether the instructions asked for and given had any application to the case, or to shew that the opinions were erroneous.

C. Johnson, in reply, cited the cases referred to in 1 Rob. Pract. 344-348, and said, the establishment of the proposition which the counsel on the other side was endeavouring to establish as to the imperfect nature of the bills of exceptions, would lead to a reversal of the judgment. He proceeded then to examine the opinions excepted to.

I. Although (he remarked) the statement in the first bill of exceptions does not shew what was the point in issue, yet enough is stated to shew that testimony was improperly admitted. All testimony is improper which is irrelevant. If testimony be prima facie irrelevant, it is incumbent on the party who offers it, to make it appear that it is relevant. If, for example, declarations of a stranger be offered, it is not necessary for the party who excepts to the opinion of the court admitting them, to do more in the bill of exceptions than state that such declarations were offered and received. And yet such hearsay evidence might be proper in consequence of some evidence previously given. They might, for example, be declarations of a witness who had been examined, contradicting what he had deposed to. But in such case the party offering them must take care to have enough stated in the bill of exceptions to shew the propriety of receiving them. In

the present case, how could the evidence set forth in the first bill of exceptions tend to prove a partnership? By itself, we cannot see that it would have such tendency; and if any other evidence had been given that would have authorized it to be admitted, that other evidence ought to have been stated.

283 *II. In the second bill of exceptions, the previous evidence not being stated, the case is governed by those already cited which require a reversal because of the imperfect nature of the bill of exceptions.

III. The third bill of exceptions shews that declarations respecting the existence of the partnership were permitted to be given in evidence, with an instruction that they were not evidence of its existence. Of what else could they be evidence? This bill of exceptions is at least obnoxious to the objection of the want of certainty.

IV. We admit that if the compensation had not been in the alternative; if the contract had been to take a part of the profits without any condition, it would have been a case of partnership. But we have been unable to find any case in which a party thus contingently entitled to a share of the profits has been held a partner. The main reason assigned for holding one who shares in the profits a partner, is, that he who so shares ought, in reference to the other dealers, to be held to share in the losses, because those dealers give credit trusting to the profits as a fund belonging to those whom they trust. Where the interest is alternative and contingent, there is, until the election of one thing or the other, no right to either, and until a share of the profits is elected, there is no community of profits. The vendor must not wait until he sees that profit is sure. The vendee has a right to require that the election be made in a reasonable time. But when the election is made, it relates back to the commencement of the dealing. What objection can there be to this view of the subject, as it regards the public? If they know the contract and deal in reference to it, they cannot complain that they are injured by it. If the contract be secret, they deal on the credit of him to whom they sell, and from him no part of the profits is taken. The court should therefore have given the first instruction asked. It was evi-

284 dently pertinent *to the issue, and the court did not refuse it because there was no evidence of the facts supposed by it, but gave an instruction based upon the same state of facts. An appellate court can never presume that the court below gave an instruction not pertinent to the matter in issue. And in giving that instruction, as well as in refusing the second instruction asked, that court has clearly erred. If there had been a partnership, it was certainly dissolved before the transaction in question, and the former partners then cannot be liable unless for want of notice. The cases cited by Mr. M'Comas shew that

notice is not necessary at all. And the circuit court has held that there must be notice to the world. Surely, there is no foundation in law for this. If notice had been given to the plaintiffs, it would not only have been good, but better than notice in the papers. The court was eminently wrong in another respect. It should have told the jury that if they thought there was a partnership, it was limited to a single object,—to the vending of these goods, and the business properly connected with it; not that it was a partnership in other goods. The argument on the other side supposes that a very curious mode might be adopted to sell these goods; viz. to purchase others.

V. What has been said upon the fourth bill of exceptions will also apply to the fifth; the variations being very slight.

STANARD, J., delivered the opinion of the court:

The court is of opinion that the evidence mentioned in the first bill of exceptions had a connexion, though very slight, with one of the questions involved in the issue, and though it might have been of very little weight, it was not error to permit it, as a link in a chain of circumstances, to go to the jury.

285 *The evidence mentioned in the second bill of exceptions was properly rejected. The exception does not shew the time of the transaction between the defendants, nor suggest any connexion between the fact the evidence was offered to prove, and any matter in controversy in the suit; nor is there any thing stated in the exception from which such connexion can be inferred.

The evidence mentioned in the third bill of exceptions was properly admissible, to prove that the plaintiffs intended to sell to, and Smith intended to purchase for, a partnership, but was no proof against Chapman & Beirne that they were the partners. That evidence, however, was not regularly admissible in this case, even for this limited purpose, until the plaintiffs had offered evidence tending to shew that there was a partnership (either by express contract, or by Chapman & Beirne permitting their names to be used as partners, or otherwise,) between Smith, Chapman and Beirne, that authorized Smith to purchase on the credit of the three.

The law of the case stated in the fourth exception is correctly expounded by the instruction asked for thereon by the defendants. But it is not stated that evidence was offered tending to prove such case; and if the court had simply declined to give the instruction, such refusal might have been justified, on the ground that the case was merely hypothetical, and the law arising on it an abstract question. As the court, however, not only overruled the instruction asked, but proceeded to give an instruction, it is a reasonable implication that there was evidence tending to prove the case, and therefore the rectitude of the judgment on the instruction overruled, and

on that given, is proper for enquiry in the appellate court. As before stated, the court erred in overruling the instruction sought. The case stated, to which the instruction given was applied, differs from that on which the instruction was asked; and if such case had been made out by the 286 proof, the instruction *was wrong in this, that though the case so stated might create a temporary partnership until election, it was limited to the sale of the goods furnished, and to the profits thereof, and did not extend to purchases and sales of other goods; and the dissolution of such partnership was effectual in respect to all who may have had actual notice, though such notice may not have been given to the world, or even publicly.

The addition to the instructions, which is the subject of the fifth exception, was not error, if it be understood that the representing themselves and acting as partners by Chapman & Beirne, mentioned in that addition, had relation to an existing and continuing partnership for the sale and purchase of goods, or to a partnership generally, without express qualification or limitation as to the subject or the continuance thereof.

It does not however appear with sufficient clearness, that the said addition was, or was intended to be so understood; and for that reason the addition was error.

The judgment ought to be reversed with costs, the verdict set aside, and a new trial awarded, on which the principles herein declared in respect to the admission and rejection of evidence, and the instructions to the jury on the law of the case, are to govern, should occasions occur on the new trial for their application, and the court be asked to apply them.

287 *Blessing's Adm'rs v. Beatty.

August, 1842. Lewisburg.

(Absent BROOKE, J)

Equity Jurisdiction—Mistake—Conveyance of Land.*—

Sale is made of land embraced by a deed under which the vendor claims, but by mistake the conveyance from the vendor embraces some land not conveyed by that deed, and omits some comprised in it. On a bill by the vendee against the administrator and heirs of the vendor, HELD, equity will correct the mistake, by directing a

*Equity Jurisdiction—Deficiency in Land—Mistake. —Courts of equity have jurisdiction to render decrees for the value of the deficiency in the quantity of land sold by the acre. The basis of this jurisdiction is either mutual mistake, or the mistake of one party occasioned by the fraud or culpable negligence of the other. *Hull v. Watts*, 95 Va. 12, 27 S. E. Rep. 829, citing the principal case.

The principal case is also cited for this proposition in *Watkins v. Elliott*, 28 Gratt. 390; *Boschen v. Jurgens*, 92 Va. 759, 24 S. E. Rep. 390; *Graham v. Larmer*, 87 Va. 233, 12 S. E. Rep. 389; *Crislip v. Cain*, 19 W. Va. 533; *Caldwell v. Craig*, 21 Gratt. 189; *Rogers v. Pattie*, 96 Va. 502, 31 S. E. Rep. 897.

Same—Same—Same—Estimate of Quantity by Parties.—The principle upon which equity gives relief in

conveyance from the heirs of the vendor according to the calls of the deed under which the vendor claimed.

Vendor and Vendee.—Contract of Hazard—Rule.—The principles upon which equity gives relief to vendor

cases of excess and deficiency in the estimated quantity upon the sale of lands, is where there is a mistake, whether the mutual mistake of the parties, or the mistake of one of them, occasioned by the fraud or culpable negligence of the other. The general rule is that an estimate of the quantity by the parties, whether in a contract executed or a contract executory, ought to be taken *prima facie* to have influenced the price. *Nichols v. Cooper*, 2 W. Va. 350, citing the principal case.

The principal case is cited in *Graham v. Larmer*, 87 Va. 233, 12 S. E. Rep. 389; *Crislip v. Cain*, 19 W. Va. 542; *Hendricks v. Gillespie*, 25 Gratt. 200; *Walsh v. Hale*, 25 Gratt. 318; *Trinkle v. Jackson*, 86 Va. 241, 9 S. E. Rep. 986.

The principal case is distinguished in *Shoemaker v. Cake*, 83 Va. 4, 1 S. E. Rep. 387. But see *Nichols v. Cooper*, 2 W. Va. 347, disapproved in *Crislip v. Cain*, 19 W. Va. 552, 553, 554.

Same—Same—Same.—In *Graham v. Larmer*, 87 Va. 233, 12 S. E. Rep. 389, the court said: "In the leading Virginia case of *Blessing v. Beatty*, 1 Rob. 304, JUDGE BALDWIN reviewed all the prior decisions of this court upon the subject in hand; and the principle deduced therefrom was, that courts of equity entertain jurisdiction and grant relief upon the ground of mistake, and this whether the sale was at a specified price per acre, or a sale of a tract supposed by both parties to contain a definite number of acres, for an aggregate sum or gross price, and that if, in either case, there was a mistake as to the quantity, equity will give relief, with compensation for the excess or deficiency, as the case may be; but that the right to relief, otherwise clear, may be excluded by a stipulation at the time of the sale, that the estimated quantity shall, in any event, be taken as the actual quantity—the parties thus making a contract of hazard."

The principal case is cited in *Crawford v. M'Daniel*, 1 Rob. 453.

Same—Principal Case Disapproved.—The opinion of JUDGE BALDWIN, in the principal case, and the subsequent Virginia cases which have adopted his views, as also the first syllabus in *Nichols v. Cooper*, 2 W. Va. 347, disapproved in *Crislip v. Cain*, 19 W. Va. 533, 545.

Same—Rule When Purchase Money Paid.—It was said in *Kelly v. Riley*, 23 W. Va. 249, citing the principal case, that if equity has jurisdiction in the case of a deficiency in quantity of land, the sale being by the acre, to enjoin the collection of purchase money after conveyance executed, it would seem to be clear that it ought to grant relief when the purchase money has been paid as no objection to its jurisdiction could be urged in the one case which would not equally apply to the other.

Same—Clerical Misprision.—The principal case is cited in *Deitz v. Ins. Co.*, 33 W. Va. 541, 11 S. E. Rep. 56, to the point that no court of record would hesitate to correct a clerical misprision in its own records, if the mistake is clearly established.

+Sale by Acre or by Tract of Land.—A question frequently arises as to whether a sale is by the acre or is of a tract of land, the acreage being merely for description and not determining the amount of the price. The question is largely one of intention. *Jolliffe v. Hite*, 1 Call 262; *Keyton v. Brawford*, 5

in case of excess, or to vendee in case of deficiency in the estimated quantity of land, examined by BALDWIN, J.

Same—Estimate of Quantity by Parties—"More or Less."—An estimate by the parties of the quantity of land sold, whether in a contract executed or in

Leigh 39; Weaver v. Carter, 10 Leigh 45; Norfolk Trust Co. v. Foster, 78 Va. 419. In this latter case the court said: "Whether a contract of sale is one of hazard as to quantity—in other words, whether it is a contract for the sale of a certain *tract of land*, whatever number of acres it may contain, or of a specified quantity—depends upon the intention of the contracting parties, to be gathered from the terms of the contract, and all the facts and circumstances connected with it. And while contracts of hazard in such cases are not invalid, courts of equity do not regard them with favor. The presumption is against them, and can be repelled only by clear and cogent proof. Consequently, a contract will be construed to be a contract by the acre whenever it does not *clearly appear* that the land was sold by the tract, and not by the acre. And so, where the contract is for the payment of a gross sum for a tract of land, upon an estimate of a given quantity, the presumption is that the quantity influences the price to be paid, and that the agreement is not one of hazard. These propositions have been affirmed by this court in numerous cases. Keyton v. Brawford, 5 Leigh 39; *Blessing v. Beatty*, 1 Rob. Rep. 374; Triplett v. Allen, 26 Gratt. 721; Watson v. Hoy, 28 Gratt. 698; Yost v. Geisler, 7 Va. L. J. 624."

The principal case is cited in this connection in Watson v. Hoy, 28 Gratt. 704, 705; Boschen v. Jurgens, 92 Va. 759, 24 S. E. Rep. 390; Graham v. Larmer, 87 Va. 233, 13 S. E. Rep. 389. See *foot-note* to Triplett v. Allen, 26 Gratt. 721, and *foot-note* to Caldwell v. Craig, 21 Gratt. 132.

"More or Less"—Effect on Purchaser.—When the real contract is to sell a tract of land for so many acres as it may contain, more or less, fully understood to be so, the purchaser takes the tract at the risk of gain or loss, by deficiency or excess. Tucker v. Cocke, 2 Rand. 51; Russell v. Keeran, 8 Leigh 9; Pendleton v. Stewart, 5 Call 1; Hull v. Cunningham, 1 Munf. 330; Weaver v. Carter, 10 Leigh 37; Grantland v. Wight, 2 Munf. 179; Caldwell v. Craig, 21 Gratt. 132; Allen v. Shriver, 81 Va. 174; Jolliffe v. Hite, 1 Call 301, 1 Am. Dec. 579; Pratt v. Bowman, 37 W. Va. 715, 17 S. E. Rep. 210; Depue v. Sergeant, 21 W. Va. 326; Anderson v. Snyder, 21 W. Va. 633.

But in Jolliffe v. Hite, 1 Call 329, where the principles applicable to this subject were discussed, it was decided that wherever the primary contract is for a sale by the acre, though it be carried into execution by a deed conveying a certain quantity, more or less, the vendee is not precluded from claiming for deficiency, nor the vendee for excess.

Same—Sale in Gross or by Acre.—A sale of a tract of land, described by metes and bounds as containing a certain number of acres, "more or less," is a sale in gross and not by the acre, though the price named be an exact multiple of the number of acres named. Depue v. Sergeant, 21 W. Va. 326; Anderson v. Snyder, 21 W. Va. 632; Crislip v. Cain, 19 W. Va. 438; Pratt v. Bowman, 37 W. Va. 715, 17 S. E. Rep. 210; Weaver v. Carter, 10 Leigh 39; Russell v. Keeran, 8 Leigh 9; Hull v. Cunningham, 1 Munf. 330; Pendleton v. Stewart, 5 Call 1, 2 Am. Dec. 583; Benson v. Humphreys, 75 Va. 196. The principal case is cited

a contract executory, ought to be taken *prima facie* to have influenced the price. Therefore where a sale was made, for 2000 dollars, of a tract of land, which, in the articles of sale and in the deed of conveyance, was mentioned as "containing 280 acres," without the addition of the customary

in this connection in Crawford v. M'Daniel, 1 Rob. 458.

Virginia Case Disapproved.—The case of Benson v. Humphreys, 75 Va. 196, is disapproved in Depue v. Sergeant, 21 W. Va. 327. The court said: "It is true that where the words 'more or less' were not added to the description of the quantity of the land, the court of appeals of Virginia in the case of Benson v. Humphreys, Law Journ. April, 1881, did hold, where the price was an exact multiple of the quantity, though it was not stated exactly but was qualified by the addition of the words 'more or less,' yet, that this was still a contract of sale by the acre. But this case met the express and decided disapproval of our court, in Crislip, Guardian, v. Cain, 19 W. Va. pp. 551 and 552. It is entirely unsustained by reason or authority in Virginia or elsewhere."

Distinction between Sale in Gross and by the Acre.—The distinction pointed out in Pendleton v. Stewart, 5 Call 1, 2 Am. Dec. 583, between a sale in gross and by the acre is as follows: Where the sale is by the acre for a stipulated number of acres, the words "more or less" will cover only very small errors, such as might reasonably be imputed to the variation of instruments or other similar causes; but if it is a sale in gross and it is fully understood that the contract is to sell a tract of land, as it may contain more or less, both parties are presumed to take the risks of the excess or deficiency in the quantity.

An agreement to sell land contained within specified boundaries, supposed to be a certain number of acres, at a fixed price per acre, is a sale by the acre, and not in gross. Carter v. Campbell, Glm. 159.

Same—Same—Rights of Vendee.—It was held in Keyton v. Brawford, 5 Leigh 39, that a vendee of land, in a sale *by the acre*, is entitled to an abatement from the purchase money. In case of a deficiency of quantity; but in a sale of land *in gross*, a contract of hazard on both sides, the vendee is not entitled to relief, in case of deficiency; and whether the sale be a sale *by the acre*, or a sale *in gross*, is a question of intention of the parties to the contract, to be collected from all the circumstances of the transaction.

Payment of Gross Sum upon Estimate of Given Quantity.—The principal case is cited in Watson v. Hoy, 28 Gratt. 698, and Camp v. Norfleet, 83 Va. 382, 5 S. E. Rep. 374, to the point that where the parties contract for the payment of a gross sum for a tract or parcel of land upon an estimate of a given quantity, the presumption is that the quantity influences the price to be paid, and that the agreement is not one of hazard. See Grayson v. Buchanan, 88 Va. 251, 13 S. E. Rep. 457.

As Estimated—As Supposed.—The words "more or less," are not construed to mean "as estimated," "as supposed," but are construed to mean "about" the specified number of acres, and are considered or designated to cover only such small errors of surveying as usually occur in surveys. Crislip v. Cain, 19 W. Va. 442. See also, Benson v. Humphreys, 75 Va. 196; Anderson v. Snyder, 21 W. Va. 647.

Warranted That Thing Sold Will Correspond to Representation.—A warranty tacitly annexed to every contract, that things bought or sold shall corre-

words "more or less," and the tract proved to contain only 253 acres, it was considered that although the purchase money was not an equimultiple of the number of acres, yet the presumption was

spond with the representation made of it, at the time of concluding the contract between the parties, is neither waived nor destroyed by the insertion of the words "more or less," in a contract for the sale of land by a specified number of acres, if an error beyond what may reasonably be imputed to the variation of instruments, or other similar causes, be afterwards discovered. *Jolliffe v. Hite*, 1 Call 801, 1 Am. Dec. 519; *Pendleton v. Stewart*, 5 Call 5; opinion of *TUCKER, J.*, *Caldwell v. Craig*, 21 Gratt. 137.

Contract of Hazard.—A sale in gross, when applied to the thing sold, means a sale by the tract, without regard to quantity, and in that sense is *ex vi termini* a contract of hazard. *Shoemaker v. Cake*, 83 Va. 1, 15 E. Rep. 387; *Russell v. Keeran*, 8 Leigh 9; *Yost v. Mallicote*, 77 Va. 616.

Material and Immaterial Differences.—Immaterial Differences.—Where the contract is for a tract or parcel of land in gross, without reference to its quantity, whatever the deficiency, no allowance is made to either party, even where the deficiency is great. Thus, in the case of *Tucker v. Cocke*, 2 Rand. 51, the deficiency was a thousand acres. In *Russell v. Keeran*, 8 Leigh 9, the deficiency amounted to one hundred acres in a tract of four or five hundred acres.

In *Caldwell v. Craig*, 21 Gratt. 132, there was a deficiency of two hundred acres in a conveyance of one thousand acres, more or less, for a consideration of six thousand five hundred dollars. See also, *Graham v. Larmer*, 87 Va. 222, 12 S. E. Rep. 389.

If a tract of land be sold for 1100 acres more or less at a fixed price, and it turns out that it is less, the purchaser will not be relieved in equity. *Pendleton v. Stewart*, 5 Call 1, 2 Am. Dec. 533.

A deficiency of eight acres in a tract of 552 acres, is no more than a purchaser who buys for more or less may reasonably expect. *Nelson v. Matthews*, 2 H. & M. 164, 3 Am. Dec. 620.

Material Differences.—But ten acres, in a tract of 106 acres, is not one of these small deficiencies to be covered by the phrase "more or less." *Triplett v. Allen*, 26 Gratt. 731. Nor a deficiency of one hundred and ninety-two acres in a conveyance of eight hundred acres, more or less. *Quesnel v. Woodlief*, 6 Call 230, opinion of *JUDGE LYONS*.

Quantity Considerably Less.—The principal case is cited in *Walsh v. Hale*, 26 Gratt. 317, to the point that a purchaser, if the quantity be considerably less than was stated, will be entitled to an abatement, although the agreement contain the words "more or less."

Sale of Five Hundred and Three Acres, Deficiency, Thirty-Four Acres.—In a sale of lands described in the deed as containing five hundred and three acres, the presumption is that the specified number of acres was intended, and if there is a considerable deficiency—here thirty-four acres—the purchaser is entitled to an abatement of price. *Watson v. Hoy*, 26 Gratt. 698, and note. See foot-note to *Caldwell v. Craig*, 21 Gratt. 132.

Fraud or False Representation.—Although the sale be in gross, and not by the acre, if the vendor, to induce the vendee to purchase, falsely represents to him that the land contains a specified number of acres, or that number "more or less," and the vendee, relying on the truth of such representation,

against the contract being one of hazard, and the vendor was held liable for the deficiency; dissentiente *STANARD, J.*

Same—Rule of Compensation.—Where, at the time of the sale of a tract of land, it is estimated that there is a certain number of acres within the boundaries by which the tract is conveyed, and it afterwards appears that the vendee is entitled to be compensated for a deficiency in the quantity, the rule of compensation will generally be according to the average value of the whole tract. **Appellate Practice—Costs!—Administrator—Amendment of Decree.**—In the court below, there having

is thereby induced to purchase the same as containing about that number of acres, at a price he would not otherwise have given for it, such representation even if innocently made, may amount to an implied warranty of the number of acres, and the vendor may be compelled to account to the vendee for a deficiency in the number of acres. *Anderson v. Snyder*, 21 W. Va. 633; *Crislip v. Cain*, 19 W. Va. 438; *Sine v. Fox*, 33 W. Va. 521, 11 S. E. Rep. 218; *Kelly v. Riley*, 22 W. Va. 247; *Boggs v. Harper*, 45 W. Va. 554, 31 S. E. Rep. 943; *Allen v. Shriver*, 81 Va. 174.

Failure to Disclose Quantity of Land Sold.—If the contract be for 900 acres, more or less, and the tract be found to contain only 765 acres, the purchaser will be relieved, if it appear, that the seller knew of the deficiency at the time of the sale, but did not disclose it. *Bedford v. Hickman*, 5 Call 236, 2 Am. Dec. 590. To the same effect, see *Anthony v. Oldacre*, 4 Call 489; *Nelson v. Matthews*, 2 H. & M. 164, 2 Am. Dec. 620.

Though land be sold in gross, for so much, be it more or less, yet, if it be evident that both parties were mistaken in a material point, as to the lines by which the vendor held, and there was no express agreement on the part of the purchaser to take the risk upon himself, a court of equity will give relief for a deficiency. *Hull v. Cunningham*, 1 Munf. 330.

Rule of Compensation Stated.—The rule of compensation or abatement in case of an excess or deficiency in the quantity of land sold is according to the average value per acre of the whole tract, unless particular circumstances require a departure from that rule. *Watson v. Hoy*, 26 Gratt. 698, citing the principal case, and *Hoback v. Kilgore*, 26 Gratt. 442; *Triplett v. Allen*, 26 Gratt. 731; *Nelson v. Matthews*, 2 H. & M. 164, 178; *Nelson v. Carrington*, 4 Munf. 332, 340; *Hundley v. Lyons*, 5 Munf. 342.

The principal case is cited for this proposition in *Yost v. Mallicote*, 77 Va. 615, 617; *Hoback v. Kilgore*, 26 Gratt. 442; *Sergeant v. Linkous*, 83 Va. 667, 35 S. E. Rep. 295; *Trinkle v. Jackson*, 86 Va. 241, 9 S. E. Rep. 986; *Caldwell v. Craig*, 21 Gratt. 139. See foot-note to *Hoback v. Kilgore*, 26 Gratt. 442.

Same.—The general rule in the case of an abatement on account of deficiency in the quantity of land sold, is to allow for the deficiency the average price of the whole land. *Depue v. Sergeant*, 21 W. Va. 345, citing the principal case, and *Hull v. Cunningham*, 1 Munf. 330; *Nelson v. Matthews*, 2 H. & M. 164; *Lowther v. Com.*, 1 H. & M. 202; *Crawford v. McDaniel*, 1 Rob. 448; *Nichols v. Cooper*, 2 W. Va. 347; *Stockton v. Union Oil & Coal Co.*, 4 W. Va. 273. See also, *Kelly v. Riley*, 22 W. Va. 247; *Boggs v. Harper*, 45 W. Va. 554, 31 S. E. Rep. 944; *Grayson v. Buchanan*, 88 Va. 261, 13 S. E. Rep. 457.

Appellate Practice—Decreasing Costs of Appeal to Appellee.—The principal case is cited in *Marks v.*

been a clerical misprision in decreeing jointly against two defendants as administrators of a decedent, when the pleadings indicated that one of them was sole administrator, and the decree for costs having through oversight been entered against him, as well as against certain heirs of the deceased, *de bonis propriis*, the appellate court amended the decree in these particulars. The appellate court being farther of opinion that what was declared in the decree would, by necessary

implication, relieve the heirs from responsibility for *certain land, but that it would
288 have been more regular to direct a release of that land, decreed such release accordingly. And the decree, being thus amended, was thereupon affirmed.

By deed bearing date the 5th of January 1816, between William Poston and Charles Tate of the one part and Jacob Blessing of the other part, it was recited that Poston and Tate, by virtue of a decree of the superior court of chancery holden at Staunton in July 1808, in a case therein depending between Jacob Blessing plaintiff and Arthur Campbell defendant, had sold to Blessing "a certain tract or parcel of land with the appurtenances, lying in Washington county on the middle fork of Holston and Mill creek, containing 280 acres," and that the court afterwards confirmed the sale and ordered the commissioners to convey the said land to Blessing; and when the deed witnessed that Poston and Tate, the commissioners aforesaid, conveyed to Blessing the said tract or parcel of land with the appurtenances; but the deed, instead of stopping there, proceeded to describe the said tract or parcel of land as bounded by particular metes and bounds set forth therein.

On the 6th of September 1828, articles of agreement were entered into between Blessing and Robert Beatty, which witnessed that Blessing had sold to Beatty "a certain tract or parcel of land containing 280 acres, called Staley creek place, lying and being in the county of Washington and state of Virginia, and on both sides of the main road, adjoining the lands of John Townsend, the heirs of John Irons deceased, the heirs of Robert Thompson deceased, Wyatt M'Ghees and Augustine M'Ghees." Beatty, on his part, bound himself to pay to Blessing 2000 dollars, to be paid in the manner set forth in the articles.

By deed bearing date the 5th of January 1830, Blessing and wife, for the consideration of 2000 dollars, conveyed to Beatty the said tract or parcel of land, describing it as "lying and being in the county
289 of Washington *and state of Virginia, and on both sides of the middle fork of Holston river, also on a creek called Staley's creek, containing 280 acres, adjoining the lands of John Irons deceased and others, and bounded as followeth, to wit:" (after which, particular metes and bounds were set forth). The deed con-

tained a covenant that Blessing and his heirs would warrant and defend the right and title "to the above described premises," to Beatty and his heirs, free and clear from the claim or claims of any person or persons whatever.

After the death of Blessing, to wit, on the 24th of October 1834, a suit in equity was brought by Beatty against the administrator and heirs of Blessing, in the circuit court of Smyth county. The bill set forth, that since Blessing's death the plaintiff had discovered that the boundaries by which the land was conveyed by Blessing to him do not contain 280 acres, and that of the land included in the said boundaries there is between 15 and 30 acres to which Blessing had no title. And then the bill proceeded to explain how this arose. It stated, that the tract of land conveyed by Blessing to the plaintiff as containing 280 acres was mortgaged by a certain Arthur Campbell to Blessing; that under this mortgage it was decreed to be sold, and was sold by Poston and Tate as commissioners, and Blessing the mortgagee became the purchaser thereof; that in the conveyance to Blessing, the commissioners included land which was not included in the mortgage, and that in this way Blessing was probably led into the error of attempting to convey to the plaintiff land to which he had no valid claim. The bill prayed that a survey might be directed, to ascertain the deficiency in the land conveyed by Blessing to the plaintiff, and that for this deficiency satisfaction might be decreed the plaintiff out of Blessing's estate.

The administrator of Blessing, after excepting to the jurisdiction of equity,
290 answered, that he knew nothing *of the terms of the contract between Blessing and Beatty. He did not know whether Beatty purchased the land by the quantity, or in gross; and he called upon the plaintiff to shew what the contract was. He did not know that there were not 280 acres contained in the tract mentioned in the bill, nor that Blessing had conveyed any land to the plaintiff to which he had not right; and he called for proof. Blessing, he said, had put the plaintiff into possession of the land contained in the deed, and the plaintiff had never been evicted; and if he had voluntarily surrendered possession of it to others, it was his fault,—a fault for which Blessing's estate was not liable. At all events, he insisted, the plaintiff should have brought a suit at law upon the warranty, and not resorted to a court of equity for relief.

Some of the defendants were out of the commonwealth, and the cause was proceeded in against them by publication. Some were infants, and answered by guardian ad litem.

Under an order of survey made in the cause, the surveyor of the county returned a plat and report; but the report was deficient in clearness. The deposition of the surveyor was taken, which stated, that he ran the lines agreeably to the courses of the

Hill, 15 Gratt. 422. See also, *Handly v. Snodgrass*, 9 Leigh 484; *Williamson v. Howard*, 2 Rob. 39; *Boyce v. Smith*, 9 Gratt. 704.

mortgage given by Campbell to Blessing; "or rather, running to the corners, where they could be found, and where not found, according to the courses and distances of said mortgage;" and found the tract of land to contain 253 acres. In answer to a question of the plaintiff's counsel, he stated that he had compared the courses of the mortgage with the courses of the deed made by Blessing to Beatty, and found them to differ, the deed last mentioned including some land that the mortgage would not cover; to wit, land on the south side of the main road, in the possession of James P. Strother. Other depositions were taken, but it is not material to state the purport of them.

291 *The cause coming on to be heard the 3d of May 1839, the following opinion and decree were entered: "The court, not being able from the evidence before it to perceive the extent of relief to be decreed to the complainant, supposes the difficulty may be removed by an additional report of the surveyor on the survey already made, or by making another survey and report; and perceiving that the probable relief to be granted will be a correction of the conveyance from Blessing to the complainant, so as to conform it to the deed of conveyance from the commissioners Poston and Tate to Blessing, under which Blessing held said land, and which (by mistake, as is believed) was departed from in the conveyance from Blessing to the complainant, so as to leave out some of the lands held by him under said deed, and to include others not conveyed to him; and then, by ascertaining the deficiency, to compensate the complainant therefor, leaving him to action at law upon his warranty for compensation for eviction of any portion thereof of which he does not now complain: therefore it is adjudged, decreed and ordered that the said surveyor so amend his report, if it can be one without a farther survey, as to shew how much land is contained in the tract in the bill mentioned, surveyed according to the lines of the conveyance made by the said commissioners Tate and Poston to Jacob Blessing, and also to shew the amount of acres included in Blessing's conveyance to the complainant; also to shew the number of acres included in the latter and not embraced by the former, and how much of the former is left out in the latter; reporting also whether or not he finds marked trees and corners on the lines surveyed by him: and if he cannot do so in the survey by him now reported, that he again go upon the land in controversy, and survey and lay off the same."

The surveyor made an additional report, setting forth the boundaries called for in the mortgage from Campbell
292 *to Blessing, and the boundaries called for in the deed from the commissioners Poston and Tate to Blessing, and specifying wherein the two deeds corresponded and wherein they differed, and accounting for the variations between the two. The principal difference was the

omission in the latter deed of one course and distance specified in the former. The surveyor supposed that a mistake was committed in copying the courses of the one deed into the other. There were, he said, two white oak corners following in succession, and he supposed that the copyist, after writing the words "white oak," overlooked the description of the first corner and passed to the description of the second. This supposition, he said, was strengthened by the fact that thenceforward the lines of the commissioners' deed pursued the calls of the mortgage, except that one course in the mortgage was S. 71 E. whilst the course of the correspondent line in the other deed was S. 21 E. which was a mistake that might readily happen with a negligent copyist, the words twenty and seventy, when written, being often mistaken for each other. The surveyor had no doubt that the commissioners intended to convey to Blessing according to the boundaries of the mortgage. This opinion, he said, was confirmed by the fact that the plat made from the courses of the mortgage closed accurately, whilst the plat according to the lines of the commissioners' deed failed to close, by a difference of 11 degrees in course, and a deficiency of 90 poles in distance.

It seemed to the surveyor that the deed from Blessing to Beatty was made upon actual survey, and that the surveyor who made that survey went by the calls of the commissioners' deed (making some corrections in course and distance) until he reached two white oaks at one of the corners described in the mortgage deed, after which he left entirely the courses both of the mortgage and of the deed from the
293 commissioners, and *struck out a new course for himself. This error was committed in attempting to run with the surrounding lands of Robert Thompson's heirs and Wyatt M'Ghees, mentioned in the deed from Blessing to Beatty.

The surveyor reported that the quantity of land conveyed by the mortgage deed, according to his survey thereof as actually run by marked boundaries, when found, and by courses and distances taken from the mortgage deed, when corners were gone, was 253 acres; so that the quantity of land embraced in the mortgage deed was less by 27 acres than the quantity for which Beatty contracted. He further reported that the deed from Blessing to Beatty embraced 23 1-5 acres of land not contained in the mortgage deed, and left out 8 acres included in it.

The cause came on to be finally heard the 7th of May 1840. The circuit court, being of opinion that an error was committed in the conveyance from Blessing to Beatty by departing from the mortgage deed, and being satisfied that the sale from Blessing to Beatty was intended to include all the lands within the bounds of the mortgage, to which Blessing had, as mortgagee, the legal title, and that the boundaries thereof were departed from by mistake, decreed that the heirs of Blessing, or, in case of their

failure, a commissioner appointed for the purpose, should convey to the complainant the land embraced by the mortgage deed, according to the calls thereof. And it appearing by the report of the surveyor, that the quantity of land embraced within the mortgage was only 253 acres, and it also appearing (as the court thought) by the original contract, that Blessing contracted to sell to the complainant 280 acres, and the average price paid for said land per acre being 7 dollars 14 cents, at which price the 27 acres deficient would amount to 192 dollars 78 cents, the court therefore decreed that the administrators of Blessing, out of his estate, pay to the complainant

294 *the said sum of 192 dollars 78 cents, with interest thereon from the 6th of September 1830 (when the last payment of the purchase money fell due) till paid; and that the complainant recover against the defendants his costs.

Although Arthur M. Bowen was the only person sued as administrator of Jacob Blessing deceased, and his son Jacob Blessing was no otherwise a defendant than as one of the heirs of the deceased, yet the decree was against both Arthur M. Bowen and Jacob Blessing as administrators.

On their petition, an appeal was allowed from the decree.

The cause was argued in writing by M'Comas and B. R. Johnston for the appellants, and by Sheffey for the appellee.

I. It was contended for the appellants, that the sale of the land was not by the acre, but in gross. Where the contract is not explicit, they argued, the question whether it is of the one character or the other, depends upon the particular circumstances of the case. The insertion or omission of the terms more or less is immaterial. In the case of *Keytons v. Brawfords*, 5 Leigh 39, the land was mentioned in the deed as containing a specified number of acres; but the court considered that this was merely descriptive of the tract of land, and could not be referred to the clause of warranty, so as to bind the party to make good a deficiency. The sale was held to be in gross, and the circumstance that the purchase money was not an equimultiple of the number of acres was strongly relied on. That circumstance equally exists here. The price per acre in this case, if it were considered to be by the acre, would be 7 dollars 14 cents and eight twenty-eighths part of a cent. The deficiency, moreover, is not excessive. Under the authority of *Keytons v. Brawfords*, no allowance should be made for it.

295 *For the appellee, it was contended to be a general principle of equity, that for deficiencies relief will be granted. Only in peculiar cases will that relief be refused. From the cases on the subject, this rule is fairly to be deduced: that where it can clearly be shewn by the vendor that the parties understood and expressly agreed that the one should risk the loss of a surplus and the other of a deficiency, let the quantity be what it might, no relief will be

granted; but where the parties did not contemplate a deficiency, or expressly contract with reference to risk as to quantity, and there turns out to be a deficiency, there equity will relieve. *Jolliffe &c. v. Hite &c.*, 1 Call 329; *Hull v. Cunningham's ex'or*, 1 Munf. 330; *Nelson v. Carrington & others*, 4 Munf. 332. Is it shewn by the appellants that such was the express contract and understanding of the parties? What evidence is there that a deficiency was contemplated, or made the subject of a contract? It does not appear by the contract, nor by the deed of conveyance. Not even the usual words "more or less" are used; and if they were used, they would not be conclusive. Who shews that Beatty expressly took upon himself the risk of a deficiency? No one. There is no principle of equity, then, which will throw upon him the loss. The only circumstance that can be relied upon to make the contract a sale in gross, is, that the average price per acre is not an even one. In *Keytons v. Brawfords*, this circumstance was expressly held not to be sufficient by itself. There were other strong circumstances in connexion with that; and from the whole the court inferred that the sale was a sale in gross.

II. It was contended for the appellants, that the case was not proper for the interference of equity. In *Long's ex'or &c. v. Israel &c.*, 9 Leigh 556, it is decided, that while equity will interfere by way of injunction to restrain the collection of purchase money, where a defect of title is alleged by the vendee, yet it is only

296 in that *mode that it will take jurisdiction; and that where the purchase money has been paid, and there is a mere covenant of general warranty, as in this case, the party will be left to his action at law, which only accrues when there has been eviction by paramount title. Though the facts in that case were stronger than in this, the party was left to his remedy at law. No compensation was allowed for land which, upon the proof, was covered by an elder and better title. In the case at bar, it appears that the appellee was put in possession under Blessing's deed, and the bill sets forth no complaint of eviction. But if equity interfere, it should only allow for so much as the land embraced in the deed from Blessing to Beatty falls short of 280 acres.

For the appellee it was said, that though the allowance for deficiency would be ascertained by the deed from Blessing to Beatty if that deed was correct, yet as there was a mistake in that deed, it was right to correct the mistake. The case of *Long's ex'or v. Israel &c.* was an authority in support of the decree in this respect. Blessing having contracted to sell, and Beatty to buy, according to the mortgage deed, it was proper to give compensation for the deficiency ascertained by running the lines according to that deed.

III. It was contended that the allowance per acre for the deficiency was too high.

The counsel for the appellee relied upon *Nelson v. Matthews &c.*, 2 Hen. & Munf.

164, and *Nelson v. Carrington & others*, 4 Munf. 332, as sustaining the allowance, which was of the average value of the whole tract.

For the appellants, it was said, that where there is a mere defect of quantity (the boundaries of the deed not including the full number of acres), the only rational and attainable standard of damages is the average value per acre; but that where, on the contrary, land is included within the boundaries which is lost by defect of title,

the land itself is subject to view and
297 *valuation, and no more damages will be given than the actual value of that very portion lost.

IV. It was insisted, that no correction could be made according to the mortgage deed, without making the heirs of Campbell parties. The counsel for the appellee answered, that all the interest of Campbell had been parted with by the mortgage, the sale under it, and the purchase by Blessing at that sale.

V. It was contended that the decree was clearly erroneous in decreeing against Jacob Blessing as administrator, when he was not sued in that character.

For the appellee it was said, that this, though erroneous, was an error without an injury. Blessing was not directed to pay out of his own funds, but out of the estate of the decedent. Having in his hands no estate of the decedent, he incurs no contempt by not performing the decree of the court, and his rights are no way affected. The burthen must fall upon the assets in the hands of Bowen the true administrator, and the associating another's name erroneously with his neither lessens his obligation to pay, nor renders the payment by him more difficult.

The counsel for the appellants replied that the decree as to Blessing was not so harmless as was supposed. For, while it remained unreversed, it fixed conclusively that there were assets in his hands, though he had never had the opportunity of pleading that he had no assets.

VI. It was insisted that the decree was erroneous in giving costs jointly against the administrators and heirs, and giving them, as against the administrators, *de bonis propriis*. *Long's ex'or &c. v. Israel &c.*, 9 Leigh 556.

The counsel for the appellee said, he did not understand the decree as making Bowen individually liable; and Blessing stood on the same footing with his coheirs.

BALDWIN, J. I am well satisfied, from all the circumstances of the case, that
298 it was the intention of *Blessing to sell, and of Beatty to purchase, the land embraced by the mortgage deed, according to the true boundaries, whatever those might be, and adopting the estimate of quantity expressed in that deed, to wit, 280 acres; but that a mistake occurred in relation to the boundaries, occasioned by errors in the deed from the commissioners to Blessing, and an unfortunate attempt to correct those errors without resorting to

the calls of the mortgage deed. The consequence has been that the deed from Blessing to Beatty embraces some land not conveyed by the mortgage deed, to which Blessing had no colour of title, and omits some comprised in that deed, to which there does not appear to have been any adverse claim. The decree of the circuit court very properly corrected the mistake, by directing a conveyance from the heirs of Blessing according to the calls of the mortgage deed. The corrected boundaries contain only 253 acres, shewing a deficiency of 27 acres: and the questions presented for our consideration upon merits are, whether compensation ought to be made for that deficiency, and if so, what should be the measure of compensation?

The principle upon which equity gives relief in cases of deficiency or excess in the estimated quantity upon the sale of lands, I understand to be that of mistake; whether the mutual mistake of the parties, or the mistake of one of them, occasioned by the fraud or culpable negligence of the other. I do not perceive any other principle upon which the jurisdiction can be founded; for if there has been no mistake, either in the contract itself or the execution of the contract, the parties must stand upon their legal rights, to be adjudicated and enforced in a legal forum, unless the question should arise incidentally in a court of chancery, in the exercise of some other branch of its jurisdiction. The principle was recognized in *Hill v. Buckley*, 17 Ves. 394, 401; *Glover v. Smith*, 1 Desaus. 433, and *Duvals*

299 **v. Ross*, 2 Munf. 290. It was the expressed and sole ground of decision in *Quesnel v. Woodlief*. That case, though commented upon and approved in *Jolliffe &c. v. Hite &c.*, 1 Call 301, was for some time misunderstood and questioned, 5 Call 9, 10, 2 Rand. 67, from the want of a correct report of it; (see an imperfect one in 2 Hen. & Munf. 173, note,) but it is now well and accurately reported in 6 Call 218, and its authority no longer disputed, but recognized; *Bierne &c. v. Erskine*, 5 Leigh 64. The cases of *Nelson v. Matthews &c.*, 2 Hen. & Munf. 164, and *Hull v. Cunningham's ex'or*, 1 Munf. 330, must have been founded upon the same principle. The idea is sometimes adverted to, of a tacit warranty annexed to every contract, that the thing bought or sold shall correspond with the representation made of it at the time, 5 Call 5, but this is only another mode of suggesting the same principle, and imports nothing more than the duty of one party to correct a mistake to which he has been instrumental, committed to the prejudice of the other. In the application of the principle, it is wholly immaterial whether a deficiency arises from a miscalculation of the area within the boundaries, as in *Duvals v. Ross*, or the exclusion by the described boundaries of a part of the tract sold, as in *Hull v. Cunningham's ex'or*, or the inclusion of a part unquestionably belonging to a third person, as in one aspect of *Nelson v. Matthews &c.*

The cases proper for compensation on account of deficiency or excess are of three classes. The first I will mention is that of a sale by the acre, by the express terms of the contract; for example, the sale of a tract stated at 1000 acres, for the price of five dollars per acre. Here the quantity mentioned is manifestly mere matter of description, or conjectural or temporary estimate; either party having a perfect right to ascertain accurately the precise quantity by actual admeasurement; which quantity,

when so correctly ascertained, 300 *gives infallibly, by the application of the stipulated price per acre, the exact amount of the purchase money. But if the parties, relying too much upon the estimated quantity, go on to adjust the consideration by that criterion, and it turns out that the estimate is erroneous, the mistake is undoubtedly one which must be corrected. In such a case, the mistake is not in the terms of the contract, but in the result of those terms when applied to the subject. The parties may, however, by their agreement, make the estimated quantity conclusive, by stipulating to dispense with a survey and to be governed in all events by the given estimate. This changes the sale into a contract of hazard, and necessarily excludes the interposition of equity on the ground of mistake.

A second class of cases is where the agreement or understanding of the parties is for a sale at a stipulated price per acre, but instead of stating those terms in the contract, they express, as the consideration, the result of a calculation based upon an erroneous estimate of the quantity. Here the mistake is in the terms of the contract, a gross sum having been adopted under the belief of its being the aggregate of the agreed price per acre. In such cases, also, the right to relief, otherwise clear, may be excluded by a stipulation that the estimated shall in any state of facts be taken as the actual quantity; the parties thus contracting for an anticipated hazard.

The third class of cases is where the parties contract for the payment of a gross sum for a tract or parcel, upon an estimate of a given quantity, which influences the price agreed to be paid. Here there is no mistake in the terms of the contract, nor in the application of those terms to the subject, but in an important element of the contract, which, if correctly understood at the time, would in all probability have prevented the contract from being made, or have varied its terms.

301 That *such cases require relief in equity, is well established; *Hill v. Buckley*, *Glover v. Smith*, *Quesnel v. Woodliff*, and *Duvals v. Ross*, above cited; to which may be added *Bierne &c. v. Erskine*, 5 Leigh 59, and the authorities cited by judge Lyons in 1 Call 316. The proper relief is to set aside the contract, or to give a just compensation, such as will place the parties in the same relative situation in which they would probably have placed themselves, if the true state of the

fact had been known when they made their agreement. In this, however, as in the other classes of cases, the relief being founded upon a mistake unprovided for, it is repelled by shewing that it was anticipated as probable, and provided for by an agreement that the contingency should be a matter of hazard.

This is briefly my view of what I consider the correct doctrine on this subject; over which it is true there is some obscurity, attributable, as I conceive, not so much to a difference of opinion in regard to the principles, as to an occasional want of accuracy and precision in the terms employed to express them; which has arisen in a great measure out of the use of the same words in different senses. Thus the word "gross" is applicable as well to the price as the thing sold, and "a sale by the acre" has reference to both. But we must bear in mind that upon the question of compensation, the substantial distinction is between a sale that is a contract of hazard, and one that is not. When "a sale in gross" is used as equivalent to a contract of hazard, the term is properly applicable not to the price but to the subject: for a sale by the acre may be a contract of hazard, and a sale for a gross sum may not. A sale in gross, when applied to the thing sold, means a sale by the tract without regard to quantity; and in that sense is (as was said by judge Cabell in *Russell &c. v. Keeran &c.*, 8 Leigh 19,) *ex vi termini* a contract of hazard. In that sense, however, the distinction sometimes taken

302 between *a sale in gross and a sale by the acre is too narrow; inasmuch as, though a sale in gross, thus understood, is a contract of hazard, a sale by the acre may be so too: and this want of comprehensiveness in the distinction is apt to beget a confusion of ideas, and lead us into error. Thus, when a sale for a gross sum is spoken of as a sale by the acre, because the quantity is not hazarded, two distinct classes of cases are confounded, and the absence of a provision regulating the price in the event of deficiency or excess, substituted for an express provision which does regulate it; in other words, a mistake of the parties as quantity, not provided for by the terms of the contract, is treated as identical with one which is provided for by the terms of the contract: for a sale at a given sum per acre carries out the intention of the parties, whether they are correct or mistaken in their estimate of the quantity; whereas a sale for a gross sum effectuates their intention, only where they are correct, and not where they are incorrect, as to the quantity. The inadequacy of the distinction tends to obscure the doctrine, and lead us away from the true ground of relief (the mistake of the parties) into delusive speculations as to the specific character of the contract. For example, where a given sum per acre is not an even quotient of the gross price stipulated, it cannot, as has been sometimes supposed, serve to show that the sale is a sale in

gross (understood as a contract of hazard), inasmuch as it may well have happened, not merely that there was no sale by the acre, but no estimate of the price per acre which the gross sum would give, and yet the gross price may have been influenced by the supposed quantity, by enhancing or diminishing the value according to an aggregate and not a distributive estimate.

The question of compensation usually arises (for reasons already suggested) not in sales by the acre, but in sales for a gross sum. In the latter cases, the enquiry

303 *to be made in the first place is, whether the parties made a mistaken estimate of the quantity, which influenced the price; and then, whether, notwithstanding such mistaken estimate, they have waived the right to compensation, by an agreement of hazard. In the absence of all direct evidence, the safest general rule, I think, is, that an estimate of the quantity by the parties, whether in a contract executed or a contract executory, ought to be taken *prima facie* to have influenced the price; for quantity is usually an important element of the agreement, and can hardly be supposed to have been disregarded by the parties, or to have been unmeaningly stated by them in a solemn contract. As a mere matter of description in a conveyance, it is for the most part useless; and more emphatically so in an executory contract. That the statement of the quantity has not generally been regarded as a matter of indifference, is evident from the frequent introduction of the additional words "more or less," the habitual employment of which can be for no other purpose than to shew that the parties do not intend to bind themselves for the precise number of acres mentioned: and the effect which the courts have given to those words (which have been construed to cover only small deficiencies or excesses, attributable to variations of instruments and the like, and not important deviations, *Queanell v. Woodlief*, 6 Call 218; *Jolliffe &c. v. Hite &c.*, 1 Call 301), illustrates the strong leaning of the courts against the inference of a contract of hazard; a construction which has moreover been expressly declared in several cases to be one that ought not to be favoured. *Hundley v. Lyons*, 5 Munf. 342; *Keytons v. Brawfords*, 5 Leigh 48.

In the case before us, the quantity is unequivocally and expressly stated at 280 acres, in the deed of conveyance from Blessing to Beatty, without even the addition of the customary words "more or less;" and the articles of agreement between them
304 evidence a sale of *"a certain tract or parcel of land containing 280 acres, called Staley creek place." These terms, to my mind, furnish at least strong presumptive evidence against a contract of hazard; and I am aware of no circumstances in the cause, by which that presumption is rebutted. The case of *Keytons v. Brawfords*, 5 Leigh 39, relied on by the appellants' counsel, is not like this. There, the

claim to compensation was not for a deficiency within the boundaries contemplated by the parties, but for the loss of land out of those boundaries, not intended to be sold, and which had been long held by an adverse claimant under a good title; and the deviations in the deed were from the known boundaries by which the land was sold and had been long held, the parties being misled in the description of the boundaries by erroneous title papers. Here, the deviations were from the true, but not accurately known boundaries of a correct title paper, by which the parties intended to be governed. There, the statement of the quantity in the deed was not an estimate according to the known and contemplated boundaries, but an incident of the erroneous description of the boundaries. Here, the statement of the quantity in the deed corresponds with that in the correct title paper, and must have been a mistaken estimate from the true and contemplated boundaries. These points of difference between the two cases are sufficient for my purpose; and I need not notice the various other circumstances relied on in the case cited, and not existing here, tending to shew a contract of hazard. The case of *Pendleton's ex'ors v. Stewart*, 5 Call 1, is more like this; but that case turned upon the effect of the words "more or less" in an executory contract, which, under the circumstances, were held to make a contract of hazard, upon the authority of *Jolliffe &c. v. Hite &c.*, 1 Call 301, where a public sale by an executor for more or less, so dis-

305 tinctly understood, was held to be of that character. *I do not consider the authority of *Pendleton's ex'ors v. Stewart* as applicable to the case before us, which is very much like, and cannot be distinguished in principle from, that of *Bierne &c. v. Erskine*, 5 Leigh 59, where a purchaser was compelled to make compensation for an excess, upon an executory contract for the sale, at a gross price, of a tract stated in the agreement to contain 100 acres.

For the reasons above stated, I am of opinion that the decree of the circuit court was right in holding the representatives of Blessing liable for the deficiency of 27 acres. As to the measure of compensation, I think there can be no difficulty. If the deed from Blessing to Beatty had been correct in the first instance, it would have presented the case of a mere deficiency in quantity within the boundaries of the tract conveyed; and such is the real nature of the case, after the correction of that deed according to the true boundaries. In such a case the general rule of compensation is according to the average value of the whole tract; and there are no particular circumstances here, requiring a departure from that rule.

The other objections to the decree require but little notice. There was no necessity for making the heirs of Campbell, the mortgagor, parties in the cause; he having been divested, by the mortgage and

the decree of foreclosure, of all title, legal and equitable. The joint decree de bonis testatoris against Bowen and Jacob Blessing, as joint administrators with the will annexed of the vendor Blessing, for the value of the deficiency, when the pleadings indicated that Bowen was the sole administrator, is not an error of judgment, but a clerical misprision, which may yet be amended. And so the decree against the administrator Bowen, jointly with the other defendants, the heirs of Blessing, for costs de bonis propriis, was evidently not intentional, but a mere oversight, which might have been corrected, on motion,

306 *by the court in which the decree was rendered, and which is still amendable. And the declaration contained in the decree, of the true boundaries of the tract, would by necessary implication relieve the heirs of Blessing from any responsibility, upon their ancestor's warranty, for the land out of those limits, but comprised in the erroneous deed: but perhaps it would be more regular, and certainly cannot be improper, to direct a release from Beatty to the heirs of Blessing of the land thus improperly conveyed.

Upon the whole, I am of opinion to affirm the decree of the circuit court with costs, after correcting it in the points above indicated.

STANARD, J., dissented. But ALLEN, J., and CABELL, P., concurring in opinion with Baldwin, J., the decree of the court of appeals was entered in the following terms:

The court is of opinion that there is no error in the said decree from which the same ought to be reversed; but that there is a clerical misprision therein, in decreeing jointly against the appellants Bowen and Jacob Blessing, as joint administrators with the will annexed of Jacob Blessing deceased, the value of the deficiency in the tract of land in the proceedings mentioned, sold and conveyed by their ancestor to the appellee, when the pleadings indicate that the said Bowen is the sole administrator with the will annexed of said testator, and therefore that the decree for that matter ought to have been against him alone as such administrator. And the court is also of opinion that the decree against the said administrator Bowen, jointly with the other defendants, for costs de bonis propriis, was evidently not intentional, but a mere oversight, which might have been corrected on motion in the court by which said decree was rendered, and is still amendable. It is therefore considered by the court that the said decree be, and the same

307 *is hereby, amended in said particulars. And the court is further of opinion, that though the declaration in said decree, of the true boundaries of said tract of land, would by necessary implication relieve the heirs of said Jacob Blessing deceased from any responsibility, upon their ancestor's warranty, for the land out of those limits, but comprised within the

erroneous deed executed by him to the appellee, yet that it would have been more regular to direct a release from the appellee, to the appellants who are the heirs of said Jacob Blessing deceased, of the land thus improperly conveyed. It is therefore considered by the court that the appellee do execute, to those of the appellants who are the heirs of said Jacob Blessing deceased, a good and sufficient deed of release for the land last mentioned. Therefore it is adjudged, ordered and decreed that the said decree, thus amended in the particulars aforesaid, be affirmed, and that the appellant Bowen out of the estate of his testator, and the other appellants out of their own estates, pay to the appellee his costs.

308 ***Warwick & Wife and Another v. Norvell.***

November, 1842, Richmond.

(Absent CABELL and STANARD,* J.)

Injunctions to Actions at Law—Legal Defences—Confession of Judgment.—A defendant at law, having a legal defence to the action, and a distinct ground for equitable relief against the plaintiff's claim, may bring his suit in equity without waiting for the determination of the action at law, and may, without being compelled to waive his legal defence by confessing a judgment, have a hearing in the court of chancery on the merits of this case, and a decree for the proper relief.

Patent—Waste Lands—Patent Void.—Land which had been patented in 1755, being adjudged in 1774.

*For monographic note on Caveat, see end of case.

†He had formerly been counsel for the appellee.

Injunctions to Actions at Law—Legal Defences—Confession of Judgment.—For the statement in the first head-note the principal case is cited and approved in *Robinson v. Braidon*, 44 W. Va. 195, 28 S. E. Rep. 802; *Knott v. Seamands*, 25 W. Va. 105; *Miller v. Miller*, 25 W. Va. 510; *Penn v. Ingles*, 82 Va. 60; *Dudley v. Miner*, 93 Va. 410, 25 S. E. Rep. 100; *Great Falls Man. Co. v. Henry*, 25 Gratt. 580.

See foot-note to *Thornton v. Thornton*, 31 Gratt. 12, and monographic note on "Judgments by Confession" appended to *Richardson v. Jones*, 12 Gratt. 58.

Same—Same—Discretion as to Requiring Confession of Judgment.—In *Great Falls Man. Co. v. Henry*, 25 Gratt. 579, it is said: "That our own courts have the discretion above accorded to them in relation to requiring a confession of judgment at law, and that they will not require it at all, if on the case made in equity it appear that it will be unsafe for the defendant at law to make such confession, is fully recognized by this court in *Warwick v. Norvell*, 1 Rob. 308."

Patents—Impeachment at Law—Causes Not Apparent on Face.—In *Blankenpickler v. Anderson*, 16 Gratt. 62, it is said: "There has been much conflict of opinion, and no little contrariety of decision upon the question how far a patent may be impeached, in an action at law, for causes not apparent on its face. The better opinion seems to be that while its validity cannot be questioned in a suit at law, but is impeachable in equity only, for causes anterior to its being issued which render it voidable merely, it may be impeached at law, for any matter which

upon petition to the general court, to be forfeited and revested in the crown, was, in 1797, granted anew by patent to the holder of a land office treasury warrant, as waste and unappropriated land. **Held** by the court of appeals (following the decision in *Whittington &c. v. Christian &c.*, 2 Rand. 353.) that the patent of 1797 was void.

Caveat—Waste Lands—Construction of Statute.—The statute of May 1779, ch. 13, giving the remedy by caveat for determining the right to waste and unappropriated lands, did not extend to lands which, having been once granted by patent, had afterwards lapsed and become forfeited to the state.

Patent—Repeal of—Statute.—Case in which a patent for land was repealed in chancery, under the statute 1 Rev. Code, ch. 119, so far as it interfered with the rights of the complainant.

In September 1812, Reuben Norvell brought a writ of right, in the superior court of law for Amherst county, against John Camm and Betsey his wife and John Warwick and Mary his wife, for a tract of 433 acres of land lying in Amherst. By the evidence at the trial it appeared, that the land in controversy was parcel of a tract of 3926 acres, which had been granted, in September 1755, to James Christian, John Christian and William Brown. That after the death of the grantees James and John Christian, (whereby the whole land survived to Brown) Charles and John Christian, sons of the grantee *John, presented a petition to the governor for the whole tract, as lapsed and forfeited for nonpayment of quit-rents. That the general court, in April 1774, gave judgment for the petitioners that the lands were forfeited and revested in the crown, and ordered it to be certified to the governor. That in October 1777, the petitioners Charles and John Christian conveyed and delivered possession of 933 acres of the land to James Grissom. That Grissom conveyed 433 acres, parcel of the 933 acres, to Thomas Powell, by deed dated the 27th of August 1787, and delivered him the possession accordingly. That Powell died in 1788, intestate; and Mrs. Camm and Mrs. Warwick were his daughters and only heirs at law. That Camm and wife and Warwick and wife, and those under whom they claimed, had been in possession, ever since the year 1774, of the land in controversy, which was the same parcel of 433 acres conveyed as aforesaid by Grissom to Powell. And that Norvell, the defendant, now claimed it under a patent issued to him, bearing date the 23d of November 1797, and founded on a land office treasury warrant. Whereupon the court gave an instruction to the jury, that, as the land had been once granted by patent in 1755, though it had been adjudged forfeited and lapsed, by the general court in 1774, and though no new patent had

been granted to the petitioners at whose suit it was so forfeited, yet it was not waste and unappropriated land, subject to be taken up by a treasury warrant, and therefore the patent granted to Norvell in November 1797 was void. The jury, under this instruction, found a verdict for the tenants, and the court gave them judgment. On appeal therefrom by Norvell, a special court of appeals, in December 1818, held that Norvell's patent, being on its face fair and regular, could not be thus impugned collaterally and by extrinsic evidence, but only by suit in equity to set it aside, or some other proceeding having that for its direct object; and that *patent must prevail, except against an elder one: therefore the judgment was reversed, and a new trial directed. See the report of the case, 6 Munf. 233.

In May 1819, Warwick and wife and Mrs. Camm (whose husband was now dead) preferred their petition to the superior court of chancery of Lynchburg, setting forth the rights under which they claimed and held the land in controversy; charging that Norvell's patent of November 1797, embracing the same, was obtained fraudulently, surreptitiously, illegally, and to the prejudice of the right of the petitioners, being granted upon the false suggestion that the land was waste and unappropriated, and while the female petitioners, who were then infants, were in the actual possession thereof, claiming title thereto in their own right: and therefore praying a writ of certiorari to the register of the land office, commanding him to certify the said patent into the court of chancery, in order that the same might be inspected and repealed. The certiorari was awarded, and a copy of Norvell's patent duly certified by the register. It was for 669½ acres of land, embracing the 433 acres claimed by the writ of right.

In February 1824, the case of *Whittington v. Christian* (reported in 2 Rand. 353,) was decided by the regular court of appeals. It was ejectment brought by the heirs of John Christian against Whittington, for 1000 acres of the 3926 acres of land granted by the patent of September 1755 to James Christian, John Christian, and William Brown. The plaintiffs claimed under John Christian, the son of John the original patentee, and one of the petitioners at whose suit the general court, in 1774, had declared the patent of 1755 forfeited. Whittington claimed under Norvell, who claimed this tract of 1000 acres under three patents dated in 1797, and who, and those claiming under him, had held the land ever since. In this case the same questions arose, which were presented in the case of *Norvell v. Camm &c.*, 6 *Munf. 233, and which were then decided in favour of Norvell; namely, Whether the land in question, having been granted in 1755, and having been afterwards, in 1774, adjudged to be forfeited and revested in the crown, was waste and unappropriated land, subject to location on a treasury warrant? if not,

makes it absolutely void; as where the state has no title to the thing granted, or where the officer had no authority to issue the grant. *Polk's Lessee v. Wendal*, 9 Cranch 87; *S. C.*, 5 Wheat. 293; *Patterson v. Winn*, 11 Wheat. 380; *Whittington v. Christian*, 2 Rand. 353; *Warwick v. Norvell*, 1 Rob. 308."

Whether, nevertheless, the commonwealth's legal title therein passed to Norvell by virtue of the patents granted to him in 1797? And the court, upon full consideration, decided both points in the negative: it held, moreover, that the petitioners, at whose suit, in 1774, the lands were adjudged forfeited by the original patentees of 1755, and the heirs or assignees of those petitioners, were even now entitled, by right of pre-emption, to claim grants for the lands so forfeited, and that such grants, when issued, would relate back to the date of the original patent of 1755.

In May 1824, Warwick and wife and Mrs. Camm filed their bill against Norvell, in the superior court of chancery of Lynchburg. After setting forth, in minute detail, the history and particulars of the title which the complainants claimed in the 433 acres of land (and which had been briefly stated in the petition), the bill charged that Norvell, though he well knew of the various acts under which the female complainants derived their title, proceeded to procure his patent of the 23d November 1797, while those complainants were yet infants of tender years, and while they were in full possession of the said tract of 433 acres; that the said grant to Norvell was illegally, fraudulently and surreptitiously obtained, by a false suggestion that the land embraced thereby was waste and unappropriated, and a fraudulent concealment of the facts known to him as aforesaid; and that it was obtained to the prejudice of the rights of these complainants. The bill then set forth the proceedings had in the writ of right, the decision of the special court of appeals therein, 312 and the conflicting *decision of the regular court of appeals in the case of Whittington v. Christian: after which it proceeded in the following terms—"These complainants, in the trial of the aforesaid writ of right, are placed by the varying judgments of the courts in this awkward dilemma—While it is solemnly decided, as the law of the land, that the said Norvell's patents are void both at law and in equity, it has been adjudged, as the law of this particular case, that the validity of said patents cannot be enquired into in a court of law. There are other grounds upon which these complainants are advised that they may still hope to recover, even at law, in the defence of the said writ of right: but they are also advised that it is unsafe for them to go into the trial thereof, precluded as they may be from insisting that the said patents of the demandant are void." Wherefore the bill prayed that the patent of the 23d November 1797 might be examined and repealed by the chancellor; that meanwhile Norvell might be enjoined from farther proceedings on his writ of right, until the subject could be examined and determined in equity; and that the court might order a new trial of the mise joined in the writ of right, wherein Norvell should be inhibited from using that patent in support of his claim.

The injunction was awarded.

Norvell answered, denying that his patent had been obtained fraudulently, surreptitiously, illegally, and upon false suggestion. He relied upon the opinion and judgment of the special court of appeals in his favour, in bar of all the claims advanced by the bill of the plaintiffs for relief; and he controverted the opinion expressed by the court of appeals in Whittington v. Christian, that the lands originally patented in 1755, and subsequently revested in the commonwealth, were not liable to be taken up under treasury warrants. "But" (the answer proceeded) "whatever may be the

313 fate of the question upon a review of the decision of the court of *appeals, this respondent is advised that the law of this case, as between him and the plaintiffs, was by the judgment of the special court of appeals, definitely and irreversibly fixed, and by the law so fixed he has a clear and incontestable right to recover at law. This being the case, this respondent is further advised that no precedent deserving the respect of the court sanctions the intervention of the court of equity in the way in which it is sought in this case, as so far granted, by stopping the proceedings at law, so as to keep the suit at law pending and undetermined. Such an intervention, if made on the idea that a defence may be still made at law, is violative of the most obvious principles of a court of equity, and if on the concession that there is no defence at law, it is equally reprobated by those principles, because it keeps on foot two undetermined suits, and should the plaintiffs succeed in equity, this respondent will have been exposed to expenses of the suit that is kept pending at law, without any possible advantage to any one, and should they fail, they will have had for a long time unmerited protection from a court of equity, while that court has left them, when that protection shall have been withdrawn, free to use at law every technical and quibbling objection that may possibly exist against the forms of the proceedings at law. This respondent insists that this case ought not to be taken out of the general rule; and by that rule no injunction should be awarded, but on the condition that the plaintiffs submit to judgment at law, and release all errors in such judgment."

On the 12th of October 1825, the court of chancery made an order that the injunction which had been awarded to the plaintiffs should stand dissolved as an act of that day, unless the plaintiffs should, at the next term of the superior court of law, confess judgment in the writ of right, for the 433 acres of land in the bill mentioned as claimed by them, or so much thereof 314 as *might be comprised in the defendant's grant sought by the bill to be repealed. On appeal by Warwick and wife and Mrs. Camm from this decree, the court of appeals affirmed the same; saying, that the general rule was, that when a party came into equity, to be relieved against proceedings at law, he must confess judgment at law, and rely solely on

the court of equity for relief: that there was nothing in the peculiar circumstances of this case to take it out of the rule: that, indeed, it did not appear that there was any cause for an injunction, except to restrain the defendant in equity, after judgment obtained by him at law, from turning the tenants out of possession, before the validity of the patent on which his legal title depended, should be examined and decided on in the court of chancery. See the case reported in 1 Leigh 96, where will be found a history, in some respects more detailed than the preceding, of the controversy between these parties.

After the case got back to the court of chancery, the only additional papers filed were copies of some proceedings in the writ of right, which shewed that it was still pending and undetermined in September 1829. At May term 1830, the cause was continued at the instance of the defendant, though the plaintiffs pressed for a hearing and offered to take a decree vacating the defendant's patent upon condition the plaintiffs should confess judgment in the writ of right. And at the October term 1830, the plaintiffs again offered to take a decree upon the same condition. But the cause being finally heard at that term, the chancellor dismissed the bill, upon the ground that after the decision of the court of appeals affirming the decree which conditionally dissolved the injunction, it was necessary for the plaintiffs either to comply with the condition of confessing a judgment at law, or to abandon their suit in chancery, and that in failing to confess the judgment they had shewn their preference for relying upon their defence at law.

315 *From the decree of dismissal, Warwick and wife and Mrs. Camm again appealed to this court.

Johnson, for appellants. The injunction was a mere appendage to the bill of the appellants, and this court, on the former appeal, held that it was even an unnecessary appendage. Yet the chancellor decided that as the injunction had been properly dissolved in consequence of the failure of the complainants to confess judgment in the action at law, the case ought not to be heard on the merits without such confession. This was obviously wrong, and this court will now decide the merits. The case arises under the statute 1 Rev. Code, ch. 119, p. 466, which declares and regulates the practice of suing out and prosecuting writs of scire facias to repeal letters patent. It may be said that the complainants should have waited until the writ of right was disposed of, and then brought their suit to repeal Norvell's patent. It may also be said that judgment in the writ of right may have rendered the decision of this case unnecessary. The first objection is sustained by no authority: and as to the last, this court can know nothing of any decision that may have taken place in the action at law. Besides, even if a judgment had been rendered in favour of the appellants, it would still be material

for them to have Norvell's patent vacated.

Stanard, for appellee. It is unnecessary to go into any examination of the merits, because the appellants have not placed themselves in a condition to entitle them to ask judgment on the merits. They have refused so to do, and elected instead to rely on their legal rights. The bill was filed in opposition to the plain elementary principle, that a party shall not, at the same time, litigate the same matter at law and in equity. The plaintiffs, if they relied on the equitable circumstances, should have relied solely on them, and submitted themselves entirely to the

316 court of equity for relief. See *Rogers v. Vosburgh, 4 Johns. C. R. 84; Branch v. Burnley &c., 1 Call 153, and the argument for the appellee on the former appeal between these parties, 1 Leigh 106. But the principle as contended for by the appellants' counsel is only applicable where no real defence exists at law; that is, where its application would avail nothing. In his answer, the appellee objects to the course taken by the appellants, that injury might thereby be inflicted on him, for which there would be no compensation. The soundness of the objection is well illustrated by the fact (not appearing, it is true, in this record) that the appellants have obtained judgment in the action at law, from which no appeal was taken in time, and yet are subjecting the appellee to the expense of this suit in equity, brought for the ostensible purpose of enabling them to do that which the result shews they could have effected without coming into equity. [Allen, J. There may be a case in which a party having a defence at law, may not be willing to defer his resort to equity until after the judgment, lest he should be barred by the limitation.] In no case where a bill is filed for substantive relief in equity, and the matter is the subject of a suit at law, will the court of equity permit the party to be proceeding at the same time in both forums. The cases in which equity permits the simultaneous proceeding in both forums in respect to the same matter, are those in which its own jurisdiction is ancillary to the jurisdiction at law.

The statute 1 Rev. Code, ch. 66, § 60, p. 208, directs that on the dissolution of an injunction, the bill of the complainant shall stand dismissed, unless sufficient cause be shewn against its dismissal. And where the complainant is proceeding at the same time in both forums, no such cause can be shewn.

Upon the merits, if it be necessary to go into the consideration of them, the plaintiffs are not entitled to relief. For, if

Whittington v. Christian is to govern 317 this *case, there was no necessity for coming into equity. If on the other hand the decision of the special court is to prevail, it amounts to this, that the appellee must succeed at law by force of his patent; and then, on the authority of Noland v. Cromwell, 4 Munf. 155, the appellants can-

not be admitted to sue in equity, unless they shew that they were prevented by fraud, surprise or accident, from resorting to the remedy by caveat. The doctrine on this subject was afterwards examined in *M'Clung v. Hughes*, 5 Rand. 453, and *Jackson v. M'Gavock*, 5 Rand. 509. If *Noland v. Cromwell* settles the law as of that time, it settles the law of this case. If the statute of 1819, 1 Rev. Code, ch. 86, § 38, p. 330, be relied on, *Jackson v. M'Gavock* settles that that statute is prospective. But even under *M'Clung v. Hughes*, the appellants here are entitled to no relief; for the appellee has been guilty of no actual fraud.

Under the proviso in the statute 1 Rev. Code, ch. 119, § 1, p. 467, the remedy given by that statute lies only for a party having an equitable title to lands. Whatever title the appellants have to the land in controversy, is decided by the cases of *Whittington v. Christian* to be purely legal.

Johnson in reply. The doctrine as to election, where two suits for the same thing are brought by the same plaintiff, is not controverted. But here the party is the pursued in one forum, and the pursuer in the other. The decision in 1 Leigh 96, itself denies the applicability of that doctrine to this case: for it supposes that there is jurisdiction, and that relief in equity may be given. And after a cause has been brought before this court, and the court has directed certain proceedings therein, the jurisdiction is no longer to be questioned.

Suppose the bill here had not been filed until after judgment; would it have been any objection that the defence was not made at law? The whole objection of the appellee

is merely that the bill was filed too soon—*that if the appellants had suffered the case at law to proceed to judgment, they might have succeeded in the court of law, in which event they would have had no occasion to come into equity.

The doctrine as to caveats has no application in this case. That doctrine is settled with reference to patents which have been acquired according to law; which the officers of the commonwealth were authorized to issue, and which do give the legal title. It has no reference to patents which the commonwealth's officers had no authority to issue, and which do not convey any legal title.

It is objected that the proceeding in equity was not authorized, if the title of the appellants was legal. Is not a good legal title a good equitable right under the statute giving the scire facias to repeal patents? If not, what means the doctrine that a patentee may caveat? But it is not ascertained, even by *Whittington v. Christian*, that the title of the appellants is not purely equitable.

Whittington v. Christian now authorizes us to say that *Norvell's* patent is void—that he had no legal title to the land in controversy. There was then a good defence to *Norvell's* action. But the special court of appeals mistook the law (as we are now au-

thorized to say) and held that the defence was to be shewn in equity. In this state of things the appellants go into equity, and the court of chancery says it will not grant relief, not because *Norvell's* patent is valid, but because the appellants have elected to make their defence at law. The whole question is merely this: whether, where a party has a good defence at law, and he is prevented from making it, not by his own fault but by a mistake of the courts, he may make it in equity?

ALLEN, J. The effect of the interlocutory order, affirmed by this court when 319 this case was formerly before *it, was merely to dissolve the injunction which had been allowed the plaintiffs, unless they should confess judgment at law for the land in controversy. The chancellor has given to the order a much broader interpretation. Though the case was ready for hearing, and a decision on the merits asked for, he has proceeded, not to dissolve the injunction according to the terms of the former order, but to dismiss the bill. In this course it seems to me he erred. The injunction was a mere incident to the main controversy. In the opinion of this court there was no cause for it when allowed. But though the plaintiffs lost the benefit of the injunction, they were still entitled to a decision upon the merits, if the case was in other respects proper for a court of chancery.

The jurisdiction of the court is objected to, because the plaintiffs relied, in their defence to the writ of right, upon the same matters set up in the bill as grounds for equitable relief. It is said that by refusing to confess judgment they have elected to abide by their legal defence, and they should not be permitted to litigate the same matter, at the same time, both at law and in equity. The plaintiffs, it is true, did attempt to avail themselves of these same matters in defence of the action at law. The special court of appeals decided, that they constituted no legal defence; that however it might be in equity, at law the defendant could not go behind a patent, regular on its face, and avoid it by extrinsic evidence. The ground of the objection to the jurisdiction therefore fails. The plaintiffs are not relying upon the same matters, as a defence to the action at law, and for relief in equity. For at law, and as respects this particular case, the matters charged in the bill constitute no defence whatever. What was the defence which the appellants expected to make at law, does not appear; nor is it material. It is sufficient to sustain the jurisdiction of the court of equity, if it be shewn, 320 that, *by the course of decisions settling the law of this case, the matters relied on in the bill could avail the appellants in equity only.

No authority has been produced which establishes that a party having a defence at law to an action brought against him, and a distinct ground for equitable relief

should his defence prove unavailing, must abandon his legal defence by confessing judgment, or await the decision of the action at law before he can be entertained in equity. Where there is a concurrent jurisdiction of the same matter, and the plaintiff may sue in either forum, there is good reason to compel him to elect between them. Redress can be obtained in either, and the plaintiff should not be permitted to harass his adversary by pursuing him in both tribunals. The defendant has no such election; he is brought into court against his consent: and I perceive no good reason why he should be prohibited from setting up his distinct ground for equitable relief, during the pendency of the action at law. The holder of the legal title has frequently obtained it under circumstances which would constitute him a trustee for the party having a superior equity. A question however may arise, whether the elder grant embraces the subject in controversy? This is proper to be determined by the legal tribunal. It is to the interest of the defendant at law, that it should be ascertained. Until it is determined, it does not appear that the plaintiff at law has a title which interferes with the right of the defendant. In such cases the defendant cannot safely confess a judgment at law. And if in the meantime he should be precluded from proceeding in chancery, his equitable right might be lost, from the lapse of time or the loss of testimony.

It is further objected that the caveat was the proper remedy, and that no sufficient excuse is offered for failing to resort to it. The remedy by caveat was provided to settle the numerous controversies likely
321 to arise between *competitors for land under the act of 1779. That law provided a mode for the disposition of waste and unappropriated lands, and for the settlement of all existing claims to unpatented lands. But lands which had been once patented, and had lapsed, were not embraced by its provisions. They were left, according to the decision in *Whittington v. Christian*, 2 Rand. 353, "as they were under the former laws." Those laws regulated the mode of proceeding in regard to lands in this condition. The first petitioner acquired a right to sue out a patent upon the performance of certain conditions. He could be deprived of this right but in one way,—by the judgment of the proper tribunal at the suit of a subsequent petitioner. Without such judgment, no grant could issue. And if a grant did improperly issue, the first petitioner could at any time sue out his patent, which related back to the first grant, and so overreached any intermediate patent. The petition and judgment thereupon would seem to have been the mode of determining controversies under the laws then in force. There was no need of the caveat. Until judgment of forfeiture, the right of the first petitioner was completed as against all others, and a subsequent grant would have been merely void. After judgment of forfeiture, his interest was at an end. I think, there-

fore, that there is nothing in this objection.

Upon the merits, the previous action of this court has left us but little to determine.

The case of *Whittington v. Christian* decided that these lands could not be appropriated by a land office treasury warrant, as waste and unappropriated; that having once been granted, no title could be acquired by entry and survey; that they were reserved to be granted in a specified mode, and a patent obtained in any other mode was void. The special court of appeals, in 6 Munf. 233, had decided in reference to the patent in this case, that as it was
322 regular on its face, extrinsic *evidence was not admissible to impeach it in a court of law. The law of the land, as determined in one case, renders all such patents void; the law of the case, as decided by the special court of appeals, excludes all evidence of facts, upon the trial at law, which go to impeach the validity of the grant. In this state of the law and the adjudications, the plaintiffs have resorted to the only remedy left, a scire facias to repeal the patent. The law regulating this proceeding authorizes it to be sued out to repeal a patent obtained from the commonwealth by false suggestions, or issued contrary to law, or to the prejudice of private right. In this case the patent was obtained by the false suggestion that the land was waste and unappropriated, and liable to entry and survey under a treasury warrant. It issued against law, as lands once granted and lapsed could only be granted in the mode specified, after judgment of forfeiture. And it issued to the prejudice of the better right of the plaintiffs; for, until forfeiture, they were entitled to a grant upon performing the conditions required. I think therefore that the court, instead of dismissing the bill, should have rendered a decree repealing so much of the patent to the defendants, dated the 23d day of November 1797, for 669½ acres of land, as interferes with and is included within the boundaries of the tract of 433 acres, conveyed by James Grissom to Thomas Powell the ancestor of the plaintiffs, by deed bearing date the 21st day of August 1787.

The other judges concurring, decree reversed with costs. "And this court proceeding to pronounce such decree as the said chancery court ought to have pronounced, it is further decreed and ordered, that so much of the patent to the appellee, dated the 23d day of November 1797, for 669½ acres of land, as interferes with and is included within the boundaries of the tract of 433 acres, conveyed by James Grissom
323 to Thomas Powell *the ancestor of the appellants, by deed bearing date the 21st day of August 1787, be and the same is hereby repealed, and that the appellee do pay unto the appellants their costs by them about their suit in the chancery court expended. And it is further ordered that this decree be certified to the register of the land office."

CAVEAT.

- I. Object and Necessity.
- II. When Caveat Lies.
- III. Title to Support.
- IV. Who May Maintain.
- V. Effect of Failure to File.
- VI. Procedure in Caveat Cases.
 1. In General.
 2. What Caveat Must State.
 3. Evidence.
 4. Dismissal of Caveat.
 5. Appeals.

I. OBJECT AND NECESSITY.

Object of Caveat.—The object of *caveat* is that a person having a better right to land to which another has obtained a survey may prevent his obtaining a grant until the title can be determined. *Harper v. Baugh*, 9 Gratt. 508; *Wilcox v. Calloway*, 1 Wash. 38; *Trotter v. Newton*, 30 Gratt. 582.

Necessity of Caveat.—It was foreseen by the legislature, that there would be interfering entries and surveys upon public lands by parties claiming title thereto, and *caveat* was the remedy for settling all those disputes prior to the patent to avoid the inconvenience of that solemn instrument being involved in contests of that kind. *Lewis v. Billips*, 1 Leigh 353; *Johnson v. Brown*, 3 Call 267.

II. WHEN CAVEAT LIES.

(See *post*, this note, "Who May Maintain.")

Statute Giving Remedy Does Not Apply to Forfeited Lands.—The statute of May 1779, ch. 13, giving the remedy by *caveat* for determining the right to waste and unappropriated lands, did not extend to lands which, having been once granted by a patent, had afterwards lapsed and become forfeited to the state. *Warwick v. Norvell*, 1 Rob. 306.

To Inclusive Survey.—A *caveat* lies as to an inclusive survey although there is no certificate from the county court that it is reasonable. *Harvey v. Preston*, 3 Call 496.

Where Survey is Not Made Twelve Months before Filing Caveat.—A *caveator* whose survey has not been made twelve months before he enters his *caveat*, will not have judgment rendered against him merely because the twelve months, allowed for returning the plat and certificate of survey into the land office, have elapsed pending the *caveat*. *Wilson v. Daggs*, 8 Leigh 681.

III. TITLE TO SUPPORT.

In *caveat*, as in ejectment, the *caveator* must show the better right to the land in controversy to be in him. He cannot recover on the ground of the weakness of his adversary's title. *Harper v. Baugh*, 9 Gratt. 508, and *foot-note*; *Beckwith v. Thompson*, 18 W. Va. 123; *Walton v. Hale*, 9 Gratt. 194, and *foot-note*; *Trotter v. Newton*, 30 Gratt. 582, and *foot-note*; *Carter v. Ramey*, 15 Gratt. 346, and *foot-note*; *Fleld v. Culbreath*, 2 Call 547.

In all cases of *caveat* the *caveat* rests upon the ground of the better right in the *caveator* for the land surveyed. Unless he can show such better right, the *caveatee* is entitled to the judgment, though it might appear that as against the party showing the right, his entry and survey were defective. *Walton v. Hale*, 9 Gratt. 194; *Beckwith v. Thompson*, 18 W. Va. 123.

Title to Warrant under Which Survey is Made.—The party filing a *caveat* must show a title to the war-

rant under which his own entry and survey are made, and if he fails to do so his *caveat* will be dismissed. *McNeel v. Herold*, 11 Gratt. 309; *Currie v. Martin*, 3 Call 28.

IV. WHO MAY MAINTAIN.

Administrator.—An administrator with the will annexed, being in possession of lands therein directed to be sold, may maintain a *caveat* to prevent any other person from obtaining a patent for the same as waste and unappropriated. *Archer v. Saddler*, 2 H. & M. 370.

Party Claiming under Grant.—Under § 38 of the general land law (1 Rev. Code, ch. 86), a person holding a perfect legal title to lands by grant from the commonwealth may maintain a *caveat* to prevent the issue of a junior grant to another person. *Hardman v. Boardman*, 4 Leigh 377.

Party Holding Adverse Possession.—Uninterrupted and peaceable possession of the land in controversy for a great length of time may of itself be sufficient to give title to the land and enable the occupant to maintain a *caveat* against parties claiming under a junior patent. Thus in *Archer v. Saddler*, 2 H. & M. 370, the circumstance of upwards of sixty years of peaceable and uninterrupted possession in the *caveator* and those under whom he claimed, together with payment of quit rents before, and taxes since, the revolution, was considered sufficient ground from which the jury might presume that a patent or grant for the land had been formally issued.

Party without Any Right to Land Cannot Maintain.—In *Carter v. Ramey*, 15 Gratt. 346, the entry and survey of both the *caveator* and *caveatee* being upon land which had been previously granted by the commonwealth, and which had never been forfeited, and the commonwealth having no interest in the land which could be vested in the *caveator*, it was held that he could have no right to it and could not maintain a *caveat* even though the *caveatee* had no better right. See also, *Walton v. Hale*, 9 Gratt. 194; *Beckwith v. Thompson*, 18 W. Va. 123.

V. EFFECT OF FAILURE TO FILE.

Generally Bars Equitable Relief.—Where one has such an equity as would, upon a *caveat* prior to the grant, have entitled him to a preference, it is not ground for a bill to set aside the title, unless he was prevented by fraud or accident from prosecuting a *caveat*. *Johnson v. Brown*, 3 Call 269; *Noland v. Cromwell*, 4 Munf. 155.

In the application of this rule, it was held in one case that a person neglecting to prosecute a *caveat* to prevent the emanation of a patent for land, was not entitled to a relief in equity on the ground of a previous certificate of the board of commissioners, under the Act of May 1779, ch. 12, in his favor. *Gooseman v. Martin*, 4 Munf. 533.

One who intended to take advantage of the interval between the acts of assembly for continuing the time for returning surveys into the land office should have entered a *caveat*. And if he neglected it, and a patent was granted on the survey, he cannot come into equity for relief against it, although he may have made an entry in the interval between the two acts of assembly. *Staples v. Webster*, 5 Call 261.

Where Caveat Was Prevented by Fraud.—After a grant issued, one claiming a prior equity against the grantee, can, in no case, have relief in equity, unless upon the ground of actual fraud in the ac-

quisition of the legal title, or unless the party was prevented from prosecuting a *caveat* by fraud, accident or mistake. By actual fraud is meant the proceedings to procure a patent after actual notice of a prior equity. *McClung v. Hughes*, 5 Rand. 458; *Jackson v. McGavock*, 5 Rand. 509; *Lyne v. Jackson*, 1 Rand. 114.

Where There is Independent Ground for Equitable Relief.—Although a party may be let into a court of equity on grounds which he could not have used on the trial of a *caveat*, and which, in fact, make another case, or upon a case suggesting or proving that he was prevented by fraud or accident from prosecuting his *caveat*, he is not to be sustained in the court of equity on such grounds as were or might have been brought forward on the trial of the *caveat*. *Noland v. Cromwell*, 4 Munf. 155. But this principle does not apply to a case in which the rights of the parties cannot be adjusted in the court of the *caveat*, but the aid of the court of equity is necessary to give to each his proper share of the land for which one has improperly obtained a patent. *Christian v. Christians*, 6 Munf. 534.

Depends on Circumstances of Each Case.—Though a party has sufficient ground for filing a *caveat* he does not in all cases lose his remedy by failing to file it; for the mere omission to *caveat* will not be considered as having closed the door to relief where the circumstances of the case are such as to excuse the failure. *Hamilton v. Maze*, 4 Call 196; *Depew v. Howard*, 1 Munf. 293; *Christian v. Christians*, 6 Munf. 534.

Under Statute, § 38, Code 1819.—Since the passage of the act embodied in § 38, Code 1819, the omission of any person, claiming a better right to land, to avail himself of the remedy by *caveat* does not bar such person from asserting such better right in any court of law or equity, in the same manner as if no such remedy by *caveat* had been given. *Beckwith v. Thompson*, 18 W. Va. 123.

VI. PROCEDURE IN CAVEAT CASES.

1. IN GENERAL.

Time of Entering Caveat.—The time of the return of a survey into the office is the period from which the six months are to be calculated for entering a *caveat*. In such case the *caveat* must show the fact. *Harvey v. Preston*, 3 Call 495.

Damages Not to Be Given in Caveat Cases.—Damages are not to be given upon the affirmance of the judgment in cases of *caveat*. *Harvey v. Preston*, 3 Call 495.

Objects Called for in Entry Not of Public Notoriety—Necessity for Special Verdict.—In a *caveat*, where the objects called for in the entry are not of such public notoriety as that the courts will take notice of them, a special verdict must find that the objects called for have a real existence, and are such as is required to make it a valid entry. Where the finding is defective in this respect it will not be remedied by finding that the survey was made in conformity with the entry. *McNeel v. Herold*, 11 Gratt. 309.

2. WHAT CAVEAT MUST STATE.

Grounds of Caveator's Claim.—The *caveator* must state in his *caveat* the grounds on which he claims the better right to the land in controversy; and he will not be permitted on the trial to abandon the right he has set out in his *caveat* as that under which he claims and prove a different one. *Harper v. Baugh*, 9 Gratt. 508, and *foot-note*; *Trotter v. Newton*, 30 Gratt. 552, and *foot-note*; *Clements v. Kyles*, 13 Gratt. 468; *Beckwith v. Thompson*, 18 W. Va. 123.

Reason of Rule.—"The law required the *caveat* to express the nature of the right on which the plaintiff claims the land. The object of the *caveat* is, in part, to notify the *caveatee* of the grounds on which the *caveator* claims the better right, that he may come prepared to controvert it; and it would be a surprise on him to permit the *caveator* to abandon at the trial the right which he had set forth in his *caveat*, as that under which he claimed, and prove a different right. Such a course would lead to injustice, and is in conflict with the terms of the statute, which requires the nature of the better right to be expressed in the *caveat*." *Harper v. Baugh*, 9 Gratt. 508; *Trotter v. Newton*, 30 Gratt. 552.

Effect of Failure to State Grounds of Claim.—A *caveator* should state in his *caveat* the grounds on which he claims to have the better right to the land in controversy. And if this is not done the *caveatee* may either move the court to dismiss the *caveat*, or to require the *caveator* to file a specification of the alleged better right on which his claim is founded. But after the jury is sworn to ascertain the facts it is then too late to object to the form of the *caveat*. *Clements v. Kyles*, 13 Gratt. 468; *Beckwith v. Thompson*, 18 W. Va. 123.

3. EVIDENCE.

To Show Patent to Be Founded upon Survey.—In *Clements v. Kyles*, 13 Gratt. 468, the *caveator* claimed under the patent issued in 1756, which did not refer to any survey. In order to show that the patent was founded on a survey, he offered in evidence a copy from the books of the surveyor of the county of a certificate of a survey and plat dated in November 1749. The certificate itself did not contain the calls for courses and distances or other marks, but these were given on the plat, and they agreed with the grant in its general and locative calls. This was held competent evidence for the purpose for which it was offered.

What Court May Consider.—In a *caveat* case, upon a question involving the boundary line between two counties, the court, in construing the acts in relation to their boundaries, may look to the acts forming other counties both before and subsequent, for the purpose of ascertaining the intention of the legislature as to the location of the boundary line. *Hamilton v. McNeill*, 13 Gratt. 389.

4. DISMISSAL OF CAVEAT.

Not Binding Unless on the Merits.—A dismissal of the *caveat*, unless it be on the merits, is not binding. *Hunter v. Hall*, 1 Call 206.

Dismissal without Prejudice.—In a *caveat* case, if it be found by the jury or agreed by the parties, that since the institution of the *caveat*, a grant from the commonwealth of the land in controversy has been obtained by the *caveatee*, judgment ought to be entered dismissing the *caveat*, but such judgment to be no prejudice to another suit in chancery which the *caveator* may bring to vacate the said grant, or any other grant that may issue to the *caveatee* in consequence of such judgment of dismissal; the judgment on the *caveat* being, in that event, not pronounced on a comparison of the respective rights of the parties. *Guerrant v. Bagby*, 6 Munf. 160.

5. APPEALS.

What Constitutes Record.—In a case of *caveat* all the facts agreed by the parties, or found by the jury, or, if a jury is dispensed with, ascertained by the court, necessarily become and should be made a part of the record in the cause. *Hamilton v. McNeill*, 13 Gratt. 389.

Where Evidence Is Certified.—Where the court certifies the evidence instead of the facts, and there is no conflict in the parol evidence, and taking the whole as true the appellate court may proceed safely to judgment upon the same, it is the duty of such court to proceed and give judgment according to the very right of the cause. *Hamilton v. McNeill*, 18 Gratt. 389.

Where Patent Issues to Caveatee after Appeal Taken.—In *Wilson v. Daggs*, 8 Leigh 681, after the dismissal of a caveat upon its merits, the caveatee filed in the land office a copy of the judgment, and obtained a patent. A supersedeas being awarded to the judgment, the patent was relied on as a bar. It was held that, notwithstanding the emanation of the patent, the court might examine into the correctness of the judgment; but if the judgment be reversed, then a dismissal of the caveat must ensue—the dismissal being without prejudice to any proceeding which might be instituted to vacate the patent.

When Bill of Exceptions Unnecessary.—Where the jury is dispensed with and the whole cause is submitted to the court, it is not necessary for the losing party to file a bill of exceptions to the judgment of the court, or to move for a new trial, and, if it is refused, to except to the opinion of the court refusing it; but it is sufficient that the circuit court shall make the facts agreed and ascertained, or the evidence, where the parol evidence is in no respect conflicting, a part of the record by its order to that effect upon rendering judgment. *Hamilton v. McNeill*, 18 Gratt. 389.

Armstrong v. Huntons.

November, 1842, Richmond.

(Absent STANARD,* J.)

Equity Jurisdiction—Discovery—Slaves.†—Bill in equity by claimant of legal title to a female slave, against an adverse claimant, charges that the slave, with her increase if any, is in possession of defendant, who refuses to surrender the same to plaintiff; and prays that defendant may be decreed to give up the slave, that he may set forth the names of her increase if any, and say if the same be not in his possession, and that he may account for the hires and profits thereof since the plaintiff's title accrued. **Held**, equity has no jurisdiction of the case.

Alexander Hunton, who died in 1789, by his will bequeathed a female slave named Letty to his daughter Nancy and her heirs forever; and having bequeathed likewise

*He had been counsel for the appellees.

†**Equity Jurisdiction—Discovery—Slaves.**—The principal case is cited in *Hall v. Smith*, 25 Gratt. 76; *Childress v. Morris*, 23 Gratt. 806; *Hale v. Clarkson*, 23 Gratt. 47; *Jones v. Bradshaw*, 16 Gratt. 360. See monographic note on "Bills of Discovery" appended to *Lyons v. Miller*, 6 Gratt. 427.

Same—Action of Detinue.—In *Summers v. Bean*, 18 Gratt. 419, the court said: "If the appellee could recover the slaves by an action of detinue, he would have an ample remedy at law and could not come into equity for relief. *Armstrong v. Huntons*, 1 Rob. R. 323, and cases therein cited." The principal case is cited in this connection in *Childress v. Morris*, 23 Gratt. 806.

to ten others of his sons and daughters one slave each, he added—"It is my will, that if any of my before mentioned children die without lawful heirs of their bodies, their estate left them shall be equally divided among the surviving children."

In July 1818, Robert, Susanna, John and George Hunton exhibited a bill against Thomas Armstrong, in the superior court of chancery of Fredericksburg, setting forth the will of Alexander Hunton; 324 alleging, that after *the testator's death, Cyrus Newby, who had intermarried with Nancy Hunton, took possession of the slave Letty, who afterwards had several children, one of whom named Patty, with her increase, if any, was now in possession of the defendant Armstrong; that Nancy Newby had died without ever having had issue, whereby the plaintiffs, the only children of the testator that survived the said Nancy, became entitled to the woman Patty and her increase, and had applied to Armstrong for them, but he refused to surrender them, pretending that as he had bought Patty from Cyrus Newby, he was the rightful owner. The bill therefore prayed, that Armstrong might be decreed to give up the woman Patty; that he might set forth the names of her increase, if any, and say if the same be not in his possession; and that he might account for the hires and profits thereof since the death of Nancy Newby.

Armstrong demurred to the bill, shewing as the ground of demurrer that the matter was properly cognizable at law. At the same time he put in an answer, stating, that he bought a negro girl named Patty at a sheriff's sale in 1811 under an execution sued out against Cyrus Newby, presuming that the title was in Newby, and knowing nothing of the stock from which she came; and that he held her till April 1818, when he sold her.

The court overruled the defendant's demurrer to the bill, and directed an account of the profits of the slave Patty from the death of mrs. Newby until she was sold by the defendant, and of the period and price at which she was sold. The commissioner reported an account of profits, amounting to 8 dollars; but instead of the price for which Armstrong sold the slave, he reported her estimated value at the time of the sale (the 15th of April 1818), which was 500 dollars.

It appeared by testimony taken in the cause, that Patty was only about 14 or 15 years old when Armstrong sold her.

325 *The court approved the commissioner's report, and decreed that Armstrong pay to each of the complainants 127 dollars, with interest on 125 dollars, part thereof, from the 15th of April 1818 till paid; and that he also pay the costs of the suit. From which decree Armstrong appealed to this court.

In the argument here, by Leigh for the appellant and Stanard for the appellees, several questions of law and fact were

earnestly debated. But as this court decided the question of jurisdiction alone, it is unnecessary to notice any of the others.

On that point, Leigh cited and examined the following authorities: Duvals v. Ross, 2 Munf. 290; Gregory's adm'r v. Marks's adm'r, 1 Rand. 355; Rankin v. Bradford and others, 1 Leigh 163; Hardin's ex'ors v. Hardin, 2 Leigh 572; Parks's adm'r and heirs v. Rucker, 5 Leigh 149. He said, the plaintiffs had not pretended in their bill that they were ignorant of any thing necessary to enable them to maintain an action at law. The case of Hardin's ex'ors v. Hardin was expressly in point, and conclusive against the jurisdiction.

Stanard contended that the case of Gregory's adm'r v. Marks's adm'r was an authority for, and not against, the jurisdiction in this case. As to the other cases cited by the counsel for the appellant, he endeavored to shew that they were distinguishable from the present case. In Hardin's ex'ors v. Hardin, the case mainly relied on for the appellant, the bill itself shewed that the plaintiffs needed no discovery of the increase of the slaves in controversy. Here the bill asks a discovery of the increase, and there is nothing to shew that the plaintiffs were aware of the fact that the slave had no increase: the circumstances of the case indeed prove that they were ignorant of that fact. In Fox v. Morton, decided by this court in 1828, but not reported, the circumstances were stronger against the jurisdiction

326 *than they are here: the ignorance of the plaintiffs, there alleged in the bill, was expressly denied by the answer: yet this court sustained the jurisdiction.

Leigh in reply. In Fox v. Morton, the bill contained an allegation that the defendant refused to give information as to the increase, so as to enable the plaintiffs to sue at law; and the circumstances of the case, like those in Gregory's adm'r v. Mark's adm'r and Rankin v. Bradford &c. shewed that the plaintiffs were in need of a discovery from the defendant. Besides, no express objection was made to the jurisdiction there. Here the bill does not assert that there was any increase; it merely asks a discovery of the increase if any. At the time of the suit brought, the girl Patty was only 14 or 15 years old, and it was highly improbable that she could have any increase: the call for discovery, therefore, was *prima facie* merely colourable.

BALDWIN, J. If this is not an action of detainue brought in a court of chancery, it must be because the plaintiffs have asserted their demand by a bill instead of a declaration. It is a suit to recover a single slave, by the owners of the legal title, if any, against an adverse claimant, without any impediment whatever to the prosecution of the plain and adequate remedy at law. If there is any thing in the case, besides the sex of the slave, to give any the slightest colour of jurisdiction to a court of equity, I have not been able to

find it. She had no issue, and of course there was no necessity for a discovery; and the ignorance of the plaintiffs, without the slightest enquiry, of a fact (that of issue) which never existed, can furnish no reason for coming into equity; the more especially when such ignorance is not even suggested by them, but is to be surmised by the court from the interjection of a prayer for a discovery of the issue, "if any." It is perfectly clear as a general rule, that in

a bill to substitute an equitable for a
327 *legal forum, a prayer for a discovery, without any averment shewing its materiality or necessity, is naught. If this court has tolerated a departure from this rule, in regard to slave property, (Gregory's adm'r v. Marks's adm'r, 1 Rand. 355,) it has been where the necessity for the discovery was supposed to be incidental, at least *prima facie*, to the nature of the demand; as where the suit is to recover a stock of slaves, after a considerable lapse of time, and there has been such an increase as would raise a fair presumption that the plaintiff is ignorant of their names, ages and residence. But even under such circumstances, if it may be inferred from the statements in the bill, or the evidence in the cause, that no such difficulty in point of fact exists, a court of equity will not take cognizance of the case, unless there be some other ground for the exercise of its equitable jurisdiction. Hardin's ex'ors v. Hardin, 2 Leigh 572. To entertain jurisdiction of the cause before us would be to obliterate the line of demarcation between the two tribunals, so far as slave property is concerned, and permit actions of detainue for the recovery of slaves to be prosecuted indifferently in a court of law or a court of chancery, at the election of the claimant.

I think the decree ought to be reversed, and the bill dismissed with costs, The other judges concurring, decree reversed and bill dismissed.

328 *Vanmeter and Another v. Giles Governor, for M'Neill.

November, 1842, Richmond.

(Absent STANARD,* J.)

Prison Bounds Bond—Sufficiency of Bond.—A prison bounds bond is taken payable to the sheriff, his certain attorney, his heirs or assigns, and the execution debtor having broken the bounds in the time of the same sheriff, the bond is by him assigned to the creditor: HELD, such bond and assignment are good and sufficient in law to render the obligors responsible to the creditor, and the sheriff is not liable for the escape.

Same—Same—Condition for Return of Debtor.—Prior to the 1st of January 1820, the law did not require that bonds given for the prison rules should be conditioned for the return of the debtor to close prison at the end of a year.

Same—Who May Assign.—A prison bounds bond

*He had been counsel for the plaintiffs in error.

†Prison Bounds Bond—Who May Assign.—See Mere-

made payable to the sheriff and his successors in office, may be assigned to the creditor by the sheriff who took it, or by a succeeding sheriff, according as the debtor's escape may be in the time of the one sheriff or the other: per BALDWIN, J.

Same—Same—Quere.—Whether, if a prison bounds bond were made payable to the sheriff and his representatives, or to him alone, it would be assignable by him, or, in the event of his death, by his executor or administrator, after an escape of the debtor from a succeeding sheriff?

Escape—Declaration for Taking Defective Bounds Bond

—Assignment of Breaches.—In debt on official bond of sheriff, breach assigned is, that the sheriff permitted relator's debtor in execution to escape, by wrongfully accepting from him a defective bond, erroneously purporting to be a prison bounds bond, and that the relator, from the erroneous and defective form of the said bond, was unable to recover his debt by virtue thereof, but was cast in an action brought by him founded upon the same: but declaration makes no profert of such bond, nor vouches the record of the action alleged to have been brought thereon, nor gives any further description of the bond or of the action. On general demurrer to the declaration, **Held**, the assignment of the breach is insufficient.

Same—Plea That Debtor Was Duly Admitted to Bounds

—Oyer.—In debt on official bond of the sheriff of H. assigning for breach that the sheriff permitted the escape of a debtor in execution

329 *under a ca. sa. from the superior court of H. the defendants plead that the debtor gave bond according to law, with good security, to keep the prison rules for the county of H. and thereupon betook himself to the prison rules for said county, without this that he escaped in any other manner. The bond (of which profert is made in the plea) is with condition that the debtor shall keep within the prison bounds prescribed by the superior court of H. Plaintiff takes oyer of the bond and demurs to the plea. **Held**, as the bond, made part of the plea by oyer, shews that the debtor was admitted to the proper bounds, the defect if any in the allegations of the plea is thereby cured.

Same—Verdict and Judgment—Special Finding under Statute.—In debt on official bond of sheriff, assigning for breach the escape of a debtor in his custody, no judgment can be entered on verdict against defendants, unless it be expressly found

(as prescribed by the statute 1 Rev. Code, ch. 136, § 3), that the debtor escaped with the consent or through the negligence of the sheriff, or that he might have been retaken and the sheriff neglected to make immediate pursuit.

Debt, in the late superior court of law for Hardy county, in the name of William B. Giles governor of Virginia, successor in office of John Tyler, who was successor of James Pleasants, who was successor of Thomas Mann Randolph, who was successor of James P. Preston, (the said plaintiff suing at the relation of Strawder J. M'Neill) against Isaac Vanmeter, Edward Williams and Samuel M'Mechin, upon the official bond executed by the said Vanmeter

dith v. Duval, 1 Munf. 76. See also, monographic note on "Official Bonds" appended to Sangster v. Com., 17 Gratt. 124, and monographic note on "Assignments" appended to Ragsdale v. Hagy, 9 Gratt. 409.

as sheriff of Hardy county, and by the said Williams and M'Mechin as his sureties. The bond bore date the 10th of November 1819, and was in the penalty of 10,000 dollars, payable to James P. Preston governor and his successors in office, with a condition in the usual form. The declaration set forth the execution of the bond by the defendants, recited the condition, and then proceeded to assign breaches thereof substantially as follows:

1. It was alleged that in October 1819, Strawder J. M'Neill the relator recovered judgment in the superior court of Hardy against a certain George Neville for 1251 dollars 41 cents with interest thereon 330 from the 5th of *July 1819 till paid, and the costs of suit, subject to a credit for 700 dollars paid the 8th of September 1819, on which judgment he sued out a writ of capias ad satisfaciendum against Neville, directed to the sheriff of Hardy and returnable to January rules 1820, and before the return day thereof delivered the same to Vanmeter, then the sheriff of Hardy, to be executed, who, before the return day of the writ, by virtue thereof arrested Neville by his body, and kept and detained him in his custody from thence until he the said sheriff, afterwards, to wit, on the 15th of November 1819, without the leave or license and against the will of the said M'Neill, to whom the amount of principal money, interest and costs aforesaid was still wholly unpaid and unsatisfied, suffered and permitted the said Neville to escape and go at large, and he did then and there escape and go at large whithersoever he would out of the custody of the said Vanmeter sheriff as aforesaid.

2. After setting forth, in like manner as before, the judgment recovered by M'Neill against Neville, the writ of capias ad satisfaciendum sued out thereupon and delivered to Vanmeter the sheriff, and the arrest of Neville by virtue of that writ, it was alleged that the said sheriff detained Neville in his custody, in execution as aforesaid, from the time of his arrest until he the said sheriff, 'afterwards, to wit, on the — day of —, by wrongfully taking and accepting of said George Neville a defective bond, erroneously purporting to be what is commonly termed a prison bounds bond according to the statute in such case made and provided, and erroneously purporting to bind the said George Neville to keep within the prison rules and bounds of the county court of Hardy for one year, without the leave or license and against the will of said Strawder J. M'Neill, permitted the said George Neville to escape and go at large whithersoever he would out of the custody of him the said Isaac Vanmeter,

being the sheriff as aforesaid, the 331 *said sum of money being wholly unpaid to said Strawder J. M'Neill, relator; and that the said relator, from the erroneous and defective form of said bond called a prison bounds bond, and through the default of said Isaac Vanmeter in his office of sheriff in taking the said bond,

was unable to recover the said debt by virtue of said bond, but was cast in an action brought by him founded upon said pretended prison bounds bond, and was subjected to pay a large sum in costs of said suit, viz." &c.

To the breaches so assigned in the declaration, the defendants put in general demurrers, in which the plaintiff joined.

Two special pleas were also filed by the defendants.

1. The first plea admitted the rendition of the judgment, and the issuing of the *capias ad satisfaciendum* thereupon, as set forth in the declaration, and that the said writ having been placed in the hands of George S. Craigen deputy of the defendant Vanmeter sheriff of Hardy, he the said deputy, by virtue thereof, and before the return day, arrested the said Neville and held him in his custody: and then the plea averred, that after Neville was so arrested and in custody, "he the said Neville, according to the act of the general assembly in such case made and provided, tendered to the said George Craigen, deputy sheriff as aforesaid, bond for the prison rules and bounds laid out for said county, and then and there executed a bond with good and sufficient security to keep the bonds and prison rules for the county of Hardy in due form of law, and then and there, in virtue of said bounds bond so executed as aforesaid, the said George Neville betook himself to the prison rules and bounds for said county of Hardy according to the statute in such case made and provided, which said bond so executed as aforesaid is now here shewn to the court, and together with the assignment endorsed on the back thereof,

332 is in the words and figures "following, to wit:" (here the prison bounds bond, and the assignment of the same, were set out in the plea); "which is the same supposed escape in the plaintiff's declaration mentioned; without this, that said George Neville went beyond the custody and immediate control of the sheriff, after taking him as aforesaid, in any other manner. And this the defendants are ready to verify. Wherefore they pray judgment" &c.

The prison bounds bond, incorporated as aforesaid into the plea, was dated the 28th of December 1819, and signed and sealed by George Neville, Charles Lobb and George S. Craigen, who thereby acknowledged themselves to be held and firmly bound unto Isaac Vanmeter sheriff of Hardy county in the sum of 1201 dollars 80 cents, to be paid unto the said Isaac Vanmeter sheriff as aforesaid, or to his certain attorney, his heirs or assigns. The condition recited that the body of George Neville was now in the jail of Hardy county by virtue of an execution issued &c. (describing the writ of *capias ad satisfaciendum* aforesaid, the amount of which, including the sheriff's commission and his fees for making the arrest and taking the bond, was stated to be 600 dollars and 90 cents,) and that the said George Neville was desirous

to take the prison bounds as laid off or allotted and prescribed by the superior court of law for said county of Hardy; and provided "that if the above bound George Neville shall well and truly keep within the prison bounds as prescribed by the said superior court of Hardy, as the law requires, and not depart therefrom until released by due course of law, then the above obligation to be void, or else to remain in full force and virtue of law."

The assignment of the said bond was in the following terms: "I Isaac Vanmeter, sheriff of Hardy county, hereby assign the within bond to Strawder J. McNeill this 18th day of May 1820." (Signed) "Isaac Vanmeter."

333 *2. By the second plea, the defendants said that the plaintiff ought not to have and maintain his action on the breach in the declaration assigning an escape, because they averred that after the execution of the writ of *capias ad satisfaciendum* mentioned in said breach, the defendant Vanmeter did not permit the said George Neville to escape, nor did he escape, out of the custody and care of the said defendant as sheriff, as the plaintiff in said breach had alleged, and thereof they put themselves upon the country.

The plaintiff, after taking oyer of the prison bounds bond whereof the defendants made profert in their first plea, demurred generally to that plea, and the defendants joined in the demurrer. On the second plea an issue in fact was made up.

The defendant Williams died pending the suit, and his death was suggested on the record.

At the September term 1831 of the circuit superior court of law and chancery for Hardy county (to which the cause had been transferred according to law), the court, after argument of the matters of law arising upon the several demurrers aforesaid, overruled the demurrer of the defendants to the first breach assigned in the declaration, sustained their demurrer to the second breach, and also sustained the plaintiff's demurrer to the first plea of the defendants. The issue of fact made up on the second plea was thereupon tried, and the jury returned a verdict in these words: "We the jury find for the plaintiff the debt in the declaration mentioned, to be discharged by the payment of 563 dollars 92 cents with interest thereon at 6 per cent. per annum from the 8th of September 1819 till paid, and the further sum of 5 dollars 72 cents with interest thereon from the 12th day of November 1820 till paid, damages." Judgment was accordingly rendered by the court, for the debt in the declaration mentioned and the costs of suit, to be discharged by the payment of the

334 damages assessed as "aforesaid for the relator, and the costs aforesaid, and such other damages as might be thereafter assessed upon a writ or writs of *scire facias* being sued out, and new breaches assigned of the condition of the writing obligatory in the declaration mentioned.

On the petition of the defendants Van-meter and M'Mechin, this court awarded a supersedeas to the judgment.

The cause was argued by Stanard and the attorney general for the plaintiffs in error, and C. and G. N. Johnson for the defendant in error.

The attorney general said, the only question upon the demurrer to the first plea was as to the sufficiency of the prison bounds bond; and in deciding that question against the defendants below, the circuit court erred. The bond must have been considered insufficient either because not taken to the sheriff and his successors in office, or because it does not provide for the return of the debtor to close prison at or before the expiration of one year from the date. It is true that in *Meredith's adm'x v. Duval*, 1 Munf. 76, where the subject of the proper form of the bond is adverted to, judge Roane expressed the opinion that it ought to be taken payable to the sheriff and his successors in office: but that opinion is said, in 1 Rob. Pract. 68, to have been questioned in the case of *Mayo v. Pleasants*, decided by this court in November 1829. Without enquiring which opinion is correct, an error of judgment in the sheriff as to a matter not expressly determined by the statute, and on which even the judges of this court have differed, is surely not such an act of negligence as ought to subject him to liability. But the question itself is immaterial in this case; for here the bond was assigned by the sheriff to whom it was taken, he being still in office at the time of the assignment: and *Meredith's adm'x v. Duval* decides that such an assignment of a bond taken payable to the sheriff, 335 *his certain attorney, his executors, administrators or assigns, would enable the creditor assignee to maintain an action against the obligors in the bond. The objection that the bond does not provide for the return of the debtor to close prison is equally invalid. Being executed on the 28th of December 1819, the bond is not affected by the statute in 1 Rev. Code of 1819, ch. 134, § 30, p. 535, prescribing that the condition of the prison bounds bond shall contain that provision; for that statute only went into operation on the 1st of January 1820. And by the preexisting laws, though the sheriff was required to recommit the debtor to close prison at the expiration of the year, and was subjected to a fine in case of his failure to do so, the prescribed condition of the bond was merely that the debtor should not depart or go out of the rules or bounds of the prison to which he was committed. Statute of 1793, 1 Rev. Code of 1814, ch. 151, § 37, p. 428 [303]; Acts of 1806-7, ch. 27, § 2, p. 16; Acts of 1812-13, ch. 26, § 10, p. 38; Acts of 1817-18, ch. 28, p. 30; 1 Rev. Code of 1819, ch. 135, p. 547.

The verdict, he said, was defective in not finding expressly that the debtor escaped with the consent or through the negligence of the sheriff, or that he might have been retaken, and that the sheriff neglected to

make immediate purauit. 1 Rev. Code of 1819, ch. 136, § 3, p. 550; *Hooe v. Tebbbs*, 1 Munf. 501; *Johnson v. Macon*, 1 Wash. 6.

The counsel for the defendant in error admitted that the validity of the bond in this case was to be determined by the law as it stood before the 1st of January 1820, and that no condition providing for the debtor's return to close custody was thereby prescribed; but they contended that the bond was defective because not taken to the sheriff and his successors in office, but to him, his heirs and assigns. Opinions of Tucker and Roane, *J., in *Meredith's adm'x v. Duval*, 1 Munf. 79, 83, 84; *Syme v. Griffin*, 4 Hen. & Munf. 277; *Sullivan v. Alexander*, 19 Johns. Rep. 233. The decision in *Meredith's adm'x v. Duval* was, that the obligors in the bond were liable to the creditor, the assignee of the sheriff, in an action upon the assigned bond. No question arose, or could arise, whether the sheriff had discharged himself from responsibility to the creditor, by taking a sufficient statutory bond. The bond here is not a good statutory bond, and the sheriff ought consequently to be held liable. And this is the more reasonable, because the sheriff himself may maintain an action on the bond, and recover indemnity from the obligors.

The object of the first plea in this case was to shew that there was no escape, unless the debtor's betaking himself to the prison bounds constituted an escape; and for that purpose it is necessary to shew that the debtor was lawfully admitted to the proper bounds. But the plea alleges that he was admitted to the bounds for the county of Hardy. If that allegation be taken (as it should be) to mean that he was admitted to the bounds laid off by the county court of Hardy, the plea is fatally defective, as it shews that the execution issued from the superior court of the county, which must be presumed to have laid off its own prison rules, since it had the power by law to do so. Statute of 1792, 1 Rev. Code of 1814, ch. 66, § 18, p. 107 [76]; Acts of 1807-8, ch. 3, § 2, 20, p. 7, 10. And although the prison rules of the superior court may be the same with those of the county court, yet they are not necessarily the same. At all events the plea does not expressly shew that the bounds to which the debtor was admitted were those prescribed by the superior court; and this defect or uncertainty in the allegations of the plea is not aided by the bond. The plea is insufficient in another respect. It ought to have shewn that the period for which the debtor was 337 allowed the privilege of the *rules was the period limited by law, namely, one year from the date of the bond; but it does not shew this, nor what was done after the year. Under the declaration, the plaintiff might have proved an escape at any time before action brought; and here every thing averred in the plea may be true, and still an escape have been permitted.

As to the supposed insufficiency of the

verdict, the case of *Johnson v. Macon* proves nothing, for the verdict there was in favour of the defendant. In *Hooe v. Tebbs*, the court were divided upon the question whether the verdict was sufficient or not: judges Roane and Fleming held that it was not; but judge Tucker was of opinion that as the declaration expressly alleged that the sheriff voluntarily permitted the escape, the general verdict for the plaintiff amounted to an express finding of the truth of that allegation. And the principle of that opinion is conformable to right reason and the intendment of the law. The object of the legislature was to exempt the sheriff where the escape was not voluntary, and to make him liable where it was; not to regulate the form of the verdict. If such regulation had been designed, the method adopted would have been to set forth what should be the finding of the jury, as is done in the case of complaints for forcible or unlawful entries or unlawful detainers, 1 Rev. Code, ch. 115, § 14, p. 458. Besides, the requisition of a special finding by the jury is contained in a statute which relates to actions brought directly for the escape, and the construction ought to be that such requisition is imperative only where an action of that kind is resorted to. The action here is for a breach of the official bond, a remedy given by a different statute, and in which the sheriff may even be rendered liable, though the escape was not with his consent or through his negligence. But he is only liable for such damages as the

338 creditor *has actually sustained (*Perkins and others v. Giles governor*, 9 Leigh 397); whereas in the action provided by the statute concerning escapes, 1 Rev. Code, ch. 136, § 3, p. 550, he is subjected to liability for the whole amount due upon the plaintiff's execution, without regard to the quantum of the actual damage resulting from the escape. There is good reason then for requiring that the consent or negligence of the sheriff shall be expressly found, where the consequence of the verdict is to be a recovery arbitrary in amount and penal in its character; but no reason at all for such a requisition, where the actual damage sustained is to be the measure of the recovery.

The decision sustaining the demurrer to the second breach assigned in the declaration was erroneous. Opinion of Roane, J., in *Hooe v. Tebbs*, 1 Munf. 507.

STANARD in reply. The first plea alleges that the debtor, being in custody under an execution issued from the superior court of Hardy, gave bond in due from of law, with good security, to keep the prison bounds for the county of Hardy, and thereupon betook himself to the bounds for said county. This is in substance an averment that the party gave bond to keep within the rules of the superior court. But the bond is set out in the plea, and is made a part thereof by the plaintiff himself upon oyer; and it thereby appears that the bounds to which the debtor was admitted were the bounds prescribed by the superior court of law for

the said county. Whatever imperfection or uncertainty might have existed in the allegation of the plea, taken by itself, is thus completely removed by reference to the bond. In *Meredith's adm'x v. Duval*, 1 Munf. 79, 82, a defect of the declaration was held to be cured by oyer of the bond declared upon. And less certainty is required in a plea than in a declaration.

Co. Litt. 303a.

339 *A further objection is made that this plea contains no justification. The plea is treated as merely stating that the debtor executed a prison bounds bond and was thereupon admitted to the rules, and then it is said, that may be true, and yet, under the declaration charging an escape in general terms, an escape at any time before action brought may be proved. This is neither more nor less than to reject a part of a plea, and then to argue that the rest without that is bad. The *absque hoc* is not matter of protestation, it is matter of denial—of special traverse. Stephen on Pleading, 1st ed. p. 212. It denies the very fact and the whole fact charged, unless the matters averred in the plea shall be held sufficiently to establish the fact. Suppose issue had been taken on the plea, and it had appeared in evidence that at any time, within the year or after, the debtor broke the bounds or escaped, would not that have falsified the plea? But if it were necessary, it might be maintained, on the authority of *Lyle v. Stephenson*, 6 Call 54, that in an action against a sheriff for the voluntary escape of a debtor charged in execution, it is a good plea in bar simply to aver that the debtor was lawfully admitted to the prison rules under a lawful prison bounds bond, because the sheriff is thereupon by law discharged of the custody of the debtor. Nor is the law as settled in *Lyle v. Stephenson* at all affected by the subsequent act of 1806-7, ch. 27. Under that act, as under the preexisting law, the condition of the bond is general; and though the sheriff is required to recommit a prison bounds debtor to close jail at the expiration of a year from the date of the bond, and is responsible if he fail to do so, (1 Rev. Code of 1819, ch. 135, p. 547,) he is not responsible for the escape of the debtor; for, so long as the debtor remains within the bounds, there can be no escape; and if he breaks the bounds, the bond,

which is general, protects the creditor.

340 *The idea that the sheriff, if held liable to the creditor for taking this bond, may sue the obligors in his own name and for his own benefit, cannot be supported. The bond is on its face a public bond, not a private one enuring to the individual benefit of the sheriff; Roane, J., in *Meredith's adm'x v. Duval*, 1 Munf. 84. If he is held liable, it must be for taking the bond without authority of law and contrary to the duty of his office, and therefore he can never be allowed to maintain a suit upon it for his own use. Syme v. Griffin, 4 Hen. & Munf. 277.

As to the verdict, under the express lan-

guage of the act of assembly, and the decisions on the subject, the finding is clearly insufficient. In *Hooe v. Tebbs*, the same reasoning was offered in support of the verdict, that is employed to sustain the verdict here; and the issue there being not guilty, the response to that issue was a more direct finding of what the act requires, than results from the issue and verdict in the present case. There is no foundation for the distinction attempted between the action here and that in *Hooe v. Tebbs*. This, not less clearly than that, is an action for the escape of an execution debtor. And it is for the court to determine whether one rule shall be applied to an action against the sheriff for an escape, and another to an action against the sheriff and his sureties for the same cause. This court decided, in *Perkins and others v. Giles* governor, that the measure of damages in the action on the sheriff's official bond is the same as in the action on the case; which was the form of action in *Hooe v. Tebbs*, where the special finding was held indispensable. It would be strange indeed if not only the sheriff, but his sureties, whose obligation is strictissimi juris (*M'Dowell v. Burwell's adm'r*, 4 Rand. 317), should be held chargeable in the action on the official bond, upon less evidence or a finding less explicit than would be necessary to
 341 subject the sheriff *alone, in the action on the case, to precisely the same recovery. No distinction between the action of debt under the statute of escapes, and the action on the official bond, is at all to the purpose: to evade the authority of *Hooe v. Tebbs*, some substantial distinction must be found between the common law action on the case and the action on the official bond; and whether that authority is, at this distance of time, and after giving the rule of practice in all cases subsequently occurring, to be directly impeached and overruled, is a question submitted unhesitatingly, and without further remark, to the court.

The second breach assigned in the declaration was properly held insufficient. The allegation is merely that the sheriff, by taking a defective bond from the debtor, permitted him to escape, and that the relator, from the erroneous and defective form of the bond, was unable to recover his debt by virtue thereof, but was cast in an action brought by him founded thereon. There is no averment that the bond was void, or that it was decided by any court of competent jurisdiction to be so, nor is profert made of it, so that the court can judge whether it is so: it is not stated in what court the action thereon was instituted, who were the parties to that action, or when the judgment therein was rendered; no record is vouched, no sort of notice given by which the defendants may be enabled to answer the charge. Judge Roane's opinion in *Hooe v. Tebbs*, 1 Munf. 507, is no authority in support of such an assignment as this. The bond taken by the sheriff in that case had been adjudged by the district

court of Dumfries to be illegal and void, and the declaration expressly alleged that fact: and though judge Roane thought the decision of the district court wrong, and the bond not void, he held that the judgment, being in full force and unreversed, was conclusive to establish the liability of the sheriff. There is no resemblance between that case *and the case here alleged. The assignment is in truth every way and utterly defective. 1 Chitty's Pl. 354, 5; 2 Id. 181.

BALDWIN, J. The controversy in this case turned upon the validity of the bond for the prison rules taken by the sheriff. The question was directly and distinctly made by the first plea, which sets forth the bond and the prisoner's consequent admission to the prison bounds, with a special traverse of any other escape. The plaintiff's demurrer to the plea admitted that there was no other escape, and of course the only question presented was as to the validity of the bond.

The bond is objected to on the ground that it ought to have been made payable to the sheriff and his successors in office, instead of to the sheriff and his heirs and assigns; and the reason urged is, that in the event of an escape from a succeeding sheriff, the letter could not have assigned the bond to the creditor, as it is supposed the law contemplated. If we were to be governed by the letter of the statute, the bond could only be assigned by the sheriff who took it, the language of the law seeming to have been framed without adverting to the fact that the escape would not always be in the time of that sheriff; but the true meaning doubtless is that the assignment shall be made by the sheriff to whom the bond is made payable. Of course, if the bond were payable to the sheriff and his successors, and the escape occurred in the time of a successor, it would be competent for the latter to assign it to the creditor. So if the escape occurs in the time of the sheriff who took the bond, it is assignable by him, whether made payable to him and his successors, or to him and his representatives, or to him alone. Whether, if made payable to him and his representatives, or to him alone, it would be assignable by him, or, in the event of his death, by his executor or administrator, after an escape from
 343 his *successor, I deem it unnecessary to enquire. No such question arises in this case. The law does not prescribe to whom the bond shall be made payable; and it matters not to whom, if it performs its legal function of making the obligors responsible for the escape of the prisoner. In this case, the escape, if any, occurred in the time of the sheriff who took the bond; for it was assigned by him while sheriff to the creditor, as appears from the assignment on the bond incorporated into the plea; and it would be strange indeed if the mere possibility of an inconvenience, which in point of fact never occurred, were to have the effect of invalidating the bond,

or subjecting the sheriff for an escape. Such a bond and assignment were expressly held to be good, and the surety for the bounds subjected thereupon, in the case of Meredith's adm'x v. Duval, 1 Munf. 76.

I think it extremely probable, as suggested by the counsel for the plaintiffs in error, that the objection to the bond taken in the circuit court was, that the condition does not provide for the prisoner's return to custody at the expiration of one year from the date of the bond; and that it was sustained by the court without advertent to the circumstance that there was no law requiring such a condition prior to the act of the 25th of February 1819, 1 Rev. Code, ch. 134, § 30, p. 534, which took effect on the 1st of January 1820. The bond in question bears date on the 28th of December 1819, and of course was not taken under the provisions of that act. Preexisting laws, by which this case must be governed, though they required the sheriff to recommit the prisoner to jail at the expiration of the year, and subjected him to a fine for his failure to do so, did not prescribe any other condition of the bond than that the prisoner should not depart or go out of the rules or bounds of the prison.

Besides the objections to the bond presented by the demurrer to the first
344 plea, that plea has been supposed *by the counsel for the defendant in error to be moreover defective, inasmuch as the prison rules for which bond was given, and to which the prisoner was admitted, are described in the plea as the prison rules and bounds for the county of Hardy, whereas the declaration and the plea itself shew that the execution against the prisoner issued upon a judgment of the superior court of that county. Whether this description in the plea, if we had nothing more to guide us, would be taken to mean the prison rules for the superior court, or for the county court of Hardy, we need not consider; for the bond itself being incorporated into the plea, and shewing upon its face that it was given for keeping the prison rules of the superior court of Hardy, the general description is thereby controlled and rendered specific, upon the authority of Meredith's adm'x v. Duval, above cited, in which a flagrant and otherwise fatal error in the declaration was cured by reference to the bond sued upon, which had been made part of the record by oyer thereof.

The question of the validity of the bond above considered, would also have been distinctly presented in another shape, by the demurrer of the defendants to the second breach in the plaintiff's declaration, if the bond had been set forth in that breach, or made a part thereof by proferat and oyer. That not being so, we can only look to the breach itself, for the purpose of ascertaining whether that part of the declaration be good upon a general demurrer. The voluntary escape therein charged is referred al-

together to the taking of a bounds bond, therein alleged to be defective and erroneous, but of which no proferat is made or particular description given, though it is alleged that in consequence of the erroneous and defective form of the bond, the relator could not recover his debt, but was cast in an action brought by him founded upon the bond. Now it will be observed that there is no averment that the bond was void in law, or that it was held to be so by

345 any court of *competent jurisdiction.

The substance of the allegation is that the relator was defeated in an action upon the bond; but against whom the action was brought, in what court, or by what decision, if any, the relator was cast, is not averred. The relator's failure in his action could not subject the sheriff to an escape, unless it was by the judgment of a court of competent jurisdiction, between proper parties, and upon the ground of the invalidity of the bond. None such is averred. It may be, for aught that appears, and as the pleadings in this cause would seem to indicate, that there was no escape from the bounds at all, and the relator may have been defeated on that very ground.

The foregoing views, if correct, serve to shew that the demurrer of the defendants to the second breach of the plaintiff's declaration was properly, and the plaintiff's demurrer to the first plea of the defendants improperly, sustained by the court. There ought, of course, to have been no judgment for the plaintiff.

The judgment rendered for the plaintiff was moreover wrong, because the verdict did not expressly find that the prisoner escaped with the consent or through the negligence of the sheriff. Our statute concerning escapes is clear and explicit, that no judgment shall be entered against any sheriff in any suit brought upon the escape of any debtor in his custody, unless the jury who shall try the issue shall expressly find that the prisoner did escape with the consent or through the negligence of the sheriff, or that he might have been retaken, and that the sheriff neglected to make immediate pursuit. This peremptory mandate applies to all actions against the sheriff, and of course his sureties, of whatever nature or form, founded upon an escape; and if not strictly complied with, the defect cannot be supplied by any intendment or conclusion, in favour of a general verdict, from the pleadings or issue; as was held by this court in Hooe v. Tebbs, 1 Munf. 501.

346 *My opinion upon the whole case is, that the judgment of the circuit court ought to be reversed, the verdict set aside, the plaintiff's demurrer to the first plea overruled, and judgment rendered for the defendants.

The other judges concurred. Judgment reversed.

Malone's Adm'r and Others v. Hobbs and Others.

November, 1842. Richmond.

[39 Am. Dec. 263.]

(Absent CABELL, P., and ALLEN, J.)

Wills—Bill Contesting Validity of—Allegations.*—

Where a will has been admitted to probat, and a person interested appears within seven years afterwards and files a bill in chancery under the act 1 Rev. Code of 1819, ch. 104, § 13, it is sufficient in such bill to aver in general terms that the writing of which probat has been received is not the will of the decedent.

Same—Same—Misjoinder of Plaintiffs—Objection in Appellate Court.

An answer to a bill contesting the validity of a will states, that some of the plaintiffs had accepted legacies and devises under the will; and the fact appears to be so by exhibits filed with the answer. After verdict and decree against the will, the objection is taken in an appellate court, that those parties had precluded themselves from disputing the validity of the will, and that as they are improperly joined with the other plaintiffs, the suit cannot be sustained. **HELD**, the objection will not avail.

Same—Same—Devisavit Vel Non†—Evidence—Declaration of Legatee—Competency.

On the trial of an issue whether a writing, admitted to probat as a will, be the will of the decedent or not, the evidence against the will consists of statements by witnesses, of what a legatee told them had passed on one occasion when he and the decedent were together. That legatee is one of many defendants, and it does not appear that he refused to testify. The admissibility of such evidence questioned before the appellate court by counsel, but not decided.

Same—Same—Same—Revocation—Destruction of Codicil.—

On the trial of an issue whether a writing,

***Wills—Bill Contesting Validity of—Allegations.—**

The principal case is cited in Dower v. Church, 21 W. Va. 45, to the point that the bill need not set out as fully the facts on which the plaintiff claims that the paper which has been probated as the will, is not the will of the decedent, as it would have to do under the general rules governing equity pleadings; but that it will suffice in such a bill to aver in general terms, that the writing of which probate has been received is not the will of the decedent.

†**Devisavit Vel Non—Object of Issue.**—The principal case is cited in Penn v. Ingles, 82 Va. 65, to the point that, in ordering an issue *devisavit vel non*, the chancellor does not exercise any of the ordinary powers of a chancery court, but acts in obedience to the express mandate of the statute: the object of the issue being to ascertain, by means of a jury trial, whether or not the will admitted to probate is, in whole or in part, the will of the decedent. When that question is decided the function of the suit is exhausted, and the verdict is binding upon the court, unless for good cause shown it is set aside, either at the trial or afterwards, on a bill of review.

The principal case is cited in this connection in Connolly v. Connolly, 32 Gratt. 663; Kirby v. Kirby, 84 Va. 629, 5 S. E. Rep. 539; Lamberts v. Cooper, 29 Gratt. 66; Dower v. Church, 21 W. Va. 44; French v. French, 14 W. Va. 486. See Coalter v. Bryan, 1 Gratt. 18. See foot-notes to Lamberts v. Cooper, 29 Gratt. 61; Coalter v. Bryan, 1 Gratt. 18.

admitted to probat as a will, was the will of the decedent or not, it appeared that the decedent had made a codicil to his will, and that the codicil was afterwards destroyed by his direction.

347 The evidence tended to "show that the will was written on one sheet of paper, and the codicil on another; that the will was left with one person, and the codicil with another; and that the will and codicil were with those persons respectively, at the time the codicil was destroyed. The circuit court instructed the jury, that if they believed from the evidence, that the decedent intended, at the time of destroying the codicil, thereby to destroy or revoke the will, in that case the destruction of the codicil was a revocation of both the will and codicil. **HELD**, this instruction was erroneous.

Same—Revocation—Direction to Destroy.—Although a testator has directed his will to be destroyed, and believes that it has been destroyed as requested, yet if it be not in fact destroyed, such direction and belief will not operate as a revocation of the will, even in relation to the personal estate.

David M. Malone of Greensville county made his will on the 29th of April 1833, whereby, after desiring that all his just debts might be paid, he devised a tract of land on which he lived to be equally divided between his aunt Elizabeth Wyche's children and his aunt Sally Davis's, that is, one moiety to his aunt Wyche's children, and the other half to his aunt Davis's children. He bequeathed his negro man Peter to William H. Hobbs senior, and his two negroes Charlotte and Mason, with their future increase, to Franky Wilkins; and he also made devises and bequests to Edmunds Mason, Frances Mason his wife, John Y. Mason, George Mason, Eliza the wife of James B. Mallory, Lawrence G. Heath, James E. Mason and James M. Wall. At the time of making this will, the testator was unmarried; but afterwards, to wit, in November 1834, he married Ann Wilson. There was no child born of the marriage; and in January 1837 the testator died. On the sixth of March 1837, the will was proved in the court of Greensville county by M. H. Hobbs and William F. Hobbs the two attesting witnesses, and admitted to record; and John Y. Mason the

‡**Wills—Revocation.**—The opinion of JUDGE BALDWIN in the principal case, discussing the subject of the revocation of wills, is quoted in Dower v. Seeds, 28 W. Va. 135, 136, 137, 138.

Same—Same—Belief as to Destruction.—In a note in 29 Am. & Eng. Enc. Law (1st Ed.) p. 273, it is said: "The fact that the testator was deceived into believing that the will was destroyed, as required by the statute to work a revocation, will not revoke it if such was not the case. Clinean v. Mitchell, 51 Pa. St. 25; Boyd v. Cook, 3 Leigh 32; *Malone v. Hobbs*, 1 Rob. 366; Hise v. Fincher, 10 Ired. (N. Car.) 130."

Thus, it was held in Boyd v. Cook, 3 Leigh 32, that where a blind testator orders a will made by him to be destroyed, and believes it is destroyed accordingly, but it is not destroyed, and no act towards destruction done, this is not a revocation by destruction or cancellation, within the statute, 1 Rev. Code, ch. 104, § 3. At least, a court of probate cannot consider this as amounting to a revocation.

executor named in the will having declined the executorship, administration with the will annexed was granted to Edmunds Mason. The testator's widow died soon after, and in May 1837 administration on her estate was granted to Baxter R. Wilson.

348 *Thornton P. Wyche and others, as children of Elizabeth Wyche, filed a bill in the court of Greenville county against Elizabeth Malone and others, as children of Sally Davis, setting forth the devise to the children of Elizabeth Wyche and of Sally Davis, and asking a decree for a division of the tract of land devised, or for a sale of the same and a division of the proceeds. The bill was duly answered, and the cause being heard, a decree was pronounced in October 1837, under which a sale was made and the proceeds divided; and the report of the sale and division was confirmed in November 1837.

The negroes Charlotte and Mason were, under an order from Frances Wilkins of the 5th of October 1837, delivered to William Wilkins the 1st of January 1838.

In July 1839, a bill was filed in the circuit court of Greenville, under the act in 1 Rev. Code of 1819, p. 378, § 13, contesting the validity of the will. The decedent having left no descendants, no father, mother, brother or sister, no descendant of his mother or of any brother or sister, and no grandfather or grandmother, the suit was brought by uncles and aunts and their descendants, to wit, by William H. Hobbs and Martha his wife, and others. Among the plaintiffs were Franky Wilkins and the children of the decedent's aunts Elizabeth Wyche and Sally Davis. The only allegations in the bill impeaching the validity of the will, were in these terms: "Your complainants deem it unnecessary to refer your honour to the various bequests contained in said paper, or to allude to the remarkable fact that a sensible man should die with such a will, his wife living, and not the least preparation of any kind made for her comfort and support. Your complainants think it only necessary to state their thorough conviction, and they therefore charge, that said paper was not the will of David M. Malone." The prayer of the bill was for an issue devisavit vel non, and that the court would set aside the will. Edmunds Mason as administrator with the will annexed and in his own right,

349 Frances Mason *his wife, John Y. Mason, George Mason, James B. Malory and Eliza his wife, Lawrence G. Heath, James E. Mason, James M. Wall, and Baxter R. Wilson administrator of the widow, were made defendants.

Edmunds Mason answered, saying, he was unable to comprehend from the bill on what ground the validity of the will was contested; stating the acts before mentioned of Mrs. Wyche's children, Mrs. Davis's children, and Franky Wilkins, (which were proved by exhibits filed with the answer,) and relying upon those acts as a recognition of the validity of the will. He then proceeded to set forth such circumstances as he knew in re-

lation to the testamentary dispositions of the testator. John Y. Mason also, in his answer, detailed such circumstances as were in his knowledge. But these answers not being evidence in favour of the defendants,* it is not deemed necessary or proper to narrate the circumstances set forth by them.

None of the other defendants answered except Baxter Wilson the brother and administrator of the widow, who stated that Edmunds Mason, the principal legatee in the will of Malone, did, soon after the death of Malone, by deed of gift (which respondent filed with his answer) generously convey to the brothers and sisters of Mrs. Malone all the slaves which Malone acquired by his marriage.

The cause (after a previous trial elsewhere, on which the jury disagreed) was removed to the circuit court of Petersburg, and an issue was directed to be tried on the common law side of that court, to ascertain whether the writing purporting to be the will of Malone was in fact his valid will. The trial took place on the seventeenth and eighteenth of November 1841.

At the trial, the bill, answers and exhibits were read to the jury, and on motion of the plaintiffs the court instructed

350 *the jury that the answers were not evidence for the defendants, except so far as they were responsive to the bill. The defendants, in support of the issue on their part, adduced the following evidence: 1. The will and the probat thereof. 2. They proved by the subscribing witnesses to the will, that at or about the date thereof, and when the testator was unmarried, he came to their store, one morning before breakfast, from the direction in which he lived, produced the writing, and requested them to witness it; which, upon due acknowledgment thereof by him, they did, by subscribing their names thereto in his presence. One of the said witnesses further stated that D. M. Malone lost his parents when quite young; that he went to live with Edmunds Mason who was his guardian, and remained there till of age; and that he always expressed great affection and respect for Mr. Mason.

The plaintiffs then introduced the following witnesses:

1. Jarrett Weaver; who deposed, that he was sent for to see the testator in his illness, and after some conversation about his situation, between the testator and witness, and between testator and Dr. Parham, witness asked him, "Have you made that disposition of your property which you wish if you should die?" He said, he had not. Witness then asked him if the law would dispose of his property as he wished? He replied, it would not. Witness then urged him to make his will without losing any time. He said he would do so the next morning. But he died before it was done. The next morning, witness went over to the testator's, and found E. Mason there. Witness said to him, "I

*See opinion of CABELL, J., in *Kincheloe v. Kincheloe*, 11 Leigh 398, and of STANARD, J., in *S. C.* 402.—Note in Original Edition.

suppose judge" (meaning the testator,) "has died without making any provisions for his wife, as he has left no will." E. Mason replied, "Yes, he has; there is a will in John Y. Mason's hands;" and then went on to remark, that after the making of 351 the will, the testator *purchased two negro boys of David Watkins; that, being taken ill at William Hobb's, testator sent for him (E. Mason) to see him; that he went down, and the next day testator was carried back to his (E. Mason's) house; that, at his house, testator requested him to write a will giving him (E. Mason) those two boys; that he (Mason) told him, he did not know that it would be worth while to write a will, saying, "You have a will, and a codicil will answer;" to which testator assented, whereupon he (E. Mason) wrote a codicil giving to himself those two boys, and testator had the codicil witnessed: that the first time Malone came, after his marriage (which he did shortly thereafter), to his (E. Mason's) house, he (E. Mason) took the paper or papers (witness did not remember whether he said paper, or papers) in his hand, and coming into the room where the testator was, said in a jocular way, "Well, judge, you are married now, I suppose we may as well destroy those papers." Testator replied, "Yes, destroy them; they are of no force now;" and he (E. Mason) threw the codicil into the fire. Witness is certain that the expression which E. Mason told him he used to the testator was, "I suppose we may as well burn those papers," and that the reply he said the testator made was, "Destroy them; they are of no force now." The witness mentioned that Dr. Parham and himself were called on by John Y. Mason at the time the will was proved, to go before the court, and testify to what they had heard the testator say. He also mentioned an expression of the testator, disapproving the conduct of a man who had not made, as he thought, proper provision for his wife.

2. Thomas Jones; who deposed to similar expressions by the testator about that same person, and a declaration by him that he would rather his wife should have what he had, than any other person. He never heard testator speak of having a will.

352 *3. B. R. Wilson, one of the defendants; who deposed to a conversation with testator shortly before his death, in which he said, "that he had made no preparation for this world or the next; that he wished witness to take charge of his affairs;" and further deposed as follows: "The day after Malone's death, very early in the morning, Mr. E. Mason came to Malone's. In the course of that day or the next, he shewed me the will of Mr. Malone; that is, I took it to be his will, not having my attention drawn to the fact. Mr. Mason spoke of it as a will. I heard, I think, from him or some other person, that he (Mr. Mason) had sent for it to John Y. Mason's. I saw Mr. Mason's old servant ride up, before I saw the will. I did not see any communication between him and Mr. Mason. I never heard Malone speak of having a will."

4. Dr. Thomas Parham, the attending physician of the testator in his last illness, who had been living in testator's family for several years before his death. He heard testator say, about four or six weeks before his last illness, that he intended to leave all his property to his wife. The night before his death, after some conversation about his situation, he remarked that he would not die without a will, or making a will, (witness does not recollect which,) for some large sum of money which he named. Witness then offered to bring pen, ink and paper, that one might be written. He said he would put it off till the next morning, when he would do it the first thing. But he died just before light the next morning. After mentioning the terms on which he and the testator were, and the happy manner in which the testator and his wife lived together, the witness deposed, that in a conversation which took place between himself and E. Mason at David M. Malone's residence, the day after his death, Mason asked the witness if David M. Malone had done any act which would revoke a will?

353 stating that there was a will in the possession of J. Y. *Mason. Witness told him he did not know what was sufficient to revoke a will; but went on to tell him what had passed the night before D. M. Malone's death, as above mentioned. In that conversation Mr. Mason told witness, that David M. Malone had made a codicil to his will, which disposed of negroes acquired after making his will, and that the first time he came to his (E. Mason's) house a few weeks after his marriage, he (Mason) said to testator, in substance, (witness cannot depose to the words), "I suppose the paper or papers are of no use now," and that testator replied, "Yes, destroy or burn them," (witness does not recollect which,) "I have got somebody else to leave my property to now." Witness never heard Malone speak of having a will. He also stated a remark made by Malone, some ten or twelve months before his death, indicating that he thought it possible his wife was pregnant.

5. John Ezell; who deposed to a conversation with testator after his marriage, at a time when (using the language of the witness) he was "a little drinkey," in which conversation testator asked witness if he had made a will, and witness saying no, testator replied, "Nor I either, but I intend to make one; for every man ought to have a will."

6. John Powell; who deposed that in the spring before testator's death, he heard testator say that he intended to give all his property to his wife in case of his death. He also mentioned a remark by the testator on some occasion, disparaging to E. Mason.

7. William Lucas; who mentioned a conversation with the testator after his marriage, in which he intimated that he thought the Mason family did not like his marrying, and declared that if he were to die, he would give his wife every thing he had.

8. H. L. S. Batte; who mentioned a conversation between him and the testator, in which, the witness having informed him

that he had a will by which he left
354 *all his property to his wife in case she
had no children, testator said, he did
not have a will, but intended to make one to
the same effect, as he thought it a good will.

9. Baxter R. Wilson, Thomas F. Jones, M.
H. Hobbs and William H. Hobbs; who stated
that they had heard the testimony of Jarrett
Weaver, and that he made statements to
them to the same effect, soon after Malone's
death.

The defendants on their part, to rebut the
evidence of the plaintiffs, then introduced
the following:

1. The deposition of Nathaniel Young,
who, since giving it, has died. This witness
deposed, that in the last week of
November 1835, he was at the house of John
Y. Mason in the county of Southampton,
and David Malone came to said Mason's,
where he spent the day and staid all night.
He slept in the same bed with deponent.
While in bed, Malone asked deponent what
could be the reason that his wife would not
have a child? to which deponent said, "The
reason is that you are deficient and cannot
perform your part." Malone replied it was
not his fault, but there was a defect or
disease about his wife that would certainly
prevent her from breeding, and he had made
up his mind never to alter his will unless
his wife had a child. Deponent then asked
him if he kept a will by him, to which
Malone answered, "Cousin John Y. wrote
my will before I was married, and had it to
take care of for me, and I am determined
never to take it out of his possession or alter
it, unless my wife shall have a child; for
there is a blamed set of folks gaping around
me for what they think I will give them, but
they shall be disappointed." Deponent
then, in a joking manner, asked Malone
if he had remembered him (deponent) in
making his will? He replied no, he had
given his property to those who had been his
best friends; and stated that he had given his
cousin John Y. some negroes, to doctor

355 *George Mason a boy and his old horse
Baptist, to Eliza Mallory wife of col-
onel J. B. Mallory, a negro man, to James
M. Mason of Tennessee some negroes and a
debt due him, to Lal Heath he had given his
bounds and rifle and some other property;
that he had given his lands to two of his
aunts, and he had given Mr. W. Hobbs a
legacy, and all the rest of his estate of every
kind he had given, as he had always in-
tended, to his uncle Edmunds Mason, who had
been a father to him.

(After the reading of this deposition, the
plaintiffs proved that Young, in a former
trial, had stated in his evidence, that after
he and Malone had gone to bed, testator
mentioned the circumstance of his wife's
health, and said he thought she would never
have a child, and did not think she would
live long. The plaintiffs examined several
witnesses to prove that Mrs. Malone was in
good health until a few months before her
death. And the defendants admitted that
Young was about 60 or 70 years old, and the
brother of Mrs. Edmunds Mason.)

2. Josiah Holleman; who deposed to Mr.
Young's being a man of unexceptionable
character, and of uncommonly tenacious
memory as to dates, places, names and cir-
cumstances. Mr. Young was the clerk of
Isle of Wight county until his death.

3. Robert M. Boykin; who was at John Y.
Mason's on the occasion referred to by Mr.
Young. His statement is as follows: "I
retired about 11 o'clock. On ascending the
stairs, I heard Mr. Malone and Mr. Young
in conversation. I did not understand on
what subject they were conversing. I well
recollect waking several times during the
night, and at each time they were in con-
versation. I recollect distinctly asking Mr.
Young what he and Mr. Malone could find
to talk about on the occasion alluded to; and
added, that they could not have slept any
that night. Mr. Young replied that they did
not sleep much; for David was telling
356 him, nearly *the whole night, of his
will, and of an affection of his wife.

I do not recollect the precise time that these
questions were propounded to Mr. Young,
but believe it was the next day." Boykin
stated that he was a son in law both of Mr.
Young and of Edmunds Mason.

4. Nathaniel P. Young; who was also at
John Y. Mason's on the occasion referred to
by his father. He stated that about 9 o'clock
at night, Malone asked his father to walk
out with him. They left the room. His
father soon returned, said that David wished
to sleep with him, and went off to bed.
Shortly afterwards, doctor George Mason
and the witness retired to a room adjoining
the one in which his father and Malone were.
The statement of the witness is then as fol-
lows: "They were in conversation when we
retired, and continued it so long as I was
awake. When my father and myself arrived
at home, I enquired what could have engaged
him and David so much in conversation
when they slept together at Judge Mason's.
His answer was, that David (or the judge, as
he called him) was talking of his will. This
was in my father's chamber. He said
nothing of the provisions of Malone's will,
or the disease of his wife, as there were
ladies present.

5. William H. E. Merritt; who travelled
to Mississippi with Malone in the winter of
1832-3. Malone, he said, frequently spoke
in terms of great affection and respect of
Edmunds Mason and his family; and the
witness, from what he saw (being with him
at the houses of two of his relations) thought
that he had unkind feelings towards some of
his relations there.

6. Benjamin Myrick; who deposed, that
he heard Malone say before his marriage,
that there was a set gasping after his prop-
erty; that Malone spoke of giving a negro
girl to a little daughter of witness, and wit-
ness said, "You had better give me Jim for a
gardener." Malone replied, "I can't do that;
aunt Mason would blow me up." He said
he had promised him to his aunt Mason
(meaning the wife of Edmunds Mason).

357 *7. Norphlet L. Pond; whose respect-
ability and character for veracity were

deposed to by Dr. Orris A. Brown and Benjamin Myrick. Pond deposed, that while at work at E. Mason's on a cotton gin, before D. M. Malone was married, witness was sent for and requested by testator to witness a paper. He and Mr. Mason's overseer (Davis) witnessed it. It was on a small piece of paper, and witness saw nothing but the name "Cynthia." He did not know what it was. In March before testator's death, witness went to his house to have a settlement with him, and witness and testator went hunting. Testator advised witness to get married, saying he had been much happier since he was a married man, and would be more so but for his wife's situation. In the course of the evening, testator said he had a will, and did not intend to be without one, (he did not say where his will was;) that there were a set of fools gasping after his property, who should never have it. He did not say who they were. He said, he never expected his wife to have a child. After testator told witness he had a will, witness asked him what the paper was he had witnessed? He said, it was a codicil to his will, but it was then of no account, as it had been burnt or destroyed.

After which the plaintiffs read a deposition previously given by Pond, in which, in answer to the question whether he was ever called on by David M. Malone to attest any testamentary paper or writing, he said, "I witnessed a piece of paper, about the size of the caption of this deposition, which he afterwards told me was a codicil to his will, and which devised certain negroes after he had made his will. This paper was executed before the marriage of the said David M. Malone, and bequeathed those negroes to the defendant E. Mason." And now upon cross examination, being asked by the plaintiffs' counsel, how it was that in his deposition he stated that the paper he witnessed be-
358 queathed certain *negroes to E. Mason, and that he now states he does not know what was in it (the paper), he said in answer, that he had no explanation; his deposition and evidence would speak for themselves.

In the same deposition, being asked whether he ever had any conversation with Malone about his will after his marriage, he said, "I did. About 10 or 12 months before his death, he was advising this deponent to get married, said he had been happier since his marriage, that there were some people gasping after his property who should never have it, that he had made his will and never intended to be without one. He did not designate who they were, or call any names. The said Malone's wife was in bad health, and he told this deponent that he never expected any child. Mrs. Malone was very ill when David M. Malone died, and survived him but a few weeks. David M. Malone was much attached to E. Mason and L. G. Heath, which attachment was never interrupted." And now upon cross examination, being asked by the plaintiffs' counsel, whether Mrs. Malone was in bad health when he and the testator went hunting? and having answered that he did not know whether she

was or not, the witness was then asked to account for the fact that he had stated in his deposition that she was in bad health at that time. He answered, that he did not know any thing about it, except that David M. Malone told him.

In the same deposition, being asked whether he ever heard from Malone where his will was, or any thing about his will, he said, "I never did. I heard him say he had one." And being further asked how often did he ever hear David M. Malone speak of his will, he said, "Never but once, and that as stated above." And now upon his cross examination, being asked by the plaintiffs' counsel, if he did not say, on the first trial of this cause, that he had had several conversations with Malone on the subject of his
359 will, he replied that he might *have said so. If he did, he meant that they were all the same evening. He does not recollect whether he said they were all on the same evening or not, at the first trial, because he does not recollect that the question was asked.

In the same deposition, being asked whether D. M. Malone ever told him what became of the codicil, he answered, "He never did. He told me after his marriage that that paper was then of no account." And being further asked whether he gave any reason why the codicil to his will was then of no account, he answered, "He did not." And now upon his cross examination, being reminded of his stating that Malone told him that the codicil was burnt or destroyed, and being asked how he accounted for having sworn in his deposition positively that he did not tell what had become of it, he answered, that after giving his deposition, in reflecting, he recollects that Malone did tell him the codicil was burnt or destroyed.

The defendants moved the court to give the two following instructions to the jury: 1. If the jury believe that the will was written on a sheet of paper, and the codicil on another sheet or piece, then the mere destruction of the codicil did not revoke the will. 2. If the jury believe that the testator intended, at the time of destroying the codicil, to destroy or revoke the will, but reserved the destruction or revocation thereof as matter to be afterwards carried into effect, and did no further act to revoke or destroy it, in that case the destruction of the codicil, though done with the intention thereafter to revoke or destroy the will, did not amount to a revocation or destruction of the will. And the plaintiffs opposed the same. But the court gave both instructions.

The court, however, on the motion of the plaintiffs, added the following:—But if the jury believe from the evidence, that Malone directed the will to be destroyed, and thought that it was destroyed as requested, the
360 *court then instructs the jury that the said will, so far as it related to the personal estate, was revoked in law, although it might not in fact have been destroyed. Moreover, if they shall believe from the evidence, that Malone intended, at

the time of destroying the codicil, thereby to destroy or revoke the will, in that case the destruction of the codicil was a revocation of both the will and codicil. To the instruction so added by the court, the defendants excepted.

On the 19th of November 1841, a verdict was found against the validity of the will. When the jury rendered their verdict, they requested permission to state in open court, and did state, that they did not design or intend by their said verdict to cast the least censure on the conduct or character of Edmunds Mason or John Y. Mason, but that their verdict resulted from the opinion, unanimously held by them, that David M. Malone, in the act of destroying the codicil to his will, intended thereby to revoke or destroy the will also. And the court, uniting with the jury in exempting Edmunds Mason and John Y. Mason from all censure, did, with the consent of parties, make a memorandum to this effect part of the record.

The defendants, after the rendition of the verdict, moved the court to certify that the verdict was against evidence; but the court overruled the motion, and the defendants excepted to the opinion. The evidence was spread upon the record; and the same was, by consent, taken as a statement of the facts proved on each side.

On the 4th of December 1841, the defendants moved the court for a new trial of the issue; but the court overruled the motion. Whereupon the cause coming on to be heard, the court decreed that the paper admitted to record in Greenville county court, at March term 1837, as the last will and testament of David M. Malone, be set aside and declared null and void.

From this decree an appeal was allowed.

361 *Robinson for appellants. The general rule is, that a will once executed remains in force unless revoked by some act done by the testator animo revocandi; such as burning, cancelling, making a new will or the like. 1 Williams on Executors 92. By what act has the will of the decedent in this case been revoked? Not by making a codicil to it; for even if that had made a disposition of any part of the estate different from the will, it would only be a revocation pro tanto. Not by the marriage; for that without the birth of a child is no revocation. And not by any verbal declarations of the testator; for even if the will were of personality merely, it would be protected by the provision in the statute declaring that "no will in writing or any devise therein of chattels shall be revoked by a subsequent will, codicil or declaration, unless the same be in writing." 1 R. C. 1819, p. 377, § 9. In the language of judge Roane, in *Cogbill v. Cogbill &c*, 2 Hen. & Munf. 512, the will submitted is to prevail unless a posterior will was not only contemplated but actually executed. "In the case," says he, "of a will of personality, such a will remains in force under our statute, until legally revoked by another will in writing, conforming in other respects to

the law as established on the subject. The question is therefore not whether the will submitted for probat is the last will the testator intended to execute, but whether, being once sanctioned as a will, it has been nullified by any subsequent act or testament."

In *Jackson v. Kniffen*, 2 Johns. Rep. 31, the will was one of lands, but the principle adjudged is equally applicable to a will of personality; for, as Spencer, J., said, (p. 36,) "a will, whether of real or personal estate, cannot be revoked since the statute of 29 Charles II. by words alone." The declarations by the testator, of which evidence was offered in that case, were of the most solemn character, but the evidence was 362 rejected *as inadmissible, because such declarations could have no effect against the will.

Where, after a will is made, the circumstances occur of marriage and the birth of a child, the revocation of the will takes place in consequence of a rule or principle of law, independently altogether of any question of intention of the party himself, and consequently no evidence is admissible to shew an intention that it should not be revoked. Such is the unanimous opinion of the judges of England, pronounced after the profoundest argument and the maturest deliberation, in the late case of *Marston v. Roe*, 8 Adolph. & Ell. 14; 35 Eng. Com. Law Rep. 303. Where the only circumstance occurring after the will is that of marriage, and no revocation takes place in consequence of any rule or principle of law, parol evidence must be equally inadmissible to shew an intention to revoke. In the language of sir William Follett in the case just referred to, (p. 315,) "since the statute of frauds, the most direct expression of an intent to revoke avails nothing unless intimated by the means there pointed out." "Suppose," says Alderson, B. (p. 313), "the testator, after marriage, has clearly declared his intention that the will shall be revoked, and he afterwards changes his mind and declares his intention that it shall take effect, is the will ambulatory in the mean time? and where are such changes to stop?" "If," says Tindal, C. J., (p. 325,) "against the intention to revoke, which is presumed by law, parol evidence of a contrary intention could be admitted, such as evidence of conduct of the testator leading to the inference that he meant the will to stand, or of declarations to that effect, then it would be but reasonable to allow such evidence to be met and encountered by evidence of conduct of the testator leading to a different inference and of declarations contradictory to the former. And again, the admission of such evidence leads to this further difficulty,

363 *that if the testator changes his first intention and adopts a contrary one, which of the two intentions is to prevail? Is it to be the first, which is clearly proved, or is the latest formed intention, like the last will, to be allowed to predominate? It was precisely to preserve us from the perplexity and uncertainty of such conflicting evidence,

both in the making and revoking of wills, that some of the provisions of the statute of frauds where expressly framed."

It is true that in the case of *Marston v. Roe*, the question related to the revocation or non-revocation of a will devising real property; and it may be said that in a case of personalty, where the question is as to what shall or shall not be a testamentary paper, or what shall or shall not amount to a revocation of a will, the evidence bearing on those points is frequently composed, in part, of the declarations of the party. The reason is, that under the law of England, and under the law of Virginia as it formerly stood, a will of chattels might be made or revoked by a writing not signed by the party or subscribed by any witness. *Glasscock v. Smither &c.*, 1 Call 479. And declarations and other evidence were necessarily let in to shew that at the time of the writing there was the animus testandi or the animus revocandi. The writing offered as a will could not be valid where there was not the animus testandi, and the writing offered as a revocation could not be valid as a revocation where there was not the animus revocandi. So too where the will is alleged to be revoked by the testator's destroying, cancelling or obliterating the same, or causing it to be done in his presence, whether the will be of realty or personalty, two things must concur: there must first be shewn an act of destroying, cancelling or obliterating, and then it is secondly to be ascertained whether this act was done animo revocandi. And in all such cases the declarations of the testator, accompanying the act, are evidence to shew

364 the quo animo. This view of the ground on which such declarations are admitted is adverted to by *Woodworth, J.*, in *Dan &c. v. Brown &c.*, 4 Cow. 490. "The execution of the will," he observes, "being established, the next question is, whether there was any evidence that it was cancelled. On this point, I lay no stress upon the declarations of the testator. They were made long after the execution of the will, and shortly before his death. They are not evidence unless they relate to the res gesta, or to an act done, as where by mistake the will is torn or thrown into the fire. The declaration of the testator are in such cases evidence, where they shew the quo animo. The act of cancelling is in itself equivocal, and will be governed by the intent." Moreover, if there was formerly any difference between the admissibility of parol evidence to shew a revocation of a will of realty, and the admissibility of such evidence to shew a revocation of a will of personalty, that difference must now be considered at an end, since the act of the 4th of March 1835. Sess. Acts. 1834-5, p. 43, ch. 60; Sess. Acts 1839-40, p. 50, ch. 57, § 2. Opinion of *Stanard, J.*, in *Barksdale v. Barksdale*, decided in March 1842.

There being in this case no writing of any kind offered as a revocation of the will, one of the grounds above alluded to for admitting parol evidence, viz. to shew the intent at the time of the writing, is of course inapplicable to this case. And before the evi-

dence can be received to shew the animus with which an act of destroying, cancelling or obliterating was done, such an act must be first established. The intent to destroy, cancel or obliterate will not suffice, unless the intent be carried into execution. *Perkes v. Perkes &c.*, 3 Barn. & Ald. 489; 5 Eng. Com. Law Rep. 353; *Winsor &c. v. Pratt &c.*, 2 Brod. & Bingh. 650; 6 Eng. Com. Law Rep. 299; *Read v. Harris*, 6 Adolph. & Ell. 209; 33 Eng. Com. Law Rep. 57; *Jackson v. Betts*, 9 Cow. 208; *Means &c. v. Moore &c.*, Harper 314; 3 M'Cord 282. In a note at

365 *the end of the case of *Reed v. Harris*, it is stated that in a subsequent case between the same parties, upon nearly the same evidence, it was decided that the will was revoked as to copyhold lands. That subsequent case is in 8 Adolph. & Ell. 1; 35 Eng. Com. Law Rep. 299; and the reason of it is that the statute of 29 Car. 2, ch. 3, has been held not to apply to copyhold lands. See *Attorney General v. Barnes & wife*, 2 Vern. 597; *Tuffnell v. Page*, 2 Atk. 37; *Doe v. Danvers*, 7 East 299. But the reason for this decision as to copyhold lands does not apply in Virginia to any kind of estate known here, our statute declaring, as before mentioned, that no will in writing, even of chattels, shall be revoked by any subsequent declaration unless in writing. Accordingly, in *Boyd &c. v. Cook*, 3 Leigh 32, where the testator was a blind man, and the parties contesting the probat offered to prove an admission by a daughter of the testator, who had written his will, that she had been directed by her father to destroy the will, and that he believed it was done, the court of appeals held this not to be proof of revocation, and admitted the will to full probat as well in respect of personal as of real estate. *Carr, J.*, said, "Mere parol directions given to a person to destroy the will can never satisfy the requisitions of the statute; and to suffer them, would be to incur the very danger the statute meant to avoid."

This decision of the court of appeals, and the other authorities before cited, have been disregarded by the circuit court. For the circuit court instructed the jury that if they believed from the evidence, that *Malone* directed the will to be destroyed, and thought that it was destroyed as requested, then the will, so far as it related to the personal estate, was revoked in law, although it might not in fact have been destroyed. And in this instruction the appellants insist there is manifest error.

The other instruction is a very curious one, in reference to the evidence, which 366 tended to shew that the will was written on one sheet of paper, and the codicil on another, that the will was left with *John Y. Mason* and the codicil with *Edmunds Mason*, and that the will and codicil were in these places respectively at the time the codicil was destroyed. The instruction is, that if the jury believe from the evidence, that *Malone* intended, at the time of destroying the codicil, thereby to destroy or revoke the will, in that case the destruction of the codicil was a revocation of both the will and

codicil. Now, if the two papers, instead of being a will and codicil, had been duplicates of the same will, and the court had instructed the jury that if they believed that the decedent, at the time of destroying one copy, intended thereby to revoke the will, the destruction of one copy was in such case a revocation of the will, such an instruction would be intelligible enough. But when the two papers, in different places, are of wholly different tenor, when one is a will and the other a codicil, and the paper destroyed is not the will but the codicil, it is difficult to comprehend how the destruction of the codicil can be a revocation of the will. If the will were destroyed, then the codicil being *prima facie* dependent on the will, the cancellation of the will is an implied revocation of the codicil. 1 Williams on Executors 76. But there is no foundation for the converse of this proposition. A will is not dependent on the codicil, and the cancellation of the codicil, so far from being a revocation of the will, is evidence rather that the will was intended to remain as it was before that codicil was made. If the intention to destroy a will be not sufficient to revoke it without an act destroying it, and if the destruction of a codicil in one place does not of itself destroy the will in a different place, it follows that the destroying the codicil, no matter with what intention, is not a revocation of the will. Yet the circuit court instructed the jury otherwise. And it was this instruction which caused the verdict that was

367 found. *For the jury have declared that their verdict resulted from the opinion that the decedent, in the act of destroying the codicil to his will, intended thereby to revoke or destroy the will also. With the verdict that was found, the court of chancery ought not to have been satisfied. It was without evidence to support it. The declarations of the testator, deposed to by the witnesses of the plaintiffs tended merely to shew that after his marriage he considered his will as not in force, and intended to make a will providing for his wife. They do not shew that there was any new will made, or any valid act of revocation. And the only other evidence adduced against the will consists of statements by Weaver and dr. Parham, of what Edmunds Mason told them had passed on one occasion when he and the decedent were together. The admissibility of such evidence as this is very questionable. Osgood v. The Manhattan Company, 3 Cow. 623; The Hartford Bank v. Hart, 3 Day 493, especially as it does not appear that Edmunds Mason was called on and refused to testify. See opinion of Bayley, J., in The King v. The Inhabitants of Hardwick, 11 East 590. But whether admissible or not, the statements are too vague and uncertain to have much weight against Edmunds Mason, and they are entitled to still less against the other legatees. They certainly ought not to be concluded by a verdict found upon the statements of one out of many legatees under the will, detailed second-hand, when even according to those statements there was no act destroying,

cancelling or obliterating the will. But the case is not merely one in which there is an absence of evidence on the part of the plaintiffs to establish a revocation of the will. The testimony of several corroborating witnesses, adduced by the defendants, and relating to different times and conversations, shews the sense of the testator, long after the act of destroying the codicil, that the will was a subsisting will. Bates v. Holman, 3 Hen. & Munf. 502. Now we do not admit that the will is invalidated by an intent to burn it, even if such intent were established, (the will itself remaining in existence). But suppose the testator did intend it should be burnt, yet if he afterwards knew that it was in existence, and intended that it should stand for his will, evidence of this removes the effect of the other evidence shewing a previous intent to destroy the will. Burns v. Burns, 4 Serg. & Rawle 297.

In every aspect of the case, the decree should be reversed and the verdict set aside. And then the question will be whether a new trial shall be directed, or the bill dismissed.

The bill ought to state such facts as, admitting them to be true, are sufficient in law to make the will invalid; and this bill stating no such facts, we insist that it is for that reason defective, and ought therefore to be dismissed. Moreover, the plaintiff Franky Wilkins, and the children of Mrs. Wyche and Mrs. Davis, having by such cogent acts recognized the validity of the will, and the bill stating nothing to avoid the effect of those acts of recognition, those plaintiffs cannot be entertained in a court of equity. And then the objection arises, that the other plaintiffs having joined with themselves, as coplaintiffs, parties who are not entitled to sue, the suit cannot be sustained. Cuff v. Platell, 4 Russ. 242; 3 Cond. Eng. Ch. Rep. 651; Makepeace v. Haythorne, 4 Russ. 244; 3 Cond. Eng. Ch. Rep. 652; The King of Spain and others v. Machado and others, 4 Russ. 225; 3 Cond. Eng. Ch. Rep. 643.

Seddon for appellees. The instructions of the circuit court to the jury declare, that there being a will and codicil, the mere destruction of the latter does not *prima facie* involve the destruction or revocation of the former, nor will a destruction of the codicil, with intent at some future time to destroy the will, revoke the will; 369 *but that a destruction of the codicil, with a design by such act of destruction to vacate and cancel the whole instrument, will as well as codicil, will revoke and cancel both will and codicil. This principle applies as well to wills of realty as of personality. Under the third section of our statute of wills, 1 Rev. Code, p. 376, which follows as to this matter the sixth section of the English statute of frauds, we admit that no mere declaration of intention to revoke is sufficient; that the strongest declaration by words in *præsentis* will not answer; and that the intention to revoke, though prevented from being carried into execution by fraud, will be wholly unavailing. We admit, in short, that there must be either a written

revocation, or an act destroying, cancelling or obliterating the will. But an act may be an effectual revocation, though the will be neither totally destroyed nor wholly obliterated; there may be a slight act, only cancelling a part or obliterating a clause, which will yet operate to revoke the will, because done with that intent: while, on the other hand, the most positive act destroying or obliterating the whole instrument will be insufficient, if the intent to revoke be wanting. Instances of total cancellation are furnished in the cases of *Scrubby v. Fordham* and others, 1 Add. 74; 2 Eng. Eccl. Rep. 34, and *Moore &c. v. Moore &c.*, 1 Phill. 375; 1 Eng. Eccl. Rep. 109, of partial cancellation, in the cases of *Sutton v. Sutton*, Cowp. 812; *Swinb. Pt. 7, § 16*; *Larkins* and others v. *Larkins* and others, 3 Bos. & Pul. 16; *Short v. Smith*, 4 East 419. In all the cases, cancelling is regarded as an ambiguous act. *Burtenshaw v. Gilbert*, Cowp. 52; *Smith &c. v. Cunningham*, 1 Add. 448, 455; 2 Eng. Eccl. Rep. 175; *Swinb. Pt. 7, § 16*. It may consequently be explained by parol evidence. Opinion of *Roane, J.*, in *Bates v. Holman*, 3 Hen. & Munf. 526. And the slightest act will revoke, where it appears to be done animo revocandi.

Bibb v. Thomas, 2 W. Bl. 1043; *Boyd &c. v. Cook*, 3 *Leigh 32. The conclusion from all the cases is, that there must be some act of cancellation; that whether such act be a revocation or not, depends on the intent; and that it shall either be a total or a partial revocation, as the testator intended. Now a codicil is part and parcel of the will, a substantive part of it, united to it, whether it be on the same or on a separate piece of paper. *Swinb. 15*; *Bates v. Holman*, 3 Hen. & Munf. 525; *Acherley v. Vernon*, Comyn 381; *Hill v. Chapman*, 1 Ves. jun. 407; *Westcott* and others v. *Cady* and others, 5 Johns. Ch. Rep. 334. The codicil republishes the will, and gives by implication new life and vitality to it. The effect of the codicil is to make the will speak as of the date of the codicil. *Beckford v. Parneccott*, Cro. Eliz. 493; 1 Wms. Saund. 277, e.; *Crosbie v. MacDougall*, 4 Ves. 616. And the will and codicil are so united that the cancellation or revocation of the will revokes prima facie the codicil. 1 Williams on Ex'ors 76. But this presumption may be repelled, as in *Medlycott v. Aasheton*, 2 Add. 229; 2 Eng. Eccl. Rep. 280. The destruction, then, of the codicil must be placed on the same ground as the destruction of a substantive and independent clause of a will. And as the destruction of part of the will, though a revocation prima facie of only that part, may, by shewing the intent, operate as a revocation of the whole, so, though the destruction of the codicil is prima facie a revocation of the codicil only, yet upon shewing the intent, it may operate as a revocation of the will, as well as of the codicil. This intent sometimes appears from the nature of the provisions. If, for example, there be a particular provision in the will, and the codicil contain the same provision, a destruction of the codicil will be a destruction of that provision in the

will. *Utterson v. Utterson*, 3 Ves. & Beam. 122. Here the codicil in respect to the slaves has the same effect as the residuary clause, and the testator at least intended a revocation pro tanto. The intent *may also be to revoke the whole, and may be shewn by circumstances. If in any case the destruction of a codicil with intent to revoke the will, can, upon shewing such intent, have the effect of revoking the will, it must have that effect here; for the jury have found such intent.

II. The circuit court has declared that the solemn direction by a testator that his will should be destroyed, and his belief that it was destroyed accordingly, are in law a revocation of a will of personalty. Before the statute of frauds, words were sufficient to revoke a will either of realty or personalty. 1 Wms. Saund. 278, h.; *Simpson v. Kirton*, Cro. Jac. 115. The provisions of the english statute are in 1 Williams on Ex'ors 59, 60. The virginian statute is more brief, but to the same effect; 1 R. C. p. 377, § 9. Under these statutes, something more is necessary than mere words; but less will do than would be required to revoke a will of realty. Words accompanied by conduct shewing an intent to revoke, are still sufficient to revoke a will of personalty. The whole effect of the statute is to prevent a revocation of such a will by words importing a present intent to revoke; but the direction to destroy the will, and the belief that it is destroyed accordingly, will still revoke it. Here the direction was to burn the papers (will as well as codicil), and the codicil was actually burnt. Such a direction applicable to both papers, and believed to have been complied with, would operate as a revocation of a will of personalty in England, and must have the same effect here. *Doe v. Harris*, 8 Adolph. & Ell. 1; 35 Eng. Com. Law Rep. 302. This, it is true, was a case of copyhold lands, which do not strictly come within the statute of frauds relating to realty; but what will revoke a will of copyholds will revoke a will of personalty. The decisions in the ecclesiastical courts shew clearly, that though words will not revoke, yet intention manifested by conduct will. *Walcott*

v. Ochterlony, *1 Curteis 580; 6 Eng. Eccl. Rep. 398. And on this subject the ecclesiastical law is our law. *Redford's adm'r v. Peggy* and others, 6 Rand. 316; *Worsham's adm'r v. Worsham's ex'or*, 5 Leigh 589. In the case of *Boyd &c. v. Cook*, 3 Leigh 32, relied upon on the other side, the attention of judge Carr was confined to the clause of the statute relating to wills of realty, and the case does not overrule the doctrine of the ecclesiastical courts, that conduct, with present intention to revoke, will amount to revocation.

It is not proper to consider the act of 1835, (Sess. Acts 1834-5, p. 43, ch. 60,) as changing the mode of revocation. At common law, every instrument not under seal was capable of being orally dispensed with. After a will was required to be in writing, it might have been revoked

by words until the statute of frauds. 1 Roberts on Wills, ch. 2, p. 193. And it must still be capable of being revoked in any manner which the statute allows. The requisition of greater formalities in the execution cannot of itself impose greater formalities in the revocation.

III. Parol evidence is clearly admissible to shew the intent with which an act was done; and for this purpose declarations accompanying the act, or made subsequently, may be received. Then as to the declarations of Edmunds Mason, though it is true that a party to a suit cannot be compelled to give evidence, yet declarations of any party contrary to his interest may be received. The King v. Inhabitants of Warwick, 11 East 578; Burton &c. v. Scott &c., 3 Rand. 399. Such evidence is received on the principle that the statements are against the interest of the party, and that he cannot be compelled to testify.

IV. This being a case of conflicting evidence, was peculiarly proper for a jury. The verdict should not be set aside merely because the judges would, if on the jury, have found differently.

373 *V. There was no necessity to set forth in the bill the grounds of the proceeding. All that is necessary is to set forth what entitles the plaintiffs to the relief required. Besides, there was no demurrer on this ground, but an answer. Had there been both demurrer and answer, the answer would have overruled the demurrer. Jones v. Earl of Strafford, 3 P. Wms. 81; Clark v. Phelps and others, 6 Johns. Ch. Rep. 214.

VI. It is no objection to a suit that the title of one of the plaintiffs is destroyed, provided there remains on the record a plaintiff whose title to relief is consistent with the claim of the other, and is not affected by its failure. The authorities cited on the other side are not applicable, because there the plaintiffs claimed a joint demand arising out of contract, and either the claim had no existence, or it was joint. Such cases are analogous to those at common law, where plaintiffs suing on a contract alleged to be made with them jointly, must sustain the demand as alleged. But here there are separate and distinct interests, and the utmost that would be proper would be to dismiss the bill as to the party having no interest. But in fact there is an interest existing in all the plaintiffs, either as devisees and legatees, or as heirs and distributees. The ground is merely that there is an equitable bar, not that any of the plaintiffs ought not to be parties. And the objection moreover is not made by plea, but only by the answer. It is like the case of an answer setting up that one of the plaintiffs is paid. Story's Eq. Pl. § 203; Wilkinson v. Parry, 4 Russ. 272; 3 Cond. Eng. Ch. Rep. 662. The case of Dickinson v. Davis and others, 2 Leigh 401, is also an authority against the objection.

Robinson adverted to the two cases relied upon as establishing that words accompanied by conduct shewing an intention to

revoke are sufficient. He remarked, that from the opinion in Doe v. Harris, 35 Eng. C. L. R. *302, it appeared, that the statute of frauds was held not to apply, and the conduct in that case was considered as equivalent to words, and as revoking because words would have been sufficient to revoke. The other case, (Walcott v. Ochterlony, 6 Eng. Eccl. Rep. 398,) he said must have been decided upon the ground that there was such a writing as satisfied the requisitions of the statute; the ecclesiastical courts going farther in holding particular writings sufficient, than the courts of Virginia would go. But here there is no writing, and it is conceded that mere words will not do.

Gholson for the appellees. Though the 3d section of our statute points out the only modes which a will of realty may be revoked, it is not true that every way in which a will of personalty may be revoked is prescribed by the 9th section. This section only declares that a subsequent will, codicil or declaration, in order to revoke, must be in writing; which is, in substance, that a will of personalty shall not be revoked by words only. The destruction of a will of realty must be in the presence of the testator. Will it be contended that the burning a will of personalty by direction of the testator, though not in his presence, is not a valid revocation? Surely not. The mere declaration "I revoke my will," the mere attempt to make a nuncupative will, will not revoke a will of personalty. These are mere words. But a positive direction to destroy is the act of the testator, and if carried into effect, is, so far as relates to personal estate, a valid revocation. And a testator having the right to revoke in this way, if a fraud be practised upon him, the will nevertheless will stand revoked as to chattels. It is certain that Malone burnt, or caused to be burnt in his presence, the codicil to his will. This was no declaration; it was a solemn act. Was this act done in obedience to his orders to destroy his will? If so, upon what principle

375 can it be contended *that this would be a revocation by words only? or in what respect would this revocation violate either the letter or spirit of the 9th section? It was no will, no codicil, no declaration, but an act of the most unequivocal character. The remark quoted from the opinion of judge Carr in Boyd &c. v. Cook, 3 Leigh 32. is made upon the 3d section, and the attention of the court in that case was not directed to the 9th section. The question, moreover, judge Carr said would be considered still open. Walcott v. Ochterlony, 6 Eng. Eccl. Rep. 398, should therefore have the weight to which it is entitled, unimpaired by the opinion in Boyd &c. v. Cook. And the point of that case is, that there was a present intention absolutely to revoke, manifested by something more than mere words.

Then as to the other instruction. No witness (except Young, whose testimony was disregarded by the jury) proves that the

will had ever been in John Y. Mason's possession at all, and he does not prove that it was there at the destruction of the codicil. But wherever the will might in fact be, it is certain that Malone thought the will, as well as the codicil, was in the possession of Edmunds Mason, when he ordered him to destroy "those papers." Malone thought so on the very night of his death, when he called upon his brother in law to take charge of his affairs. He thought so on the occasions when he told his friends and companions he had no will. Is the instruction wrong? A codicil being part of the will, and the destroying a part of the will *animo revocandi* being a sufficient revocation of the whole, it follows that the destroying the codicil, with intent to revoke the will as well as codicil, is a revocation of both. Where there are duplicates of a will, and one is in the possession of the testator and the other in possession of a friend, the fact that the one is missing from the testator's possession works a revocation of the other. 4 Kent's Comm.

531; Colvin v. Fraser &c., 2 Haggard 376 266; *4 Eng. Eccl. Rep. 113; Boughey v. Moreton, 2 Lee 532; 6 Eng. Eccl. Rep. 231; Onions v. Tyrer, 2 Vern. 742; S. C.; 1 P. Wms. 346. Much stronger is the case where a codicil is destroyed with the belief and for the purpose of revoking and destroying the will.

Upon the other points, Gholson enforced the views presented by Seddon. If the instructions of the court were right, the verdict of the jury, he insisted, was not without evidence to sustain it. The bill was clearly sufficient; for upon it the court was obliged to direct the issue, and the decision of the question could not be withdrawn from the jury, by demurrer to evidence or in any other way. And there was no such improper joinder of plaintiffs as had been objected. Suppose, he said, all the legatees of an estate sue an executor, and he files with his answer receipts in full from several of the plaintiffs, this surely would not cause the bill to be dismissed as to the others. The principle contended for only applies where a plaintiff joins with him others who, according to their own shewing, are not entitled to sue.

Macfarland, in reply, argued, that this case strikingly vindicated the wisdom of the law which protected last wills and testaments from the frail memories and the machinations of witnesses. There was in truth nothing to authorize a grave suspicion that the testator intended to destroy his will, or directed it to be destroyed. The only foundation for such an opinion was the report by one of the witnesses, of a conversation held by him with a legatee; and even that was to be sought for, not in the general accuracy of the report, but in its minute and exact precision as to the terms employed by the legatee. It would be better to annul the law, than admit of exceptions broad enough to sanction such an experiment. The admissions of the legatee were not evidence. But admitting

377 them, and granting the instructions, *the evidence was not only too loose and imperfect to justify a verdict against the will, but should have induced an opposite finding.

2. Parol evidence, he said, was admissible to ascertain the intent of an equivocal cancellation or partial destruction, so as to determine whether the act was done for the purpose of revoking the will altogether or only in part, or was accidental, and so was not designed to have either operation. But an apparent partial destruction was necessary, to lay a foundation for the admission of such evidence; which had never been received to dispense with the factum of destruction, or to make it out when the instrument exhibited no traces of it. To allow evidence to impeach a will as destroyed, whilst the appearance of the instrument refuted the pretension, would leave it wholly at the mercy of witnesses. The necessity of an apparent act, tending to destruction, was shewn by all the cases. It was sufficient to refer to *Read v. Harris*, 33 Eng. Com. Law Rep. 57, when they are collected.

The general rule was admitted; but it was still contended that the destruction of the codicil, to which the testator assented, furnished the act or factum required to let in the evidence; upon the ground that the codicil was part of the will, and that the rule, properly understood, required nothing more than some significant act with which to connect the evidence. The answer was, that the factum which alone authorized a recourse to evidence, was something which had impressed itself on the will, and naturally suggested an enquiry as to the intent wherewith it was done; not something which the evidence brought to light, and which, without it, would be unknown. Any other hypothesis involved the absurdity of admitting evidence to prove the factum, at the same time that the ascertained existence of the factum was a prerequisite to the admission of evidence. The argument ran in a circle. It was plain that there

378 *was no practical, sensible restriction on the introduction of evidence, unless it be confined to marks or indications of destruction apparent on the will. So the rule had hitherto been expounded; and every consideration of policy was opposed to any relaxation of it. The argument founded on *Doe v. Harris* and *Walcott v. Ochterlony* had been already answered; and he enforced the views taken by *Robinson* of those cases. The idea of a factum, of which there was no trace on the instrument, serving to let in parol proofs, implied the efficiency of typical cancellation and destruction. It had no foundation in authority or principle.

It was not denied that a codicil was part of a will. Still the will was independent of the codicil, and would remain effectual notwithstanding its cancellation. Such was the general rule. In the present instance the will and codicil were on different papers, committed to separate custodies,

and when the codicil was burned, it was not in the power of the testator to destroy the will if he had so wished. The will bore no marks of the testator's dissatisfaction with any of its provisions, and was to all appearance exactly such as might have been expected if the testator remained contented with it. Upon its face it was a complete and perfect instrument. The simple act of destroying the codicil raised no presumption against the efficacy of the will. And then the question was, whether it was admissible to prove the intent or impression of the testator as to the will, so as to extend the act of destruction to that? in other words, whether the evidence of witnesses, unaided by any inherent indications, was competent to prove that the will had been renounced? The question could admit of none but a negative answer. The case of *Utterson v. Utterson*, relied upon by the opposite counsel, was in perfect harmony with the rule. It proceeded on the ground that the cancellation of the codicil evinced a change in the testator's purposes
379 towards his disinherited *son; and that the intent to provide for him, implied thereby, ought to prevail over the correlative clause of the will. The cancellation of the codicil connected itself by internal evidence with the will; and the case, therefore, was not an authority for the apellees.

3. He insisted that the bill was imperfect in respect to all the requisites of a bill in equity, and ought to have been dismissed.

BALDWIN, J. The spirit of our statute law in regard to the making and revocation of wills, is, to restrain parol testimony on the subject within the narrowest practicable limits. Hence the solemnities of writing, signature, attestation. Revocations by cancelling or destroying the instrument arise naturally from the custody, control and dominion of the testator. Prescribed formalities in regard to them would be of little value, and would involve the necessity, in the event of nonobservance, of resorting to parol testimony for the purpose of setting up and establishing the ruined instrument; one of the very evils intended to be guarded against. Still, however, the statutes are not without their efficacy in relation to these as well as the other modes of revocation, by excluding the evidence of witnesses as to the conduct and declarations of the testator, except so far as they bear upon the permitted acts of revocation. This is obvious from the consideration, that, as nothing can supply the want of the acts of revocation, so nothing can extend them beyond the legal import and effect of the acts themselves. The act, however, of cancellation or destruction necessarily presents enquiries calling for or permitting the examination of parol proofs to a very considerable extent. The mere act most usually establishes itself; for if a will which had been executed by the testator, and retained in his custody, be found cancelled at his death, or after diligent enquiry cannot be found at all, the legal presump-

tion *is that it was cancelled or destroyed by himself. But then this presumption is liable to be repelled by proof that the act of cancellation or destruction was done by some one else, without his knowledge and consent. So too, as the mind of the testator must accompany his physical act, every such case is open to proof of a mistake in point of fact: as if he were to throw ink upon his paper instead of sand, or, having two wills by him of different dates, should direct one of them to be cancelled or burnt, and the person so directed should through misapprehension or inadvertence cancel or burn the other. Still further, if the act in question be not a substantive, independent act, but dependent upon another, the whole forming together one transaction, we must look to the entire design and purpose, in order to ascertain whether a revocation has been accomplished. Thus, where a testator knowingly cancels or destroys his will, but with the belief that he has substituted or is about to substitute another in its place, which consequential or preliminary object is defeated by some accident or mistake, preventing the execution, or the complete and perfect execution, or the valid effect of the new will; in such cases, the work of revocation is incomplete and ineffectual. The purpose must concur with the act. And in this sense it is that there must be the animus revocandi; the purpose to revoke by the adopted mode of revocation. But the purpose alone is unavailing, without performance of the act itself. A general intent of the testator to alter his will, or change the disposition of his estate; a particular design to cancel or destroy it; an abortive attempt to do the very act in question, even though prevented by accident, fraud or violence, do not affect the legal validity of the instrument. The will must be cancelled or destroyed. How far the work of destruction must proceed, is not yet settled. It would seem that where the tes-

tator has done all that he designed to
381 do for the purpose of actual *destruction, and believes that he has accomplished it, a literal compliance with the statute is not indispensable, *Moore &c. v. Moore &c.*, 1 Phill. 375. A slight tearing and burning were held sufficient in *Bibb v. Thomas*, 2 W. Black. 1043. A mere scorching of the envelope, not extending to the will it embraced, was held insufficient in *Reed v. Harris*, 33 Eng. Com. L. R. 57. However this may be, I think it clear that a cancellation or destruction, to effect a revocation of the whole instrument, must be directed against the whole, or an essential part of it; otherwise it can amount only to that partial cancellation or obliteration so well established as being a revocation pro tanto only. *Swinb. Pt. 7, § 16*; 1 *Williams on Ex'ors* 73; *Scrubby v. Fordham &c.*, 1 Add. 78. If a will, whether written on one sheet of paper or several sheets, be torn up by the testator, or thrown into the fire, then it is manifest that the act of destruction is directed against

the whole instrument, though only a part be destroyed, and that part a codicil only; but if the testator cancels or obliterates a particular clause, or destroys one of the sheets, retaining and preserving the rest, then his purpose to destroy a part only is equally clear, and the sole question is as to the validity and effect of what remains unradicated; a question which may occur as to the whole residue of the instrument, or (as in *Sutton v. Sutton*, Cowp. 812; *Larkins &c. v. Larkins &c.*, 3 Bos. & Pull. 16; *Short v. Smith*, 4 East 419,) as to the residue of a particular clause.

In the case before us, it was physically impossible that the act of destruction in question, the burning of the codicil, could have been directed against the bill, inasmuch as the will was not present but in a different custody. And yet the court instructed the jury, that if the testator intended, at the time of destroying the codicil, thereby to revoke the will, in that case the destruction of the codicil was a revocation

of both the will and the codicil. If this
382 be correct, it must be either *because a codicil is so essential a part of a will that its revocation necessarily involves the revocation of the will, (a ground too palpably wrong to require discussion, and not assumed by the appellees' counsel, nor by the circuit court); or because the destruction of a codicil, without any the slightest destruction of the will, or any attempt to destroy it, or even an intent to destroy it, must have the effect of revoking the will, if so intended by the testator. This last proposition, it seems to me, requires but little consideration after what has been already said. To place it in the strongest light for the appellees, let us suppose that the testator, at the time of burning the codicil, expressly declared that he did it with intent thereby to revoke the will. Could it have that effect? The will itself was in no wise cancelled or destroyed, but remained perfect and entire, indestructible and intangible by the act in question. Then is it not obvious, that if revoked, it must have been by the sole efficacy of the testator's parol declaration, directly in the teeth of the statute?

The argument of the appellees' counsel is, that the question of revocation is in some degree a question of intention, and the act of cancellation or destruction an equivocal act, which must be done with an intention to revoke; and therefore, that though a partial cancellation or destruction is *prima facie* a partial revocation, yet by the intent of the party it may be extended to a total revocation. The premises are true, but do not warrant the conclusion. The intent to revoke must concur with the act of revocation, but cannot go beyond it, being limited by law to the act itself. We must not confound the intent to do the physical act of cancellation or destruction, with the intent to produce thereby the legal effect of revocation. When the intent to do the physical act concurs with the act itself, it then becomes an act of revocation; and

when the intent to revoke concurs with the act of revocation, if then becomes
383 *a legal revocation. When the concurring physical act and intent to do it are partial only, we have merely a partial act of revocation, and, as regards that act, the testator designs to do no more; and thus the question is presented, whether a partial act of revocation can accomplish a total revocation? a question which is answered by merely stating it.

In this view of the subject, it avails the learned counsel nothing to prove, from reason or authority, that a codicil is to be taken as a part of the will; for still it is a case of partial revocation. The argument is, however, stronger against total revocation, where the act of cancellation or destruction is applied to the codicil, than where it is applied to a part only of the will; for the part of the will cancelled or obliterated may be essential to the validity of the rest, which can never be as regards the codicil relatively to the will. The codicil is a part of the will for construction and testamentary disposition, but not for execution, nor for revocation, when that is applied to the codicil. It is a branch not essential to the existence of the tree, but which can have itself no distinct vitality.

In my opinion, therefore, the instruction in question violates both the letter and the spirit of the statute, and is fraught with all the evils of parol revocations. There can be no stronger illustration of the mischievous effects of such a doctrine than is furnished by this very case, which was made to turn upon the hearsay testimony of two witnesses to prove admissions, by one of the devisees, of expressions used by the testator, which derive their whole force from the very looseness of the terms employed.

The attempt to sustain this doctrine by authority has completely failed. No case has been produced in which it has been held that a revocation of a codicil, with whatever intent or in whatever mode, has operated as a revocation of the will. The

384 case cited of **Utterson v. Utterson*, 3 Ves. & Beam. 122, it seems to me is not in point. There a father, after having made his will, being displeased with his son, by an interlineation of his will excluded him from all share in his property but one shilling, and also by a codicil, made for that purpose, declared his determination to the same effect; but afterwards being reconciled to his son, the testator cancelled the codicil by drawing his pen across it, but the interlineation was left standing in the will: and it was held that the cancellation of the codicil had the effect of cancelling the interlineation. The obvious principle of this decision, I think, is, that the interlineation and the codicil were parts of the same transaction, and to be regarded as an entire act for the same identical purpose; and that the revocation of the codicil was as much a revocation of the interlineation, as the revocation of a will is of its counterpart.

Another instruction given by the court on the trial of the issue was, that if the jury believed from the evidence, that the testator directed the will to be destroyed, and thought that it was destroyed as requested, then the will, so far as it related to the personal estate, was revoked in law, although it might not in point of fact have been destroyed. As this instruction, if erroneous, ought not to be repeated on another trial of the issue, I think it proper to express my opinion upon it. The proposition which in its broad terms it announces, is, that if the testator directed the will to be destroyed, whether in *presenti* or in *futuro*, and whether the will was present or absent at the time, and believed, whether then or at a subsequent period, that it was destroyed, then the will, as relates to the personal estate, was revoked, though not in point of fact destroyed. I need not consider the proposition thus stated, as I do not believe the court intended to be so understood, and as the counsel for the appellees have chosen to construe the instruction in reference to the instructions 385 which had already been "given on the motion of the defendants, and to the evidence on the trial. Passing by any objection founded on an apparent clashing of the instructions, or an ambiguous hypothesis of the facts, let us suppose that the court had in its contemplation the undisputed facts disclosed by the evidence; to wit, that the will was not present at the time of the destruction of the codicil, but in a different custody; that the destruction directed by the testator was in *presenti*; and that if the direction extended to the will, it was under a misapprehension on his part, not occasioned by any fraud or mistake of the person directed, that the will was actually present. Let us further suppose that there was evidence tending to prove that the direction, under such misapprehension, extended to the will as well as the codicil. Then the case presented is that of a destruction of a codicil in the testator's presence and by his direction, and a further direction at the same time to destroy the will together with the codicil, under a mistaken belief of the testator that the will was then actually present. The instruction concedes that the will was not revoked as to the realty, and the question is whether it was revoked as to the personalty. I waived the enquiry whether the act of 1835, placing wills of personal property on the same footing as wills of real estate in regard to authentication, is to be consequently construed as placing them on the same footing in regard to revocation. Let the negative be conceded: Still we have a statute of long standing, taken from the english statute of frauds, prohibiting parol revocations of wills of personalty. Of what avail then was the parol direction to destroy the will, when in fact it was not destroyed, and moreover could not at that time have been destroyed? There is nothing more certain than that a direction to cancel or destroy a

will, if it be not complied with, is not a cancellation or destruction. Revocation by cancellation or destruction, equally applicable to wills of personalty *and realty, is recognized by the english statute of frauds, and our statute of wills, in regard to revocations of devises of real estate. And in the language of Coleridge, J., in *Reed v. Harris*, 33 Eng. Com. Law Rep. 61, "the kind of construction which has been insisted upon would lead to a repeal of the statute on this subject, step by step. The statute, for wise purposes, does not leave the fact of cancellation to depend on mere intent, but requires definite acts. In the making of a will, if the proper signatures were not affixed, no explanation of the want of signatures could be received; and so where a will has been made, to revoke it there must be some act coupled with the intention, to bring the case within the sixth section." The learned judge of course refers to the acts of cancellation or destruction mentioned in the 6th section of the english statute. The counsel for the appellees, however, contend that the statute prohibiting verbal revocations, that is to say, requiring revocations by words to be in writing, does not apply to acts evidencing an intention to revoke, though falling short of cancellation or destruction. There is no argument for this, founded in reason or policy; and no authority that I am apprized of. The cases cited do not warrant the proposition. That of *Walcott v. Ochterlony*, 6 Eng. Ecc. Rep. 398, was one of written directions to destroy a will, which were treated as an actual revocation in writing. *Reed v. Harris*, 35 Eng. Com. Law Rep. 301, was a case of copyhold, which was held not to be within the statute of frauds, and therefore the will liable to revocation, as at common law, by words of present revocation, or acts equivalent thereto.

And here again this case strongly illustrates the danger of parol revocations of wills. This part of the case was made to turn upon the testator's unfounded belief, supposed to be proved by the hearsay evidence of loose expressions above alluded to, that the will was *actually present at the time, so as to connect that belief, and the inferred direction in relation to the will, with the burning of the codicil. If we were to lose sight of the legal barriers, that is to say, the solemn forms and decisive acts prescribed by law, what security could we have against the corruptions, and blunders, and inaccuracies of witnesses in relation to the testamentary dispositions of estates?

Without considering the objection made by the appellants' counsel to the evidence, given without opposition on the trial, of the admissions made by Mr. Mason, one of the devisees, in regard to statements of the testator in conversation with him, I am of opinion that the judge of the circuit court, sitting as chancellor, ought not to have been satisfied with the verdict of the jury, because of the misdirections above

stated; and therefore that the decree ought to be reversed, and the cause remanded.

It remains to enquire what further proceedings ought to be had in the cause. The appellants' counsel contend that the bill should be dismissed, on two distinct grounds. One is that the bill does not state such facts as, admitting them to be true, are sufficient in law to make the will invalid; it merely, by a sweeping allegation, charging that the paper propounded is not the last will and testament of the alleged testator. My present impression is that this objection could only be properly taken by a demurrer to the bill; but I will briefly consider it upon its merits.

The question of *devisavit vel non* is a common law question, and in Virginia most usually a mere question of probat. After a will has been admitted to record, it cannot, with us, be controverted incidentally; as it frequently is in the English common law courts, and sometimes (through the intervention of a jury) in their court of chancery, in consequence of the want of a court of probat in relation to wills of real estate. The

388 *sentence of our courts of probat cannot be drawn in question, unless in an appellate forum, except in the mode prescribed by our statute of wills, 1 R. C. p. 378, § 13, which provides, "that when any will shall be exhibited to be proved, the court having jurisdiction may proceed immediately to receive the probat thereof, and grant a certificate of such probat. If, however, any person interested shall within seven years afterwards appear, and by his or her bill in chancery contest the validity of the will, an issue shall be made up whether the writing produced be the will of the testator or testatrix or not, which shall be tried by a jury, whose verdict shall be final between the parties; saving to the court a power of granting a new trial for good cause, as in other trials: but no such party appearing within that time, the probat shall be forever binding;" with a saving in favour of persons labouring under disabilities. The 14th section also provides, that "in all such trials by jury, the certificates of the oath of the witnesses at the time of the first probat shall be admitted as evidence, to have such weight as the jury shall think it deserves." Thus the statute provides a supplemental tribunal to revise the decision of the court of probat, if in favour of the will; and that tribunal is a jury, to be impanelled for trial of the issue of *devisavit vel non*, to be directed by a court of chancery. The jurisdiction, such as it is, so conferred on the chancery courts is no part of the original jurisdiction of the courts of equity, which will not, (in the language of the books) in an adversary way, take jurisdiction to determine the validity of a will. It is a probat jurisdiction, to be exercised not by the chancellor, but by the jury; and his only province is to convene the proper parties, and cause the prescribed issue to be made up and tried, with the incidental power to grant a new trial, and to remove impediments

and furnish facilities to a full and fair trial of the merits before the jury. The issue is *directed by the mandate of the law, in order to the final probat of the will propounded; and not to inform the conscience of the chancellor, whose conscience is not at all concerned in the matter, except to prevent injustice from being done by the verdict of the jury. The issue is not that made up by the bill, answer and other pleadings in the chancery proceeding, but is a new and separate issue, which, when drawn into technical form, is the result of feigned pleadings in a supposed action at law. The issue covers the whole ground (at least so far as required by the parties) whether the paper propounded is the last will and testament of the testator or not. When the jury are impanelled upon the issue, the parties are then in a legal forum, which looks only to the question that the jury have been sworn to try, without regard to the chancery pleadings. Those pleadings cannot enlarge or contract the issue before the jury, nor the evidence adduced at the trial. Of what avail then would it be, to require the chancery pleadings to be ramified into details of the facts that are to be the subject of evidence on trial before the jury? No such unprofitable controversy is required at the first probat, and why should it be at the last? It could not have been contemplated by the statute, the object of which was to allow an opportunity "to contest" the validity of the will, to all who had not enjoyed it in the court of probat, where the propounding was usually *ex parte*; and to allow it, not in a more formal, but a more substantial manner, the probat court not having the power to convene the necessary parties, and trying the case itself without the aid of a jury, supposed by our law to be a more competent tribunal for the decision of such matters. The legislative mind has since been more fully developed by the act of 1838, which, by a happy expedient, authorizes the whole controversy, at the election of the propounder of the will, to

be finally adjudicated in an original 390 court of probat; *which is clothed with the same powers of convening the parties, directing the issue, granting new trials &c. as are vested in the chancery court by the original statute of wills; and without any formality of pleading, unless it be the fictitious or supposed common law pleading, employed, or conjectured, to raise the broad issue of *devisavit vel non*. No inconvenience is felt in this mode of proceeding, from the want of schedules of controverted facts, in the form of bills and answers, which serve rather to perplex than elucidate the cause, by multiplying subordinate and irrelevant issues. Upon the whole, I cannot perceive the propriety of requiring the plaintiff to do more in his bill, (besides shewing his interest in the subject and making the necessary parties) than to "contest the validity of the will," by averring in general terms that it is not the last will and testament of the alleged

testator, or, at his election, by a brief statement of his grounds of objection thereto, the briefer the better upon a mixed question of law and fact, which it is not the province of the court to separate, and which must be submitted in general terms to the decision of the jury.

It only remains for me to notice the other objection to the bill, that some of the plaintiffs, by accepting their legacies and devises under the will, have precluded themselves from disputing its validity, and that the other plaintiffs, having joined with them those so precluded, are not entitled to sue. This objection comes too late (*Dickenson v. Davis &c.*, 2 Leigh 407), not having been made by plea, nor even relied upon as a bar by way of answer. But it could have availed nothing in any form; the correct rule, as I conceive, being that of the ecclesiastical courts, that the acquiescence of the next of kin in the grant of a probat in common form (which corresponds with our *ex parte* probat), even though they receive legacies as due them under

the will, does not preclude them from calling for proof in "solemn form" (which is analogous to our final probat under the issue of *devisavit vel non*), unless under peculiar circumstances, and laches by long acquiescence. 1 Williams on Ex'ors 193. With us, no laches can be imputed to those who come within the period prescribed by law.

My opinion therefore is, that if the cause be remanded, it should be with directions to set aside the verdict of the jury, and award a new trial of the issue, on which new trial the instructions given at the former trial on the motion of the plaintiffs are not to be repeated.

The other judges concurring, the opinion of the court of appeals was declared to be, that the instructions given by the circuit court to the jury, upon the motion of the appellees, on the trial of the issue of *devisavit vel non*, were erroneous; and therefore that the judge of that court, sitting as chancellor, ought not to have been satisfied with the verdict of the jury. The decree was reversed with costs, and the cause remanded to the circuit court, with directions to award a new trial of the issue, on which new trial the instructions aforesaid were not to be repeated.

392 *Campbell's Adm'x v. Montgomery.

November, 1842. Richmond.

Pleading—Admission of Plea—Exception to—Waiver.

—A plea being received by the court though objected to by the plaintiff, he excepts to the decision, and then takes issue in fact on the plea: HELD, his exception is not waived by taking issue. Set-Off—Equitable Defences at Law—Statute.—The 2d section of the act passed the 16th of April 1831,

*Rule as to Acts Done under Repealed Statute.—In *Crawford v. Halsted*, 20 Gratt. 332, JUDGE STAPLES, after quoting from a Massachusetts case in which the rule as to acts done under a statute repealed is

establishing the circuit superior courts, allowed the equitable defences therein provided for, in all actions at law pending in such courts at the time of pleading the same, whether such actions were originally brought in such courts, or had been transferred thereto from the former superior courts of law.

Debt on a penal bill for 666 dollars 66 cents, conditioned for payment of 333 dollars 33 cents, brought by Eliza F. Campbell as administratrix with the will annexed of John Campbell deceased, against Montgomery, in the former superior court of law for the county of Westmoreland. The suit was brought in December 1828. In 1830 issue was joined on the plea of payment. On the 15th June 1831, the cause was transferred to the circuit superior court of law and chancery for the said county, under the 96th section of the circuit court act, passed 16th April 1831, (Supp. R. C. p. 169). In October 1831 the defendant had leave within sixty days to file additional special pleas in bar, in the nature of pleas of set-off.

At April term 1832 the defendant tendered a special plea in bar, setting forth substantially that on the 14th September 1826, three bonds (to wit, the bond in question and two others for the same amount, dated 14th September 1826, and payable on the 14th September 1827, 1828 and 1829, respectively), were executed by him to the testator of the plaintiff on a settlement of accounts then had between himself and said testator; that in that settlement he was unable (in consequence of having lost or mislaid a receipt of the said testator,

393 *dated 15th July 1823, for 600 dollars) to obtain the credits to which he was entitled, and that not being able to find said receipt, and being threatened with a chancery suit, he was induced to execute the said bonds, upon the express promise on the part of said testator that the said receipt (if it should ever be found), should be allowed as a credit against them; that shortly afterwards, viz. on the 20th November 1826, the said receipt was found, and immediate notice thereof was given to the said testator in his lifetime &c. And he therefore claims this receipt as a credit against the bond on which this suit is founded. The plea was duly verified by the affidavit of the defendant.

To the filing of this plea the plaintiff objected, solely upon the ground "that this suit was depending in the late superior court of law for Westmoreland county antecedent to the passage of the act of April 1831, and the plea was therefore inadmissible;"† but the court overruled the objec-

laid down, said: "In *Campbell v. Montgomery*, 1 Rob. 392, a similar principle was announced in applying the statute of 1831 which authorized equitable defences to be made at law, to a suit pending when the statute took effect, because it merely affected the remedy and not the right."

†"In all actions at law founded on contract, whether such contract be by deed or by parol, brought either in the said circuit superior courts of

tion and admitted the plea, and the plaintiff excepted to the opinion of the court, and took issue on the plea.

The jury found for the plaintiff on the plea of payment, and for the defendant on the special plea, and the court gave judgment for the defendant.

On the petition of Campbell's administratrix a supersedeas was awarded to the judgment.

G. N. Johnson for plaintiff in error. The question is the single and narrow one presented by the reception of the special plea. That plea was received under the act of

April 16, 1831, § 62, Suppl. to Rev. 394 Code p. 157. *The plaintiff in error

contends that this act does not authorize such a plea in any action instituted before the passage thereof. The terms of the 62d section are general, and apparently applicable to all cases, or rather (according to their literal import) to actions already brought, and to those only. But this cannot be the construction. All legislation is to be deemed prospective, and nowise ex post facto in its operation, unless that be plainly the intent of the legislator. This is a general principle of construction, founded upon the equity of the case,—the apparent danger of working injustice by allowing a retroactive effect to the law. The earliest case on the subject to be found decided in this court is that of *Craig v. Craig*, 1 Call 483, in which the assignee of a bond with collateral condition was not allowed to maintain an action in his own name, by virtue of the statute giving such action, the statute being passed subsequent to the assignment, and to the institution of the suit. So in *Elliott's ex'or v. Lyell*, 3 Call 268, it was held that the representatives of a deceased obligor in a joint bond were not liable to an action at law by virtue of the statute giving such action, that statute being passed after execution of the bond. These two cases, it may be objected, are decisions upon statutes which affected rights in contradistinction to remedies: but the principles discussed in them may be usefully referred to as a guide in the present case. *The Commonwealth v. Hewitt*, 2 Hen. & Munf. 181, was the case of a motion for a venditioni exponas to the present sheriff, to sell property seized by a former sheriff, since dead, under a statute passed subsequent to the seizure; and the judgment of the general court overruling the motion was affirmed by this court. This was a question upon a law affecting the remedy—the process of execution upon judgments; and according to the principles laid down by judge Roane, even laws which affect merely remedies are to be deemed only prospective, unless the contrary

395 *intention unequivocally appear.

law and chancery, as courts, of common law, or in the county and corporation courts, the defendant may file a special plea in bar, in the nature of a plea of set-off."—Suppl. to R. C. ch. 100, § 62, p. 157.—Note in Original Edition.

The application of the statute here to pending actions would enable the defendant to defeat an action originally well brought and indefeasible,—would deprive the plaintiff of his right to recover in the action, and give the recovery to the defendant,—contrary to the express language of the proviso contained in the 101st section (Suppl. R. C. p. 171), as well as to the general spirit of legislation, as understood and expounded by this court in the several cases above cited. It may be said that the accrued right of action in the plaintiff was only equivalent to the equitable right of set-off in the defendant, which he might enforce in chancery; and that the effect of the statute, if applied even to pending suits, would only be to enable the defendant to avail himself of this equivalent right, in the court of law instead of the court of equity. But the rights are not equivalent—there is a difference in the plaintiff's favour at least to the extent of his costs at law; and besides, it may well be deemed that he sustains injury by transferring the adjustment of the defendant's equitable claim from the appropriate forum to that of law, whose modes of proceedings are so much less adapted to the office of making such adjustment.

Stanard for defendant in error. It is admitted by the plaintiff's counsel that the terms of the statute are broad enough to embrace all suits brought in the circuit courts, whether by the act of the plaintiff, or the act of the law in transferring to those courts actions brought in the former superior courts; but still insisted that the statute applies only to the suits brought in the circuit courts by the act of the parties. Suppose a suit brought after the 16th of April (the day of passing the act) and before the 15th of June, (when the transfer of actions to the new courts was to take effect, § 96, Suppl. p. 169); it would be instituted in the old superior court. Will it be contended that the statute is inapplicable to such action?—to an action which must in

396 regular course be *determined in the new court, and which the plaintiff, when he instituted it, knew must be so determined? *Craig v. Craig* would be an authority for the plaintiff, if the decision had been that the statute allowing assignments of the bonds with collateral condition did not apply to bonds executed previously; but that was not the decision; and in *Meredith's adm'x v. Duval*, 1 Munf. 76, (in which *Craig v. Craig* is referred to and recognized) it is held that the statute does apply as well to bonds executed before as after its passage. *Elliott's ex'or v. Lyell* was a case upon a statute which, if retroactive, would have affected rights, not remedies, and the decision was made expressly on that ground. In *The Commonwealth v. Hewitt*, the words of the enacting clause expressly applied to future cases only, and the decision was merely that the words of the preamble could not make the enacting clause applicable to any other cases. The

statute here cannot be considered as affecting or impairing any right of plaintiffs at law; and the proviso referred to by Mr. Johnson expresses no more than would have been implied without it. If the right to recover at law be considered as a right vested under the contract, and distinguishable from the remedy, then the argument would go the length of denying to the legislature the power to authorize an equitable defence to be made at law, in any action upon a contract entered into before the statute was passed. But in *Ansell v. Ansell*, 3 Carr. & Payne 563, 14 Eng. C. L. R. 451, it was held that the English statute requiring a written acknowledgment to take a simple contract debt out of the statute of limitations, applied to a debt contracted before the law was passed, and to an action previously pending.

To ascertain the meaning of the legislature in the particular section under consideration, the whole of the statute containing it must be looked to. In the language of lord Coke, as cited in *Dwarris on Statutes* 706, [p. 50 *of edition in: Law Library, vol. 9.] "the best expositors of all acts of parliament in all cases are the acts of parliament themselves, by construction and conferring all the parts of them together. Optima statuti interpretatrix est (omnibus particulis ejusdem inspectis) ipsum statutum." See also Co. Litt. 381 a.; *Dwarris on Stat.* 698, [45.] The same principle is laid down by chief justice Best, in 3 Bingh. 196; 11 Eng. Com. Law Rep. 94, 5, and by the court of king's bench in *Doe d. v. Bywater v. Brandling*, 7 Barn. & Cress. 643; 14 Eng. C. L. R. 108. Again, it is a maxim that *ubi lex est specialis et ratio ejus generalis, generaliter accipienda est.* *Dwarris on Stat.* 697, [45]; Co. Litt. 381 b. Applying these principles of construction to determine the meaning of the expression actions brought in the circuit superior courts, and looking at the whole statute, particularly the 68th and 69th sections, there can be little doubt that the actions intended by the legislature were as well those which might be transferred to the new courts from the former superior courts of law, as those which might be originally instituted in the new courts: for it can scarcely be denied that the interrogatories allowed by the 68th section, and the production of papers authorized to be enforced by the 69th section, might be availed of in an action previously instituted; and the remedies given by these two sections are directly applicable, and no doubt were chiefly designed, to render available the equitable defences given by the 62d section. Statutes of a remedial nature, it has been seen, are to be so construed as to suppress the mischief and advance the remedy. What was the mischief here, and what the proposed remedy? The mischief was, that a defendant not bound in justice to pay one dollar of the plaintiff's claim might be subjected to a recovery at law, and have no remedy except by the tedious and expensive interposition of

chancery, even though the matter of his defence were such that a jury might be perfectly competent *to pass upon it, and to do exact justice between the parties: the remedy proposed was to abolish the impediment, and enable the defendant to make his equitable defence in the court of law,—to determine the whole controversy in a single suit. It is manifest that the mischief and the reason for a remedy applied as strongly to actions then pending as to those subsequently instituted.

Patton on same side. In the statute of 1831, the words brought—pending—instituted—are all used, and it will be found that they are applied indiscriminately to suits already instituted, and suits thereafter to be instituted. See § 38. The true rule is this—that a statute is not readily to be construed retrospectively, where such construction would affect or repair existing rights, or the obligation of existing contracts: and in England, where such laws are within the constitutional power of parliament to enact, the courts always struggle against the conclusion that the retrospective effect was intended. But laws, the retrospective operation of which affects merely remedies, are not construed with the same anxious desire to avoid such retrospection. This is strongly exemplified in the case of *Ansell v. Ansell*, already referred to. The distinction between the two classes of statutes is clearly laid down in 1 Kent's Comm. (3d ed.) p. 455, and remedial laws, it is there shewn, not only may be applied to cases not included by the letter, but will be so applied, if the terms of the enactment do not exclude such application. Roane's adm'r v. Drummond's adm'r's, 6 Rand. 182, is a case of this sort. Such has been the construction, too, of the statute allowing a new action within a year after arrest or reversal of judgment, where the verdict has passed for the plaintiff, or judgment been given for him. The case of *Garland v. Marx*, reported in a note 4 Leigh 321, is another example of applying a remedial statute to a case not within the literal terms. The case of *Elliott's* 399 *ex'or v. Lyell is not applicable, being decided on the ground that rights

would have been affected and changed by giving a retrospective operation to the statute there under construction. No right is impaired or changed by giving to the statute here the application which the defendant contends for. The defendant had in equity precisely the same right which the statute enabled him to enforce in the court of law: he was clearly entitled to a perpetual injunction in equity to the whole recovery at law—principal, interest and costs. If the statute be held not to apply to suits already pending, it will give rise to the very diversity of decision, in consequence merely of a difference in the time of determination, which, in the case of a law clearly remedial, is so strongly disapproved by judge Roane in *Elliott's ex'or v. Lyell*. But even if the plaintiff's costs at law could be considered a subject of vested

right, liable to be affected and lost by the application of the statute, the error as to that matter is not a ground of itself sufficient to justify the reversal of the present judgment, admitting that as to the debt recovered by the plaintiff at law, the defendant was entitled to a perpetual injunction in equity.

There are other english cases supporting the principle of *Ansell v. Ansell*; namely, *Towler v. Chatterton*, 6 Bing. 258; 19 Eng. C. L. R. 75; *Hilliard v. Lenard*, 1 Mood. & Malk. 297, 22 Eng. C. L. R. 313.

But further: the court having received the special plea, and the plaintiff having joined issue, and taken her chance of success before the jury, the fact of her having objected to the admission of the plea ought not now to be available as a ground to reverse the judgment. If the plea ought not to have been received, it was on account of a defect which appeared on its face and was ground of general demurrer. The plaintiff might have demurred, and ought to have done so. She ought not to be allowed, by means of an objection to receiving the plea, to get the advantage of demurring *and replying both. In *Chew v. Moffett*, 6 Munf. 120, where the plea presented a defence purely equitable, after verdict for the defendant it was held that the equitable nature of the defence was immaterial, and no ground to reverse the judgment.

Leigh in reply. If the legislature had meant, in providing the equitable defence to actions "brought in the circuit superior courts," to include suits previously pending and afterwards transferred to those courts, these latter words would in all probability have been employed also. The 68th and 69th sections cannot prove the contrary. They simply authorize a discovery in the court of law, instead of the court of chancery, in support of a defence of a legal nature: they do not give any new defence, of an equitable nature. Instead of looking to these sections to ascertain the meaning of the 62d section, it is more proper to consider for that purpose the 65th and 66th sections, which, like the 62d, expressly authorize new and equitable defences: and it is manifest that the 65th and 66th sections are confined to the case of suits thereafter to be instituted in the circuit superior courts. To allow the equitable defence here, is not merely to allow in a court of law a defence before competent in equity only; the effect is to change the rights of the parties: for the defendant's allegations in a bill in equity filed by him, if contradicted by the answer, must have been proved by two witnesses, or one witness and pregnant circumstances; whereas the plea under this statute cannot be contradicted by the oath of the plaintiff at law, and may be proved by a single witness. The intent of the statute was to restrict the blending of common law and chancery jurisdiction (as in pleas under the 62d section) to actions originally instituted in the new courts, and to allow in all cases the discov-

ery in a court of law, in aid of a legal defence, which could previously have been had in chancery only. *Ansell v. Ansell* is founded on the terms of a statute which expressly refers to the period 401 *of trial, thereafter to be had, (no matter when the suit might have been instituted) as the period when the plaintiff must, to sustain his action, be provided with written evidence of the new promise; it was therefore necessarily retrospective. The *Commonwealth v. Hewitt* shews that although a remedial law may be applied to past cases (which no one ever thought of questioning) yet it will not be so applied, where those cases, however clearly within the same mischief, are not included by the terms of the enactment. *Day v. Pickett*, 4 Munf. 104, was decided on the same principle.

The question of practice in relation to the objection to the plea, is settled (if any thing can be considered as settled) by the decisions of this court. The plaintiff did not waive her objection by taking issue.

BALDWIN, J., delivered the resolution of the court as follows: "The court is of opinion that though the plaintiff did not, by her replication to the defendant's plea of equitable set-off, waive her exception to the decision of the circuit superior court allowing said plea to be filed, nor consequently her right to have the propriety of that decision examined in this court, yet the said plea was properly received by the said circuit superior court, notwithstanding the plaintiff's objection thereto; this court being of opinion that the 62d section of the act of the 16th of April 1831, establishing the circuit superior courts, allowed the equitable defences therein provided for, in all actions at law pending in such circuit superior courts at the time of pleading the same, whether such actions were originally brought in such circuit superior courts, or had been transferred thereto, under the provisions of said act, from the former superior courts of law:" therefore,

Judgment affirmed, with costs in the court of appeals, to be levied &c.

402 *Literary Fund v. Dawson's Ex'or and Heirs.

December, 1842. Richmond.

(Absent STANARD,* J.)

Literary Fund—Devise for—Case at Bar.—After the decision in the case of the *Literary Fund v. Dawson* and others, 10 Leigh 147, an act of assembly was passed the 10th of March 1841, empowering the president and directors of the literary fund to receive the estate of Martin Dawson, devised by the

*He had been counsel for some of the parties interested.

†*Charitable Devices—Beneficiary—Corporation to Be Created by Statute.*—The principal case is cited in *Kinnaird v. Miller*, 25 Gratt. 121, for the proposition that, wherever a devise or bequest is made to a corporation, to be afterwards, within a period not too remote, created by law for the purpose of carrying

17th clause of his will, into the literary fund, and making provision for managing and administering the estate when so received. Whereupon the said president and directors filed a bill against the executor and heirs to recover the estate devised by the said 17th clause. And by the answer of the executor and the demurrer of the heirs, the objection was taken that the act of assembly was passed not on the application of the executor, but against his consent, and in other respects, as well as in this, was not such an act as the testator contemplated. The circuit court dismissed the bill. But on an appeal from the decree, the court of appeals reversed the same, and remanded the cause to the circuit court, with directions to overrule the demurrer and give the relief sought by the bill.

After the decision by this court of the case of the Literary Fund *v.* Dawson & others, reported in 10 Leigh 147, the general assembly, on the 10th of March 1841, passed an act entitled "an act concerning the estate of Martin Dawson deceased and for other purposes," which is contained in the session acts of 1840-41, p. 52. Under this act the president and directors of the literary fund filed a bill in the circuit court of Albemarle county at September rules 1841, against William W. Dawson the acting executor of Martin Dawson deceased, and against the heirs of the said Martin Dawson, praying that the executor might be required to settle up his executorial accounts, and decreed to pay over to the plaintiffs the balance in his hands embraced by the seventeenth clause of the will, 403 and that the real estate devised *by that clause, with the rents, issues and profits thereof, might also be decreed to the said plaintiffs.

The answer of the executor stated, that the act of the 10th of March 1841 was obtained by the plaintiffs without the acquiescence, consent or interposition of the said executor, against his wishes, and in disregard of his petition. The answer contained the following views as to the position of the executor—"He is advised that by the terms of the 17th clause of the will, the trust is reposed in him, as the acting executor of his testator, and not in the president and directors of the literary fund, nor in the legislature, to 'use' the portion of the estate therein included, in the manner designated; and that it is too plain for construction, that the respondent, as acting executor, is the only person in the universe authorized or capable to take the steps necessary to carry the testator's designs into effect, that is, to obtain the act of assembly requisite for the purpose. If this can be

made clearer than the testator's language has made it, the respondent conceives it to be done by the court of appeals in the decree pronounced by it, and especially in the opinions delivered by judges Brooke and Tucker. (See 10 Leigh 151-2.) The plaintiffs owe it to this power, control and trust vested in the respondent, that the devises and bequests of the 17th section of the will were not declared void. Their whole interest therein depends on the recognition of the respondent's power over the subject, and by both the learned judges above named it is expressly affirmed that the act of assembly, which is to infuse vitality and give effect to the testator's munificence, must be obtained by the respondent. And judge Tucker refutes the idea that the contingency that the act would be obtained was too remote, by declaring that it must occur, if at all, within the lifetime of the executors; confirming thus indirectly what indeed he had already stated in clear and precise

terms, that it was a personal trust 404 *devolved by the testator upon his executors, and to be exercised by them according to their discretion, not by the president and directors of the literary fund, and at their pleasure.

"The respondent has said thus much of his powers, to vindicate the position which he has felt it his duty to take in the premises, viz. that no one besides himself can procure the act of assembly which is demanded by the clause in question of his testator's will; and that it is neither competent to the president and directors of the literary fund to ask for, nor to the legislature to enact, a law unsanctioned, or even unsolicited, by the respondent.

"To the law of March 10th 1841, referred to in the bill, the respondent has never given his sanction. On the contrary, he dissented then, and ever since, and has always regarded the act as founded on an unwarrantable usurpation, on the part of the plaintiffs, of his powers and functions, and in itself as merely inoperative and void. That the legislature itself had at least a suspicion that such might be the case, is apparent from the phraseology employed in the last clause of the preamble to the act.

"The respondent has been fortified in these general views of his powers and duties, by reference to the provisions of the act obtained by the plaintiffs, particularly those of the second section thereof. By that section it is declared, that 'all the costs of suit, fees and expenses heretofore and hereafter incurred by the president and directors of the literary fund, in sustaining the said devise, and in receiving, managing and administering the said fund, shall be charged to the said fund.' The respondent is informed, believes and charges, that the fees and expenses thus charged upon the fund by the act in question would be from ten to twelve per cent. of the whole amount. If no other reason operated, as many others do, to induce the re-

Into effect a charitable intention of the testator, expressed in his will, the same may be good and valid as an executory devise or bequest, and will become absolute and executed, if, and when, such a corporation shall be created accordingly.

See, in accord, *Literary Fund v. Dawson*, 10 Leigh 147. The principal case is cited with approval in *Kinnaird v. Miller*, 25 Gratt. 122, 123 *et seq.*

See monographic note on "Charities" appended to *Kelly v. Love*, 20 Gratt. 124.

405 spondent to repudiate *the act, he would deem himself faithless indeed if he should consent to so material an abatement of the fund created by his testator's benevolence."

Such of the heirs as were infants answered by guardian ad litem. The adult heirs demurred to the bill, and assigned the following causes of demurrer:

"1st. That the plaintiffs have no interest in the estate of Martin Dawson deceased, neither as officers representing the commonwealth of Virginia as imparted to them by the laws of the state creating the literary fund, nor as trustees, under and by virtue of the act of the general assembly passed the 10th March 1841, for the counties of Albemarle and Nelson; and so they say that the plaintiffs cannot maintain any action at law or in equity relating to the said estate, and this court therefore cannot rightfully take jurisdiction thereof.

"2d. Because of a misjoinder of the distinct causes of suit and action, in this, that even if the plaintiffs are capacitated by the said act of the 10th March 1841 to take, sue for and recover any portion of the said estate, still, as to the real estate which is impleaded by the bill, there was and is a plain remedy by an action at law; and so they say there is a misjoinder and want of jurisdiction on that head also.

"3d. Because the act of assembly aforesaid, under which the plaintiffs seek to ground their suit, is merely void both at law and in equity, for the reasons that it attempts to take away private property for public services without making reasonable compensation to the owners thereof, and moreover was passed by the legislature not only without any application or assent of the executors of Martin Dawson deceased, and of his heirs at law and next of kin, for such purpose, but against the will of said executors, and against the wishes of these defendants, and is therefore violative of their rights of property of all the defendants.

406 "4th. Because the said act of assembly, in many of its provisions, violates the will of Martin Dawson deceased, and actually asserts the rights of dominion and control over, and interest in the whole estate, viz. First, in the second section of the bill, it is enacted that the estate shall be lessened before it reaches the literary fund, by all costs of suit theretofore and thereafter to be expended, the amount unlimited; a power of diminution not contemplated by the testator, and inconsistent with the will, and with the idea that others had or have any interest in the fund, which the commonwealth seeks to take to and dispose of herself. Secondly, it is provided by the 3d section of the bill, that the interest of the fund, to be called the 'Dawson fund,' in certain portions shall be paid over to the school commissioners of Albemarle and Nelson, to be used by them for the same purposes and under the same regulations as the school quotas of the said counties were used at the date of

the said act. At the time of Martin Dawson's death (as of which date his will in law must be construed to speak) the quotas of these counties from the literary fund, as regulated by law, were expended wholly in primary education; but after his death and before the passage of this law, a law was passed by the legislature, authorizing the school commissioners of any county wherein there were unexpended balances of the school fund, to devote the same to the academy or academies of such county; so that Martin Dawson's estate, designed clearly by his will for primary education, if this law prevails, is liable to be appropriated to the aid of the rich, and not of the poor and needy. Thirdly, by the 5th section of the act it is provided as follows: 'And if the general assembly should hereafter abolish the literary fund, it will transfer the said Dawson fund to such body or bodies as it may provide, to the use and benefit of the said counties, and for the same or like purpose for which the funds given to the

407 *school commissioners are given.' Now the legislature may, and most probably will, soon abolish the literary fund, and if they do, equity will declare the trust ended, and a resulting trust would instantly arise in favour of the next of kin; and so if the fund is appropriated contrary to the will of the testator. And in either case, where is the remedy to the next of kin to be found in the act? There is none; no right is reserved to them to sue the literary fund to reclaim the estate; on the contrary, the law provides that they, the law-makers, will make another will for the decedent. True, the first section gives the literary fund power to defend and maintain any suit or suits, that may be necessary to enable them fully to recover the estate; but none to be sued, or defend suits, having for the object the recovery of the estate back from them, or to provide payment if received."

The cause coming on to be heard in the circuit court the 21st of May 1842, before judge Thompson, he delivered the following opinion:

"If I rightly comprehend the opinion and reasoning of the court of appeals, they have decided that the 17th clause contained a valid devise, because, conceding as they did that the literary fund could not take by devise, and that had it been a devise in presenti to that fund it would have been void, it was a gift directly to the executors (of the legal title, I suppose, though they do not say so), upon an executory trust to be performed in futuro—in other words, an executory devise or limitation in favour of some devisee or legatee to be called into existence and made capable of taking by the joint instrumentality of the executors and the legislature.

"To bring it within the legal limitation as to the time of vesting, and to prove that it must vest within the time allowed by law, judge Tucker says, the act constituting the estate a part of the literary

408 fund must be *obtained by the exec-

utors; and he says in another part of his opinion, 'As this act is to be obtained by the executors, the contingency of its passage is within a life or lives in being, and therefore not too remote.' The judge has not told us in express terms whether this executory trust in the executors is personal or official, though he has said it could be performed by them only.

"It seems to me very clear, that in order to sustain the most important position of the opinion, the one on which the validity of the devise mainly turns, to wit, that the limitation was not too remote, it must be conceded that the trust is personal, and therefore only limited by a life or lives in being; for if official, there is no limitation of the time of its execution. It could be executed by an administrator de bonis non with the will annexed, a century hence, as well as now.

"It seems to me equally clear that the opinion of the court concedes another proposition; and that is, that neither the legislature nor the literary fund, nor any one else except the executors, could execute the trust, that is, could constitute the estate a part of the literary fund. If the legislature, upon its own mere motion, or upon the application of the president and directors of the literary fund, without and against the consent of the executors, could execute this trust and vest this devise, it is surely not an executory trust in the executors, to be exercised during their lives or the life of the survivor, but a limitation depending upon the power, will and pleasure of the legislature, which they might as lawfully exercise 500 years hence as in 1841.

"The president and directors of the literary fund cannot make themselves, nor can the legislature make them, the devisees of this estate. The legislature can capacitate them to take, if it be the will and pleasure of the executors to bestow. Until the trust be

executed by the executors in their
409 favour, they have no more interest *in this estate than any other citizen of the commonwealth, and until then there is no pretence for saying that they can compel the executors to execute the trust. Nor can the legislature compel the execution of the trust in their behalf. That would be to exercise a judicial and not a legislative function. If the act of the legislature in this case be allowed the force and effect ascribed to it, it is an act divesting the vested rights of Dawson's heirs and Dawson's executors, and vesting them in the president and directors of the literary fund. Such an act is beyond the constitutional competency of the legislature; and it is due to that body to say, that it is most apparent, from the preamble and body of the act, that they never meant to claim or exercise any such power. They disclaimed any such intention, right or power. All they did was to make the literary fund capable of taking the devise, and to provide how it should take and hold, and then to provide, that if their act, passed without the applica-

tion of the executors, could vest the legacy or devise in the literary fund, it should be vested; otherwise the first five sections of the law became a mere nullity, a dead letter.

"It appears from the act itself, that it was passed without the application or consent of the executor; and from his answer, that it passed not only without but against his consent, and that he has not, nor does he intend to ratify or consent to said act. To say, therefore, that such an act could confer any rights on the plaintiffs, would be to say that the legislature (if they could not make a will for Martin Dawson) might by their act constitute themselves, or somebody else, his trustees to execute his will, in the lieu of those to whom he has seen cause to confide the trust.

"Upon the demurrer of the heirs at law, and the answer of the executor, the bill must be dismissed with costs."

410 *The decree of the circuit court was in conformity with this opinion. It declared, that for the causes of defence relied on in the demurrer of the heirs at law, and in the answer of the defendant William W. Dawson, the bill was dismissed, and the plaintiffs were to pay to the defendants their costs.

From this decree an appeal was allowed on the petition of the president and directors of the literary fund.

The attorney general for the appellants. The difficulty apprehended by the testator was, that, under the organization of the literary fund, what he devised and bequeathed might go into the general fund for its general purposes, and not be confined to the particular counties and purposes which he had specially in view. He wished his executors to bring the subject to the notice of the legislature, so that his object might be effected. The executors were looked to as the means of effecting the object; but their agency was not regarded as a part of the contingency itself. The passage of the act of assembly was the contingency contemplated by him. If there should be difficulty in procuring the legislation, he contemplated that aid would be given by the executors as well as others. But to suppose the concurrence of the executors indispensable, would be to suppose that he had put it in the power of his executors to defeat his will; that he had put it in their power to have the use of this fund for their lives. For the president and directors of the literary fund could not interfere, they having no interest; and the heirs could not interfere, since the executors would have during their lifetime to apply for the act, and the heirs would have no right until the time for such application had passed by. If the agency of the executors be indispensable, the devise must be considered a devise to the executors. But it cannot be so considered. The testator shews his intention to be, that

the property was to go at all events
411 *to the literary fund. That no personal benefit was intended to enure to the executors in respect to this property,

is apparent when we look at the 15th* and 21st clauses of the will, as well as the 16th and 17th. They are trustees, a breach of trust by whom was never contemplated by the testator. The gift is to an existing corporation, and the view of the court may be very different from what it would be, were the gift to a corporation to be called into existence. The existing corporation had a right to apply for such an amendment of its charter as would enable it to take for particular specified objects, and the legislature had a right to make such an amendment. And even if the testator contemplated that this change would be made through the agency of the executors, still what had been done was proper, to prevent injury by a breach of the trust of those executors.

C. Johnson for appellees. On the former argument, the court was referred to the cases of Gallego's ex'ors v. The Attorney General, 3 Leigh 450, and especially to the passage at p. 466; Janey's ex'or v. Latane and others, 4 Leigh 327; Baptist Association v. Hart's ex'ors, 4 Wheat. 1; Charles and others v. Hunnicutt, 5 Call 311; Overseers of poor v. Tayloe's adm'r, Gilm. 336; William & Mary College v. Hodgson and others, 6 Munf. 163; Inglis v. Sailor's Snug Harbour, 3 Peters 99. We contended that the contingency must be such as
412 must happen *within the time limited by law. Fearne p. 468, 470, § 5, 6, 8, and p. 488, § 14. And we argued that if the executors were charged with the duty of applying for the act of assembly, it was an official trust, and might be performed by an administrator with the will annexed or other representative, and so the contingency would not be within the time limited. But we conceded that if the trust was personal to the executors, if it did not go to their successors, the contingency would be in time. What did the decree decide? The decision was that the devise is to the executors, who took the estate charged with the performance of the trust contained in the 17th clause. And the court must have taken the view, that application was to be made by the executors to the legislature to carry into effect that clause, and whether made by all or one, it would be within lives in being. Thus, and thus only, was the objection met, that the devise depended on an act of assembly not to be passed in a limited time.

But now it is contended the will and decree

*The 15th clause is as follows: "15th. I give to my relation and friend William W. Dawson my wearing apparel, books, watch, horse and saddle, also the goods I may have in the hands of William W. Dawson & Co. unsold at my death, also my part of the profits in the mercantile concern of William W. Dawson & Co., he paying for my stock and the sums allowed him for his services with interest, in which concern I became a partner for no other object but to promote the said William's interest, and therefore I relinquish my right to the profits." The 16th, 17th and 21st clauses may be seen in 10 Leigh 148, 9.—Note in Original Edition.

meant that the devise was to take effect on a single contingency, the passage of an act in a reasonable time. Is this the true interpretation? The decree is brief, and we must refer to the opinions. They shew that judges Tucker and Brooke both contemplated that the application for the law was to be made by the executors; that both judges supposed no law could be passed after the death of the executors; and that judge Brooke supposed the executors did not necessarily have their whole lives,—that the application must be in a reasonable time.

Ought not this to have been the judgment? It was intended by the testator to impose this trust on the executors, and to make them necessary agents in carrying it into effect. The will furnishes conclusive evidence that the subject was not given to the discretion of the legislature, or to the president and directors of the literary
413 *fund without the agency of the executors, who were the selected agents.

It shews that the executors were intended to have a discretion in the matter. The testator intended them to see that the fund was dedicated to the poor, and if they could not get such an act as in their opinion would conform to his intent, to let the fund go to his heirs. If the testator could have anticipated the language of the school commissioners of Albemarle, in the report wherein they say the fund is large enough, would he still have wished them to have more? There was not even a necessity for placing the fund in the charge of the president and directors of the literary fund; for the executors might have asked for an act incorporating the school commissioners. If, under the will and decree, and application by the executors is necessary, the trust is personal, and all the executors must apply; whereas here none have applied, and without their consent an act has been passed. This act must be void. It is said that to hold so would be giving the executors power to disappoint the will; and it may perhaps be said further, that in the meantime, before the application is made, or the time for it passed, the property might be wasted. If the supposition that the testator intended the executors to have a discretion be correct, the argument is answered. But if the estate should be wasted, the executors would be liable to the heirs or devisees. And when the condition should be broken, the heirs might enter. Porter's case, 1 Rep. 22; Baptist Association v. Hart's ex'ors, 4 Wheat. 33-35.

II. The act passed is not such an act as the testator intended, but such a one as would authorize the heirs to enter for breach of the condition. 1 R. C. 1819, ch. 33, p. 82; Supp. to R. C. p. 33, ch. 18; Id. p. 35, ch. 19; Id. p. 36, ch. 20; Id. p. 40, ch. 28; Sess. Acts of 1836-7, p. 13, ch. 12. We admit that the legislature, when properly applied to, may put the fund under such government as it sees fit, not
414 inconsistent with the objects *of the testator; and therefore we do not

complain of the first section. But with respect to the second section, so far as it charges on the fund expenses which have been incurred or shall be incurred in sustaining the devise, the will is violated. The fund is to be held not only "for the uses to which the school fund of the counties of Albemarle and Nelson is applied," but also "for the like uses in the said counties," as is provided in subsequent sections. At the date of the will, only the quota of 45000 dollars was paid over to the school commissioners, and that was for the education of the poor. At the date of the act concerning the estate of Martin Dawson, there was in force the act of the 22d of March 1836, Sess. Acts of 1835-6, ch. 4, p. 7-8. And hence the estate of Dawson may be applied, not to primary schools for the poor, but to colleges and academies for the rich. Whereas so much of the fund as is not necessary to educate the poor—whatever, in short, is not applied according to the trusts, belongs to the heirs, precisely as a dedication of an estate to pay debts charges so much as is necessary, and when they are satisfied, the rest belongs to the heirs. Did the testator mean, if there were no poor to be educated, to authorize the fund to be applied to like purposes; to educate the rich, or any particular sect; or for general purposes of education or charitable objects? If our decisions have gotten us rid of any thing, they have gotten us rid of the latitudinous decisions under the statute of Elizabeth. The well considered decisions in Gallego's ex'ors v. The Attorney General and Janey's ex'or v. Latane and others are all foolishness, if there be such wide discretion in our chancery courts. It may be said, the expression "for like objects" is used in the 17th clause of the will. But can any one believe the testator meant any thing except the education of the poor? The like object, as understood by him, was the education of the poor not exactly in the same manner, but perhaps by applying the principal.

415 pal. *Whereas the natural effect of the act which has been passed is to withdraw the fund from the education of the poor, and apply it to such kindred objects as the legislature may think proper.

The attorney general in reply. The literary fund is a corporation, but an act was necessary for authorizing it to take and hold this property. Suppose a man by his will gives an estate to A. if £100. be paid by B., and A. himself pays the £100.; would not that be a sufficient performance of the condition? Marks v. Marks, 1 Str. 129. So here, as the literary fund may take and hold when the act is passed, it may itself procure the passage of the act.

The executors were to carry into effect the 16th clause of the will. But if they could not, if they failed to carry that into effect, then the estate was to be used as directed in the 17th clause. The language is mandatory, followed by an earnest injunction to the executors. And it is not discretionary with them to execute the clause or not. The testator looked to the perpetual use of

the fund, and the power which was to regulate and control the fund was to be in the legislature, not in the executors. The legislature is, from time to time, to act in regard to it. The testator, having devised his own scheme, and given the legislature power to execute it, never intended to clothe the executors with the power of interfering on the ground of deviation from his intent, or with the power of otherwise controlling the legislative action. When, in the 21st section, he has declared the powers of the executors, it cannot be inferred that he intended to clothe them with higher powers. He never contemplated that the power should exist in them to decide whether or no the estate should go to the literary fund.

The objection to the act on the ground of provision for costs and charges, 416 comes with a bad grace from *those whose conduct leads to those charges.

The testator never intended the charges to come out of the general treasury: he must have meant them to be met out of this fund. What is meant by the testator in the expression "is used?" He is giving the fund for a perpetual object of charity: is it his intention that no change shall be made in the mode of using it? The meaning is, that it is to be used in the same manner that the ordinary fund of the school commissioners is used, at the time of using the same. Moreover, the act of February 24, 1821 appropriated the surplus income of the literary fund to the endowment of such colleges, academies and intermediate schools as the general assembly might thereafter designate. Sess. Acts of 1820-21, p. 16, ch. 11, § 5. And an instance of such designation is furnished by the act of February 27, 1833. Sess. Acts of 1832-3, p. 13, ch. 11. These acts shew that there was an intention to modify the fund; that an improvement was going on in its application. And there is nothing in the will which shews an intention to provide for the poor, except that part of the 16th clause relating to the overplus, which contains the expression "such as is not able." In providing for seminaries of learning, as the testator has done by that clause, he has shewn his intention rather to be to make provision for the middle classes.

BALDWIN, J. In the case of The Literary Fund v. Dawsons, 10 Leigh 147, it was held by this court, that the devise contained in the 17th clause of the testator's will was a valid executory devise, to take effect on the happening of the contingency therein contemplated; and the question now presented in the present suit is whether that contingency has happened? The counsel for the appellees have supposed that some light on this subject may be obtained by recurring to the difficulties which the court thought, when it decided the former

417 *cause, were removed by the construction it gave to the devise in question. Let us therefore briefly advert to the nature of those difficulties.

The testator was desirous of promoting

the cause of education, by establishing three seminaries of learning in the counties of Albemarle and Nelson; and to this object he devoted the greater part of his estate, real and personal, by the 16th clause of his will. But it appears he was apprehensive that this scheme of benevolence might fail, from the want of corporate powers for the preservation and administration of the fund thus created. In the event of such failure, he contemplated effectuating his general charitable design, the education of youth, by another plan, which would give him the agency of a then existing corporation, the president and directors of the literary fund. That plan was to constitute the estate devised a part of the literary fund, in such manner as to be used by the school commissioners for the counties of Albemarle and Nelson, in aid of the school fund allotted under the general law to those counties. But it seems he was aware that the laws constituting and regulating the literary fund, only contemplated its general resources, and would not be adequate to the administration of the specific charity he had in view. This obstacle, however, he believed could be removed by the power of the legislature, and he invoked its exercise in the following brief and comprehensive terms: "An act of assembly for said object supposed can be obtained."

The testator's apprehensions in regard to his primary scheme were realized. It did fail at the moment of his death, from the want of corporate powers to carry it into effect. The seminaries of learning which he sought to endow by the provisions of the 16th clause were not in existence, and could only be created by an act of incorporation. A devise to or for them was therefore inoperative and void, 418 upon the principles decided *by the supreme court of the United States in the case of *The Baptist Association v. Hart's ex'ors*, 4 Wheat. 1, and by this court in the case of *Gallego's ex'ors v. The Attorney General*, 3 Leigh 450. And the expedient had not occurred to the testator of providing that an act of incorporation should be obtained, and that when obtained the seminaries so incorporated, or other persons in trust for them, should be the devisees of his estate. That such a devise, at least in the latter form, by way of trust, would be good according to the law of executory devises, there is no reason to doubt. It would be a devise to or for a person (whether natural or artificial is immaterial) not in esse at the time of the testator's death, but to come into existence in a reasonable time, so as not to violate the rules of policy inhibiting perpetuities. A limitation of that kind, engrafted by way of condition on a common law conveyance, was held to be valid in *Porter's case*, 1 Rep. 24, and in the case of *Inglis v. The Trustees of the Sailor's Snug Harbour*, 3 Pet. 99, the supreme court of the United States sustained a devise to certain official persons in the state of New York (whom by

their official titles the testator appointed his executors) and their successors, upon trust to erect, manage and govern an asylum or marine hospital to be called *The Sailor's Snug Harbour*, for the support of age, decrepit and worn out sailors, and that if it could not be legally done according to his intention by them without an act of the legislature, they should apply as soon as possible for an act to incorporate them for that purpose: and the contingency of procuring an act of incorporation was held not to be too remote, inasmuch as by the intent of the testator it was to happen within a reasonable time.

When the former cause between the present parties was before this court, it would seem that the counsel for the then plaintiffs, the testator's heirs at law, based their argument against the validity of 419 the devise in *question mainly upon the ground that it was a devise to the literary fund, a corporation then incapable of taking, and upon a contingency too remote. But the court held that the devise was not to the literary fund, but to the executors in trust, and that the contingency upon which the testator's bounty was to take effect was not too remote. The devise to the executors, and the time for its effectual operation, were matters of construction; and the difficulties removed by the construction adopted by the court were not inherent in the cause, but suggested by the ability of counsel, upon an erroneous construction of the devise insisted on by them, but repudiated by the court. The difficulties therefore were not in the mind of the court, but in the mind of the counsel, and can throw no light upon the present question.

The question now before the court is simply and exclusively whether the contingency has occurred upon which the trust for the literary fund, created by the will and engrafted upon the devise to the executors, was to take effect. To determine this, we must of course look to the nature of the contingency; and that must depend altogether upon the intent of the testator. He had resolved to establish a charity, to be administered by the president and directors of the literary fund, through the agency of the school commissioners; and that resolution was fixed and final, so far as he and his representatives were concerned. But it required for its accomplishment the concurrence of another will, that of the legislature; and it required nothing more. It was wholly immaterial whether such concurrence was granted with or without solicitation, whether upon or without the application of the trustee or cestui que trust, whether at the suggestion of a member of the legislature or a stranger, whether as an act of grace and favour on the part of the government, or of public duty as the representative of a great public interest.

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general intent. Thus, that the devise is to the executors has been inferred from the direction that the estate is to be used by them in constituting it a part of the literary fund; which can only be done (in the appropriate mode of a surrender and conveyance of the property) by regarding the executors as clothed with the possession and title. So, that the devise is contingent upon the action of the legislature, we infer, because such action was contemplated by the testator, and indispensable to the success of his bounty. But we are not at liberty to infer a condition which is to defeat the whole purpose of the devise. The testator has not made his charity dependent upon the volition, or discretion, or fidelity of his executors. They had a plain and simple duty to perform, to wit, the tradition and conveyance of the property to the literary fund, so soon as that corporation should be authorized by the legislature to receive and appropriate it for the intended purpose. It was moreover the duty of the executors (not made so expressly, but by strong implication) to obtain, if they could, the concurrence of the legislature in the proposed endowment; a concurrence, not with the will of the executors, but with the will of the testator. But to obtain if practicable; imports nothing more than the use of the lawful and proper means: and of what significance are the means when the end has been accomplished?

The desired act of assembly has been passed, and why should we now enquire whether it was passed with or without the consent of the acting executor? I readily admit that if it appeared clearly from the will, that the testator intended the establishment and endowment of his proposed charity should depend upon the consent of his executors, then we ought to treat
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The views above stated are, it seems to me, in perfect accordance with the decree of this court, and the opinions of the judges, in the former cause between the same parties. All objections to the validity of the devise were then overruled: that founded on the supposed remoteness of the contingency was especially noticed and condemned, not because the contingency depended on the will of the executors, but on their
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The views above stated are, it seems to me, in perfect accordance with the decree of this court, and the opinions of the judges, in the former cause between the same parties. All objections to the validity of the devise were then overruled: that founded on the supposed remoteness of the contingency was especially noticed and condemned, not because the contingency depended on the will of the executors, but on their
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curement or passage of the law within a reasonable time, and not upon the consent of the executors to its passage. Judge Tucker thought the case very much the same as that of *Inglis v. The Trustees of the Sailor's Snug Harbour*, in which it will be seen that the executors were directed to apply to the legislature as soon as possible, and no one supposed for a moment that they had any discretion.

In a word, it would to my mind be very remarkable, if the testator had defeated his manifest and lawful purpose, by the lawful means which he adopted for its accomplishment: if he could be regarded as attempting a perpetuity, not in the legal sense of a corporate charity, but in the illegal sense of unreasonable delay in its creation: if his measures for the sure and swift execution of his scheme should have the effect of protracting it indefinitely; and if he had confided to his executors the discretion of thwarting his unequivocal, decided, and clearly expressed intention.

As to the objections made to the details of the statute for the administration of the charity, they are matters which go not to the abrogation but the modification of the law, and should be addressed to the legislature. The provisions of the act are, however, in my opinion, strictly in conformity with those of the devise, for reasons which will be assigned by judge Allen in presenting his views of the case; which reasons, to my apprehension, are entirely satisfactory.

I think the decree ought to be reversed, and the cause remanded, with directions to compel the prompt and complete execution of the trust.

ALLEN, J. The validity of the devise contained in the 17th clause of Martin Dawson's will was considered by this court in the case reported in 10 Leigh 147.

424 *The inferior court had declared that devise void. That decree was reversed, upon the ground that the devise was not to a corporation at that time incapable of taking and administering the estate in the mode prescribed by the will, but to the executors, in trust for the purpose of procuring the necessary act of assembly to constitute the estate a part of the literary fund. Holding the devise valid on this ground, the trust must be viewed as personal, confided to the persons named as executors, and not as an official trust. If an official trust had been intended, the contingency would have been too remote: the executors named, or their successors administering with the will annexed, would have been embraced, and there would have been no limit to the time within which the contingency might have happened. This the law forbids. To constitute a good executory devise, the contingency must happen within a reasonable time; and that has always been held to be a life or lives in being and 21 years afterwards. An act of the legislature has since been passed, on the application of the president and direct-

ors of the literary fund, empowering them to receive and hold the estate dedicated by the 17th clause of the will. This application was not concurred in by the executors. They had petitioned for an act to carry into effect the intention of the testator as expressed in the 16th clause of the will; which petition, the preamble of the act recites, was rejected because of the decision that the said clause was void. In enacting the law which was actually passed, the legislature declared that the same was not to affect the rights of the heirs of the testator, in the event it should be decided that an application or petition from the executors was necessary to give effect to the claim of the president and directors of the literary fund. That question is now presented for decision: and in considering it, the will must be looked into for the purpose of ascertaining the intent of the testator.

425 *By the first clause of the will, an intention is manifested to dispose of his whole estate. Then follow many special bequests in favour of his relations and others, among which is included a provision for Willim W. Dawson one of the executors. Having made these particular dispositions, the testator by the 16th clause gives and devises the residue of his estate, real and personal, to be used by his executors in erecting three seminaries of learning. The 17th clause is as follows: "Should my executors fail to carry into effect said 16th devise for seminaries of learning, (which I hope and trust they will not,) then the real and personal estate devised for said objects, to be used by my executors in constituting a part of the literary fund of the state of Virginia, and two thirds of the interest on it to be used by the school commissioners for the county of Albemarle, in the same way the school fund allotted for the said county is used. The other one third of the interest on it to be appropriated and used by the school commissioners for the county of Nelson in the same way. And from time to time, as the legislature may think advisable, the principal may be used for like objects for the benefit of the said counties, in same proportions as the interest is directed to be used. An act of assembly for said object, supposed can be obtained."

The general and leading intention to dedicate this estate to the purposes of education within the counties of Albemarle and Nelson is clearly manifested. As regarded his relations, he had made such provision for them before as he thought proper. His first and favourite scheme is developed in the 16th section. But he seems to have apprehended that difficulties might obstruct its execution. He looked to the possibility of its failure: and to provide for that contingency, and ensure an application of this estate to the leading intention of his will, he made the devise contained in the 17th clause. Is there anything which indicates an intention *to confide this matter to the discretion of his execu-

tors; to leave it to their judgment, whether this leading intention should or should not be carried into effect? He contemplated no benefit to them individually; for his relations he had provided; and he manifest a determination, in the first clause of the will, to dispose of the whole estate. No motive to be gathered from the will itself seems to have existed for permitting the disposition of the principal part of his estate to depend upon the discretion of his executors. To give to his will such a construction, would convert that which he intended to be a complete and final disposition of his estate, into a mere request to his executors so to dispose of it if their judgment corresponded with his; thus substituting the will of his executors in the place of his own. The terms of the devise itself shew no intention to place the administration or control of the fund in the hands of the executors. They were to use it in constituting a part of the literary fund of the state. When constituted a part of that fund, their power over it ceased forever. For its future preservation and application to the purposes of his will, he trusted to the legislature. Whilst it remained unimpaired, the interest was to be applied by the school commissioners in the same way the quota allotted by law to the two counties was used. With this application of the interest, the executors could not interfere. The testators knew that the duties of the school commissioners were prescribed by law, and that they were at all times, in respect to the administration of the school fund, subject to the control of the legislature. When therefore he directed that they should administer the interest of the fund created by his will in the same way the school fund was used, he clearly intended that it should be used by them in the mode prescribed by law, subject to such modifications as the legislature should from time to time adopt. The executors
427 could not interfere *with the school commissioners in the administration of the public school fund; and if not, neither could they exercise any supervision over this particular fund, for both were to be used in the same way. And so with respect to the principal: the testator, foreseeing that in the progress of time it might be expedient to apply the principal to the purposes of his will, confides that in express terms to the discretion of the legislature; thus making a complete and final disposition of the whole estate. With that disposition the executors could not interfere.

But it is said, the testator also contemplated an application to the legislature by his executors, to enable the president and directors of the literary fund to take and hold the estate for the purposes of his will. That he so intended must be conceded, for that intention was necessary (according to my interpretation of the decision of this court) to give validity to the devise. But was that the leading, governing intention of the testator? To hold that it was, would

be to bring us back to the question already discussed, and to say that the discretion of his executors was to be substituted in the place of his will. The testator no doubt had confidence in the good faith of his executors, and did not contemplate any failure on their part to perform the trust confided to them. He intended that they should apply for the act. An act was necessary to effectuate the end he had in view, and an application by his executors the means of obtaining it. But if they refuse to apply, and the end is attained in another mode, is the whole will to be defeated because this particular intent fails? The mode by which it was his intention to dedicate his property to the purposes named, is not departed from. The act, no matter by whose application obtained, is the mode pointed out by him; and when it is passed, his intention is carried into effect. In *Inglis*

v. The Trustees of the Sailor's Snug
428 *Harbour*, 3 Peters 116, it is *said, that "for the purpose of carrying into effect the intention of the testator, any mode pointed out by him will be sanctioned, if consistent with the rules of law, although some may fail;" and (p. 117), that "where the court can see a general intent consistent with the rules of law, it is to be carried into effect though the particular intent shall fail." And see the authorities referred to in the last cited page. The respect due to a decision of that tribunal is in this instance somewhat impaired, as to the case itself, by the dissent of justice Story, with whom the chief justice concurred. But justice Story in his opinion does not deny the rule of law. Commenting on this part of the case, he observes, "It is said that in a will, a particular may be made to yield to a more general intent. Certainly it may: but then the difficulty in the application of this rule to the present case is, that the argument insists upon a construction, which I cannot but deem an overthrow of the general, to subserve an intent not indicated. Because a testator has expressed an intent to be carried into effect one way, which cannot consistently by law be so, and the court can see another way by which he might have carried it into effect if he had thought of it, it does not follow that the court can do that which the testator might have done, and newmodel the provisions of the will." And again, in the same passage, he remarks—"The general intention here appears to me to be, to create a perpetual trust, in certain trustees in succession, for charity. And I can perceive no particular intent as distinguishable from that general intent. The perpetuity, the succession, and trusteeship are in his view equally substantial ingredients."

In the case under consideration, the testator has not expressed an intent to be carried into effect one way, which cannot consistently by law be so. The mode designated to carry his intent into effect conflicts with no rule of law; and by
429 holding the act valid which has *been

passed, the general intent is executed, and not defeated. It is effected, not to subserve an intent which the testator never indicated, but substantially in the mode which he pointed out. He intended to create a perpetuity, but not in these trustees. No succession or supervision in them was contemplated. When the act should be obtained, and the executors should have constituted the estate a part of the literary fund, their powers were to terminate; and the preservation and administration of the fund, so as to effectuate the testator's leading intent, was entrusted to others. According to the argument of judge Story, this would be a case where the particular should yield to a more general intent.

It is supposed that the decision of this court in 10 Leigh 147, conflicts with this construction. The determination of the court is embodied in the decree. The only question before the court was as to the validity of the devise in the 17th clause. They held that the devise was not void. To that extent the decision, whether a correct construction of the will or not, (as to which I give no opinion,) furnishes the law of the case, and is binding on this court. The point now under consideration was not then before the court for adjudication. At that time the executors expressed their willingness to carry into effect the intention of their testator, if it could be done consistently with the rules of law. The idea of a refusal by them was not entertained, nor its effect upon the devise considered. In this condition of the case, and with reference to the question then presented (the validity of the devise), judge Tucker observed, that the law is clearly to be obtained by those to whom the trust is confided of constituting the estate a part of the literary fund. The opinions of a judge are always to be received in connexion with the point for decision. So treating this remark, it is perfectly correct, and yet does not bear upon the subject now under consideration.

To give to the devise a construction
430 *which would relieve it from the objection that the contingency might not happen within the reasonable time prescribed by law, and was therefore too remote, it was necessary to shew that the testator intended it to be performed within a reasonable time.

That he did so intend, the judge argued, was clear, for he intended his executors to apply for the law: so intending, the contingency must happen in their lifetime; and therefore the devise was valid. But though such an intent was necessary to give validity to the devise, it is nowhere said or intimated by the judge, that if the executors should refuse to give effect to that intent, their refusal should defeat a valid devise. That depended on distinct considerations; upon a view of the whole will, to ascertain the general, leading intent of the testator; the mode designated to effectuate it; and whether, though there should be a failure in one particular, that of an

application by the executors for the necessary act, the general intent could not be still carried into effect, and substantially by the mode designated, notwithstanding the refusal of the executors to make such application.

It seems to me that, in the event which has happened, it was competent for the president and directors of the literary fund to apply for the act, and that upon the passage of a law empowering them to take, hold and administer the estate in conformity with the terms of the will, the contingency has happened which gives effect to the devise, and the estate vests in the president and directors of the literary fund. The estate is to constitute a part of the literary fund: a perpetuity in the corporate body, if the legislature should think it advisable, is contemplated; and neither the heirs nor the executors have any beneficial interest. The legal title vested in the executors must be transferred to the corporation, charged with the execution of the trust; for this is essential to such an
431 administration of the *fund as the testator clearly intended. The property cannot return to the heirs; for where lands are given to a corporation for charitable uses which the testator contemplates may last forever, the heir cannot have the lands back. 2 Story's Equity 420; High. on Mortmain 336, 353.

It is said that the legislature has not so acted as to carry into effect the intentions of the testator; and several objections are made to the details of the act.

The 2d section charges the fund with all costs of suit, fees and expenses heretofore incurred or hereafter to be incurred by the president and directors of the literary fund, in sustaining said devise or managing the fund. The testator could not have supposed that these expenses were to be paid out of the public fund. By legal intendment, all expenses incurred in relation to this fund are properly chargeable on it. A decision of the court as to the validity of the devises contained in the 16th and 17th clauses of the will necessarily preceded the application for or the passage of the act. The costs incurred in the prosecution of the suit to determine this question grew out of the will itself, and are chargeable on the fund created by it.

The 3d section directs the payment of the interest to the school commissioners of the counties of Albemarle and Nelson, in the proportions designated by the testator, to be used by the school commissioners for the same objects and purposes, and under the same regulations, that the school fund for those counties from the public treasury may be used. At the date of the will, the quota allotted to each county was applied to the education of poor children; but when the act passed, the surplus income of the literary fund had been appropriated, and the school commissioners were empowered to apply their proportions of this surplus for the benefit of colleges or academies within their respective counties. It is said

that the testator looked to the mode in which the fund was then used, and intended to devote *his estate to the exclusive education of the poor: whereas under this law the school commissioners may, either directly or indirectly, appropriate it to colleges or academies. According to my construction of this clause of the will, though the testator adopts the phrase "is used," he is not to be understood as speaking of the time at which he prepared his will. The fund was to be paid to the school commissioners, to be used by them as they used the fund paid by the state. As they used the money received from the state according to the regulations prescribed by law; such use as they were authorized to make of the public fund would be a proper use of this fund: the testator confiding in the good faith of the legislature to use it according to his expressed intentions. But however this may be, the law does not justify the application of the interest to any other purpose than that to which the money allotted to the school commissioners was applied at the date of the will. The act of assembly passed March 22, 1836, (Acts of 1835-6, ch. 4, p. 7,) gives authority to the school commissioners of the respective counties to apply the quota of the surplus then distributed, to colleges and academies. Their discretion is limited to that surplus. But the interest from this fund is to be administered in the same way the general school fund is used.

The 4th section provides for the preservation of the fund, and directs that any unexpended balance for one year shall be converted into principal, so as to enlarge the fund. To this provision there would seem to be no valid objection. Surely, when the testator entrusted the whole administration of the fund to the agents selected, he must have intended to confer upon them the authority to preserve it from waste, if any portion was not required for the use of a particular year. It is argued, that if the fund is not required for any particular year, it should be transferred to the heir or next of kin. But if I am right in sup-
 433 posing that upon the happening *of the contingency the whole estate vests in the literary fund in perpetuity, the heirs and next of kin have no interest in the subject.

The 5th section provides, in the words of the will, that the principal may, if the legislature think it advisable, be appropriated to the uses of the school commissioners, or for like purposes. It is contended that under this provision and almost unlimited latitude is allowed to the legislature, and that in virtue of it they might apply this fund to any object they deemed analogous to the one to which the will had dedicated it. The answer to this is, that the law as passed directs the application in strict accordance with the intentions of the testator, and the power reserved is precisely that which the will conferred. We are not called upon to determine the extent of this authority. If a power over this

estate is vested in the legislature as extensive as that which is exercised by the english chancery court under the statute of 43d Elizabeth of charitable uses, that would not render the act void. The power of the legislature to pass a general law similar to the 43d Elizabeth has never been questioned. No more can it be doubted, that whatever power is conferred by the words of the will in regard to this estate, may be exercised by the legislature, if by a special act they have sanctioned and legalized the devise.

Upon the whole, it seems to me that upon the passage of the act the contingency has happened which enables the president and directors of the literary fund to take, hold and administer the fund, and that the act is in strict conformity with the terms, provisions and conditions of the will; and consequently that the court below erred in dismissing the bill upon the demurrer of the heirs at law and the answer of the executor.

BROOKE, J. I concur in the view taken by judge Baldwin, and also in the view
 434 taken by judge Allen, of *the act authorizing the literary fund to take the devise under Martin Dawson's will: and I shall add nothing but a few remarks in reply to what has been said in respect to my opinion in the case of *The Literary Fund v. Dawson and others*, 10 Leigh 147. When that case was before the court, the act of assembly now before us had not passed; and it is not to be inferred, from my using in that case the expression—"If then the executors in a reasonable time can procure such a law" &c. that in my opinion it depended entirely on the executors to procure the law, and the will otherwise could not be executed. The executors in their answers had expressed a willingness to apply for the law. I had no idea then that the testator intended they should have the whole of their lives to make the application. I thought a reasonable time should be allowed them, and that in the event they did not procure an act, the literary fund might procure it, and execute the trust first confided to the executors by the testator. I did not concur with the president in thinking that the contingency of its passing was to be within a life or lives in being: to my mind the obvious intention of the testator was, that if the act were found necessary, it should be procured in a reasonable time.—I could elaborate this opinion; but I shall not.

CABELL, P., expressed his concurrence in the opinion delivered by judge Allen.

The decree of the court of appeals declared the decree of the circuit court to be erroneous in dismissing the bill of the appellants, instead of overruling the demurrer thereto and giving the relief sought by said bill: Therefore the said decree was reversed with costs, and the cause remanded to the circuit court, for further proceedings to be had therein pursuant to the foregoing opinion and decree.

435 *Stinson Ex'or &c. v. Day & Wife.

December, 1842, Richmond.

(Absent BROOKE, J.)

Wills—Devise for Testator's Daughter and Her Children—Construction.—A testator devises to a married daughter A. R. and her heirs, W. S. R. included, two tracts of land, and declaring that the daughter's husband is not capable of conducting his own affairs, and is therefore entirely excluded from managing any part of his (testator's) estate, directs that his executor shall manage the land "in the following manner, that is to say, that A. R. and her children shall have the rents or profit, except the place I now rent to W. R. and J. D. for three years, but after that time the entire profit of both tracts shall be to the said A. R. and her children, and shall not be sold by them or any of them until her youngest child comes to the age of 21 years, and not then without the consent of my daughter A. R. if she is then living." At the date of the will, A. R. has eight children, all of whom except two are living with her. The annual value of the land devised is about 175 dollars. HELD by the court of appeals, (dissentiente STANARD, J.) A. R. is entitled to receive the whole rents and profits of the lands devised, during her life, and her children can maintain no suit to recover any portion of the same. Accord. Wallace & ux. v. Dold's ex'ors & al., 3 Leigh 258.

James Stinson senior, late of Shenandoah county, died in the year 1830, having duly made and published his last will and testament, bearing date the 10th of January 1825, by the sixth clause whereof he devised as follows:

"Sixthly, I give and bequeath to my daughter Anna Roy, late Stinson, and her heirs, Wiley S. Roy included, two tracts of land, viz. the one is the tract that was con-

veyed to me by William Roy by deed bearing date the 30th day of December 1817, lying on the north side of the South river; the other tract lying on the opposite or east side of said river, a small distance below said land, and is the land whereon William Roy now lives, and is included in the same deed of the 100 acres above
436 *mentioned; which land I bequeath to them in the following manner, to wit: William Roy, my son in law, is not capable of conducting his own affairs, therefore he himself is entirely excluded from managing any part of my estate. I therefore wish, and it is my will, for my hereinafter named executor to manage the land in this clause in the following manner; that is to say, that Anna Roy and her children shall have the rents or profit, except the place I now rent to Wiley Roy and Joseph Day for three years, but after that time the entire profit of both tracts shall be to the said Anna Roy and her children, and shall not be sold by them or any of them until her youngest child comes to the age of twenty-one years, and not then without the consent of my daughter Anna Roy, if she is then living."

In the fifth clause of his will, the testator had given a tract of land to his grandson Wiley S. Roy. The seventh clause contained the following bequests of slaves: "My daughter Anna Roy is to have Lucy, but on the same terms of the land mentioned in the sixth clause of this my will, to her and her heirs. And I give and bequeath to my granddaughter Polly Day, late Roy, a small negro girl named Harriet, to her and her heirs forever." By other clauses, the testator devised certain lands to his two sons John and James, respectively, and their heirs.

James Stinson junior, a son of the testator, was named in the will sole executor thereof, and he qualified as such in November 1830.

At the date of the will, Mrs. Roy the daughter of the testator had eight children, all of whom were living with her, except Wiley S. and Mary (called in the 7th clause of the will Polly) who was the wife of James Day. The youngest of the children was then scarcely two years old.

In May 1833, James Day and Mary his wife exhibited their bill in the circuit
437 superior court of Shenandoah *county, against James Stinson the executor and trustee named in the will, Anna Roy, her husband William Roy, and her other children, of whom several were still infants, and five continued to reside with her. The bill set forth the will of the testator, and insisted that, according to the just construction thereof, the rents and profits of the two tracts of land devised for the benefit of Anna Roy and her children, belonged to the said Anna and all her children in equal shares, and so the plaintiffs were entitled to one ninth part of the same. It was alleged that one of the tracts of land was in the possession of Anna Roy, and the other in that of Wiley S. Roy, to whom

***Conveyance for Woman and Children—Mention of Children—Motive for Gift.**—A grant or gift to a woman and her children, or to a trustee for the benefit of herself and children, passes to the mother; the mention of the word "children" in the deed or will merely indicates the motive for the gift or conveyance, without investing them with any interest therein. For this proposition the principal case is cited in Walke v. Moore, 95 Va. 733, 30 S. E. Rep. 374; Richardson v. Seever, 84 Va. 270, 4 S. E. Rep. 712; Seibel v. Rapp, 85 Va. 30, 6 S. E. Rep. 478; Bain v. Buff, 76 Va. 375; Stace v. Bumgardner, 89 Va. 425, 16 S. E. Rep. 252; Mauzy v. Mauzy, 79 Va. 539; Waller v. Catlett, 83 Va. 203, 2 S. E. Rep. 280; Penn v. Whitehead, 17 Gratt. 515; Rhett v. Mason, 18 Gratt. 566; Summers v. Bean, 13 Gratt. 422.

The principal case is distinguished in Nickell v. Handy, 10 Gratt. 343. See foot-notes to Penn v. Whitehead, 17 Gratt. 508; Rhett v. Mason, 18 Gratt. 541; Leake v. Benson, 29 Gratt. 153.

In addition to the above authorities, see upon this subject, Wallace v. Dold, 3 Leigh 258; Fackler v. Berry, 93 Va. 565, 26 S. E. Rep. 887; Nye v. Lovitt, 92 Va. 710, 24 S. E. Rep. 345; Atkinson v. McCormick, 76 Va. 800; Mosby v. Paul, 88 Va. 533, 14 S. E. Rep. 330; Vaughan v. Vaughan, 97 Va. 327, 33 S. E. Rep. 603. But see Fitzpatrick v. Fitzpatrick, 100 Va. —, Va. Law Reg. Oct. 1902.

The principal case is cited in Armstrong v. Pitts, 18 Gratt. 243.

the same had been rented by the defendant Stinson; and that Stinson had been applied to by the plaintiffs for some proportion of the rents and profits, but had refused to let them have any part. The prayer of the bill was, that the court would direct an account of the said rents and profits since the death of the testator, and decree one ninth part thereof to be paid to the plaintiffs by Stinson the executor and trustee; or that the plaintiffs might have such other relief as they were entitled to on the true construction of the will.

Stinson, by his answer, submitted the construction of the will to the court. He denied that he had rented any part of the land to Wiley S. Roy; stated that no part of it was in his own possession; and insisted that he could not, if he would, recover the possession, not having the legal title.

The infant defendants answered by their guardian ad litem, submitting to the court the construction of the will and the protection of their interests. The other adult defendants failed to answer, and as to them the bill was taken pro confesso.

The cause coming on to be heard the 10th of April 1834, the circuit court held, that according to the true construction of the will, Anna Roy and her children
439 *took as joint purchasers the lands devised in the sixth clause, and that the plaintiff Mary Day was entitled to one ninth part of the rents and profits thereof since the death of the testator; and accordingly directed a commissioner to ascertain the amount of such rents and profits, and report the same to the court.

The commissioner reported an account by which the annual rent of the two tracts was estimated at 175 dollars, and interest was charged upon the rent of each year. The aggregate of principal and interest from the death of the testator to the 1st of November 1833 was 576 dollars, to one ninth of which, or 64 dollars, with interest on 58 dollars part thereof from the said 1st of November 1833, the plaintiffs were entitled according to the terms of the interlocutory decree.

On the 10th of September 1834 the cause was finally heard; when the circuit court, overruling an exception taken by the defendant Stinson to the commissioner's report, decreed that he pay to the plaintiffs the sum of money, with interest, thereby appearing to be due them, and eight ninths of the costs of suit, which he was to retain out of the rents that Mrs. Roy and her other children were entitled to receive.

Stinson applied by petition to this court for an appeal; which was allowed.

C. and G. N. Johnson, for the appellant, admitted that Mrs. Roy did not take a fee simple interest in the lands devised, the word heirs in the beginning of the clause being qualified and explained by other terms employed; but they insisted that the construction adopted by the circuit court, whereby the daughter of the testator and her youngest child (scarcely two years old

at the date of the will) were held equally interested in the rents and profits, was erroneous. The testator's daughter, they said, was the chief object of his bounty.

The creation of a trust in the executor
439 was solely intended *to exclude the marital rights of her husband, not to give a joint and equal interest to her children and herself. The practical administration of the fund was to be left to the discretion of the mother during her life; and in the exercise of that discretion, she might apply the proceeds to the benefit of herself and her children in such manner and proportions as their respective wants, which would certainly be unequal, might require. After her death, if she died before the youngest child attained the age of 21 years, the same discretion was to be exercised by the trustee, for the common benefit of the children. That such was the scheme intended by the testator, was confirmed by the provision restraining the children from alienating. That restraint could only have been imposed, because the power of alienation would be inconsistent with the discretionary power over the rents and profits, designed to be vested in those who were to administer the fund; namely, the mother and the trustee. The case of *Wallace & ux. v. Dold's ex'ors & al.*, 3 Leigh 258, they said, was a conclusive authority against the claim set up by the bill.

The attorney general, for the appellees, argued, that the direction for the executor to manage the land and apply the rents or profits to the benefit of Mrs. Roy and her children, shewed that the testator designed the rents or profits to pass through the hands of the executor to the beneficiaries; and there was no rule for apportioning the fund, but equality of benefit. The restraint of alienation until the youngest child attained full age, implied that a present interest was conferred on the children, and might be alienated by them but for such restraint. In *Wallace & ux. v. Dold's ex'ors & al.* the child had not separated from the family of the mother. The suit here is brought by a child who has married and left the family; and unless it be sustained, she will be excluded from all interest in a fund which was certainly intended not less for her benefit than
440 that of *the children who continued to reside with their mother. The authorities referred to by president Tucker, who dissented from the other judges in *Wallace & ux. v. Dold's ex'ors & al.* shew, that the construction of wills similar to this has been, that the children take equally with the parent.

BALDWIN, J. This is an awkward and obscure devise, but it has a key to it, which I think will unlock the testator's meaning. That key is to be found in the condition of this daughter, and the provision which a father would be naturally disposed to make for a child in her circumstances. She was the wife of an improvident husband, and the mother of a large, and, it may have been, increasing family of children; some

of them of tender years; and of two who had attained maturity, one was a married daughter, and the other a son who had set out in life and was managing for himself. The testator, in making a final distribution of his property amongst his children, would of course be desirous of placing the share intended for this unfortunate daughter, beyond the control of the thriftless husband, and the grasp of his creditors; and to secure the benefits of the property to her and those who were the nearest objects of her solicitude, and who by that reason chiefly had attracted his own affectionate regard. The anxious father's wish would therefore be to give the daughter the control, discretion and authority, which should pertain to the only efficient head of the family; so restricted merely as to prevent her dominion over the subject from being injuriously perverted. Such a purpose would require a scheme giving to her a home and the perception of the little income of her humble estate, for the common maintenance of herself and family, with the chance of appropriating any surplus that industry and frugality might yield, towards the advancement of such of her

offspring as had left, or might leave,
441 the household "shelter; a scheme that would authorize her, for those objects, to continue her ownership and enjoyment within the limit of her life, or to surrender either or both, at her discretion, to and for the benefit of those entitled to the succession; a scheme that would thus retard or accelerate the admission of her heirs respectively into their inheritance, according to the wants and interests of the family.

With this view of the testator's probable motives, arising out of the triple relation of the prominent devisee of daughter, wife and mother, and in connexion with the scantiness of the provision contemplated, we shall find that the devise is reasonable and judicious in the whole, with a perfect unison and harmony in all its parts: whereas a different consideration of the subject must result inevitably in a harsh and grating discord. Let us look for a moment into the particulars of the clause in question.

In the first place, the testator shews that this daughter is the primary object of his contemplated bounty, by giving the property to her and her heirs, with the designation, it is true, of one of those heirs, (who, it would seem, was a favourite grandson,) lest it might be supposed that he was excluded from the inheritance, by a separate devise of a tract of land to him in a preceding part of the will. He then proceeds to exclude all marital rights and control of the husband, by declaring that he shall have nothing to do with the management of the property, because incapable of conducting his own affairs. He next interposes his executor as trustee, but without investing him with the title, inasmuch as he was merely to be the protector of the separate estate, without actual possession of the property, or pernancy of the profits. Then

follows a declaration that the profit is to be to the daughter and her children, evidencing that she is to have the income and her heirs a present interest in the subject, but qualified immediately
442 *afterwards by a provision that it shall not be sold by them or any of them (meaning the heirs or children) until the youngest child comes to the age of 21 years, and not then without the consent of their mother, if still living. This provision manifests that the mother was to take the profits for the common benefit of the family, without diminution by subtractions from the principal, so long as the whole income might be requisite for the support of the younger children, or afterwards during her life, if she should deem the whole necessary for her own maintenance. We can account rationally in no other way for the acceleration first of the interest of the heirs, and then its restriction, at the discretion of their mother. Why should the adult and married children be prevented from alienating during the minority of the others, and subsequently at the will of the mother during her life, but to secure her maintenance and that of the household? And why too should they not be permitted to alienate, if it should be found to advance their interests, without prejudicing the common interests of the family; and who so proper to be the judge of this as the mother and mistress of the domestic establishment?

On the other hand, why should we imply, for it is not expressed in the will, an immediate devise of the little estate, real and personal (it embracing a slave by a subsequent clause) to the mother and her children, adults and infants, married and unmarried, born and unborn, as joint tenants or tenants in common, with the distribution amongst them individually and equally of what was a bare modicum of income for common sustenance? Look at the consequences, and see how it defeats the whole paternal scheme for shelter and food and raiment, and domestic happiness. What becomes of the maternal control and authority; of a discretion adapted to the wants and inclinations of the children; of a frugal but comfortable household management and thrift; of the domestic hearth itself? And how is the trustee to

443 *conduct the complex machine, without personal attention to its minutest details; or to save himself from responsibility without taking actual possession of the subject, and doling out the peculium of each individual, including the pittance of some 20 dollars per annum to the mother of the family? In the very nature of things, a device so absurd, impracticable and mischievous could never have entered a father's heart.

A construction fraught with such evils, defeating the main object which the testator had in view, and mocking the wretchedness which he sought to relieve, can gain no countenance except from a merely technical view of the question, derived

from the rigidity of common law conveyances, and inapplicable to the last wills and testaments of ignorant testators, whose intention, the great desideratum, is to be attained by moulding with a plastic hand their rude and imperfect language into a conformity with their natural and common sense thought. The intention, fairly and candidly sought and sufficiently ascertained, overrules every thing else, and becomes the law of the will, unless in contravention of the law of the land. "If," said lord Mansfield in *Chapman v. Brown*, 3 Burr. 1634, "words are supplied by construction, it must always be in support of the manifest intent. The blunder of expression is here favourable to the real meaning, and therefore cannot be supplied by construction, the constant object of which is to attain the intent. For this purpose, words of limitation shall operate as words of purchase; implications shall supply verbal omissions; the letter shall give way; every inaccuracy of grammar, every impropriety of terms shall be corrected by the general meaning, if that be manifest."

This view of the case is, I think, strongly sustained by the decision of the court, and the reasoning of judge Carr, adopted by the majority of the judges, in the case of *Wallace & wife v. Dold's ex'ors & al.*, 3 444 Leigh 258. *In that case there was a bequest of slaves and money to trustees, with a direction that the profits of the slaves and the interest of the money should be applied to the support and maintenance of a married daughter of the testator, and her child; and that on the death of his daughter, the slaves should be given to her child or children, if she should have more than one; and it was held that the testator's daughter was entitled to the whole profits during her life, and the daughter's child had no right to demand a share of them for her support and maintenance. There were other circumstances relied on, but the opinion of the court was based, in a great measure, upon the probable motives and design of the testator, the wants of the daughter, and the nature and purpose of the bequest. It was a much stronger case than this; and though judge Tucker dissented from the rest of the court, some of his remarks in reference to provisions for the maintenance of families, seem to indicate that his conclusion would most probably have been different in a case like this.

I think the decree ought to be reversed, and the bill dismissed with costs.

ALLEN, J. In the construction of this will, the situation of the parties must be looked to for the purpose of ascertaining the probable intent of the testator. He had three children, for whom it was his intention to provide, and who are the principal objects of his bounty. To his two sons he gives portions simply and directly. But his daughter was peculiarly situated. From the face of the will it appears that she was married to an improvident husband. He states that his son in law was not capable

of managing his own affairs, and therefore he excludes him from managing any part of his estate. This daughter had eight children, two of whom had left the paternal roof; and for these, the testator makes a special provision. The remaining 445 children *lived with the mother, and some of them were of tender years.

In this state of the family, it seems to me, the daughter was the principal object of the testator's bounty. Having provided for such of her children as had left her, his intention was to secure to her a comfortable provision for life; to place her in a condition in which she should be certain to receive the profits of this small estate, the whole of which was not more than sufficient for her maintenance in the decline of life. The first clause gives the property to her and her heirs, the grandson included; the testator apprehending perhaps, that if he were not specially named as one of the heirs, a doubt might arise whether, as he had previously given him a tract of land, he would not be excluded. These words would have given the daughter the fee. Subsequent qualifications of the devise prove that did not use the word in a technical meaning, and that he intended by it the children. They are important, however, as indicating an intention that all the children of his daughter, whether then living or not, were to take; that it was not the intention to exclude afterborn children. Having by this clause indicated the general intent to provide for his daughter and all her heirs, he proceeds to qualify the generality of the devise, by securing it from the control of the husband. For this purpose he interposes a trustee to manage the estate, and directs that his daughter and her children shall have the profits, but that the land should not be sold by them or any of them until the youngest child arrived at age, and not then without the consent of the daughter, if she was then living.

The provision preventing a sale is relied on as shewing an intent to confer a present interest in the profits.

It is clear from that clause, that the testator supposed he had invested them with some interest; and therefore the daughter did not take a fee. But it does not prove that he intended to give a present in- 446 terest in *the profits. If that was

his intention, the prohibition from selling would have been idle; for of what consequence could it be to the others, that one should sell, if each was entitled to his aliquot proportion? That would neither be enlarged nor diminished by such a sale. It seems to me, he intended to keep the property together until the youngest child arrived at age, at all events, and until the death of his daughter, if she outlived that event. Whilst she lived, the provision was for her benefit: if she died before the youngest child arrived at age, the property was to be managed by the trustee for the support and benefit of the family: if she survived that event, the property was still to remain unsold, unless by her consent.

Until the youngest child arrived at age, the testator contemplated a comfortable provision for his daughter, and relied on her maternal tenderness to provide for the children, according to their wants and at her discretion. After they attained full age, he intended that she should still control the property during her life: and that is what he meant by prohibiting a sale without her consent. But if she died before the youngest arrived at age, as the wants of the younger members of the family might and certainly would exceed those of the children who were able to take care of themselves, the estate was to be kept together and managed for the children by the trustee. The property would thus be disposed of in such a way as in any event to secure a provision, first, for the daughter; secondly, through her, and at her discretion, for the children; and thirdly, for the younger children through the trustee, if they should be deprived of their mother before they attained full age.

I think, therefore, that the children took no present interest in the profits during the lifetime of their mother. If they took any such interest, I know of no other mode of securing it to them, than by holding that each took equally and had the absolute right to his portion. The daughter, it seems to me, was entitled to the whole for life, with a remainder to all the children after her death, vesting in those living at the death of the testator, and in any afterborn children as they successively came into being; and this construction is in conformity with the decision of this court in *Wallace & ux. v. Dold's ex'ors & al.*

I think, therefore, that the decree should be reversed, and the bill dismissed.

STANARD, J. Had I been one of the court that decided the case of *Wallace & wife v. Dold's ex'ors & al.* I should have concurred in the opinion of president Tucker. The principles of that opinion I still approve, and I think the cases cited by that judge fully sustained the main position of his opinion, that, on the proper construction of the will, the child took a present interest, not liable to be divested at the discretion or will of the mother. In the case in judgment, I think the argument of that opinion, and the cases referred to in it, conclude with equal if not greater cogency in support of a construction of the will, whereby the children take a present interest in the profits, which, however small the property, is not destructible at the will or discretion of the mother, and for which, if withheld, the injured child is entitled to a remedy in equity.

CABELL, P., approving the decision in *Wallace & wife v. Dold's ex'ors & al.* and being of opinion that it ruled the present case, held that the decree ought to be reversed and the bill dismissed.

Decree reversed and bill dismissed.

448 *Crawford and Another v. M'Daniel.

December, 1842, Richmond.

(Absent CABELL, P.)

Vendor and Vendee—Deficiency in Quantity of Land Sold—Compensation.—A deed of bargain and sale conveys a tract of land described as "containing by survey 785 acres, and bounded as follows, to wit, beginning" &c. (here certain metes and bounds were set out) "this part containing 765 acres, and another part attached to the same tract containing 20 acres, and making up the full amount of 785 acres, being bounded as follows," &c.—the price stated in the deed being 11775 dollars, which is the product of 785 acres at 15 dollars per acre, and there being no evidence but the deed itself of the terms of the contract between the vendor and vendee. It turns out that the tract contains less than 785 acres. HELD, the vendee is entitled to compensation for the deficiency.

Same—Sale by Acre—Right of Surveying.—Where there is a sale of land by the acre, a right of surveying exists whether expressly reserved or not, and if no time is limited for making the election to survey, it may be done at any time before the whole business is closed between the parties. Accord. *Nelson v. Carrington & others*, 4 Munf. 322, and *Carter v. Campbell*, Gilm. 170.

***Sale by the Acre—Contracts of Hazard.**—See foot-note to *Triplett v. Allen*, 26 Gratt. 721.

The principal case is cited in *Boschen v. Jurgens*, 92 Va. 759, 24 S. E. Rep. 390. The authorities upon this subject will be found collected in foot-note to *Blessing v. Beatty*, 1 Rob. 287.

Sale in Gross or by the Acre—Price Multiple of Number of Acres.—In *Crislip v. Cain*, 19 W. Va. 545, the court said: "The case of *Crawford v. McDaniel*, 1 Rob. 448, was decided by the same court, and the facts were substantially the same as in the case of *Blessing v. Beatty* (1 Rob. 287), except that the price of the land was an exact multiple of the number of acres and the court allowed the vendee an abatement for the purchase money on the face of the contract, there being no proof in the case except the deficiency in the land. The decision was clearly right, as on the face of the contract and this proof the vendor would be regarded as guilty of a legal fraud; but the court following the views of JUDGE BALDWIN, decided it on the ground of a mutual mistake. JUDGE SHERRARD concurs in this decision basing his opinion on the fact, that the price was a multiple of the number of acres stated in the contract, and therefore it was to be regarded as a sale by the acre. This I submit is in direct conflict with the case of *Bierne v. Erskine*, 5 Leigh 59, where just such a contract was held to be *prima facie* a sale in gross but as ambiguous and admitting therefore in aid of its interpretation proof of the conduct of the parties in carrying it into execution: and because of this proof only was the contract in that case interpreted to be a contract by the acre. But in the case of *Crawford v. McDaniel*, 2 Rob. 448, it was unimportant, whether it was a contract by the acre or not, inasmuch as there was a deficiency, and the vendor was, as I conceive, responsible therefor because of his presumed fraud in the absence of evidence. And I cannot regard the unsound reasons assigned for the decisions as sufficient to overthrow the large number of Virginia decisions sustained by authorities elec-

Same—Purchase Money—Judgment for—Injunction to—Dissolution—Damages—Extent of Relief.—The vendee of land enjoins a judgment recovered against him for a balance of the purchase money, alleging a defect in the title to the land, which he fails to prove, whereupon the injunction is dissolved and the bill dismissed. Afterwards he brings another suit, in which he establishes his right to compensation for a deficiency in the quantity of the land, to an amount equal to the unpaid balance of the purchase money. **Held**, he is entitled to relief as well against the damages accrued on the dissolution of the first injunction, as against the judgment at law.

Assignment—Assignees of Purchase Money—Rights of.

—A bond for purchase money of land, executed by the vendee to one of the vendors, being assigned by the obligee to another of the vendors and a third person, the vendee brings a suit in equity against the vendors and assignees, and obtains relief against the payment of the bond; but held that in the condition of the cause there is nothing to justify a decree over in favour of the assignees.

Same—Same—Same.—The vendee of land having paid a part of the purchase money to the assignee of his bond for the same, it turns out that the quantity of the land is deficient, and that the money already paid to the assignee is more than the vendee was bound to pay. **Held**, he has no equity to recover back the excess from the assignee.

449 *Vendor and Vendee—Suit by Surviving Vendee for Compensation—Parties.—After judgment

recovered by vendor against two joint vendees of land for a balance of the purchase money, one of the vendees dies, and the other brings a suit in equity against the vendor, alleging and proving a deficiency in the quantity of the land to a value exceeding the unpaid balance of the purchase money, and claiming that the judgment be enjoined and the overpaid money refunded. **Held**, it is improper to decree in the cause without having the representatives of the deceased vendee before the court: *dissentiente STANARD, J.*

Appeal by Sophia Crawford and Alden B. Spooner from a final decree of the circuit superior court of law and chancery for the town of Lynchburg, pronounced on the 18th of January 1832, in a suit in chancery, in which John M'Daniel was plaintiff, and the said Sophia Crawford and Alden B. Spooner with others were defendants: by which decree a perpetual injunction was awarded against all further proceedings on a

where, which are irreconcilable with the reasons assigned in these two decisions, but which are in perfect accord with the decisions themselves."

Sale of Land—Deficiency in Quantity—Rule of Abatement.—The principal case is cited in *Dupue v. Sergeant*, 21 W. Va. 345, for the proposition that, the general rule in the case of an abatement on account of deficiency in the quantity of land sold, is to allow for deficiency the average price of the whole land.

See *foot-note* to *Blessing v. Beatty*, 1 Rob. 287.

Judgments—Injunction by Person Not Party—Liability.—If a person, not a party to a judgment, enjoins it, and the injunction is dissolved, he is liable to pay the ten per cent. damages prescribed by the statute. *Clayton v. Anthony*, 15 Gratt. 518, 523, citing and reconciling the principal case.

judgment obtained by Crawford and Spooner, as assignees of William Vannerson, against M'Daniel, and they were directed to pay him the sum of 292 dollars 50 cents, with interest thereon from the 17th of November 1820 till paid, and costs.

The material facts of the case were as follows:

In October 1816, the said John M'Daniel and a certain Richard Jones jointly purchased of John Patton and Sarah his wife, William Vannerson and Henrietta his wife, and A. B. Spooner and Elizabeth his wife, a parcel of land in the county of Amherst, for the sum of 11775 dollars, and received a deed therefor, bearing date the 17th of October 1816, in which the land is described as "containing by survey 785 acres, and bounded as follows, to wit, beginning" &c. (here certain metes and bounds were set out) "this part containing 765 acres, and another part attached to the same tract containing 20 acres, and making up the full amount of 785 acres, being bounded as follows;" (here the metes and bounds were given; and then the deed proceeded—) "to

have and to hold the said tract and
450 *parcel of land containing 785 acres described and bounded as aforesaid, with the hereditaments &c. unto the said John M'Daniel and Richard Jones, their heirs and assigns forever."

M'Daniel and Jones paid all the purchase money of the land except 600 dollars, part of a bond for 1804 dollars 40 cents, payable the 17th of November 1820, which they had executed to William Vannerson, by whom it was assigned to Sophia Crawford and A. B. Spooner. This balance they refused to pay, alleging that the title to part of the land was defective; whereupon the assignees brought a suit against them on the bond in the superior court of law for Amherst county, recovered a judgment, and took out execution, under which M'Daniel gave a forthcoming bond with surety. By a suit in the superior court of chancery for the Lynchburg district, M'Daniel and Jones enjoined the judgment, upon the ground of the alleged defect in the vendors' title to part of the land: but at the final hearing on the 10th of May 1828, the court dissolved the injunction and dismissed the bill. Crawford and Spooner then moved for and obtained judgment in the superior court of Amherst on the forthcoming bond executed by M'Daniel, which judgment included 431 dollars damages in lieu of interest for the time the injunction had been pending; and proceeded to sue out execution thereon.

Whereupon, in October 1828, M'Daniel (Jones being now dead) filed a new bill in the superior court of chancery of Lynchburg, alleging, that at the time the first suit was brought, and during its progress, neither he nor Jones knew of any other equity against the payment of the purchase money, than the supposed defect of title on which they relied in that suit; but that since Jones's death he had discovered by a survey made for the purpose of a partition between himself and Jones's representa-

tives, that the tract, instead of 785 acres, *contained only 734, so that it was deficient in quantity 51 acres. This survey he alleged to have been made by John Pryor, the deputy surveyor of Amherst county. The purchase of the land, he insisted, was by the acre, at the price of 15 dollars per acre; and for the deficiency in the quantity, he claimed that the judgment against him on the forthcoming bond should be enjoined, and that the money which had been overpaid should be refunded. The defendants to this bill were Sophia Crawford and A. B. Spooner, as assignees of Vannerson, and the aforesaid vendors and their wives; that is, John Patton and wife, William Vannerson and wife, and A. B. Spooner and wife. Jones's representatives were not parties, either plaintiffs or defendants.

The injunction prayed by the bill was awarded.

Answers were put in by the defendants Sophia Crawford, Spooner and wife, and Vannerson and wife, denying the sale by the acre, and the alleged deficiency, and insisting that the sale was in gross. Process was served on the defendants Patton and wife, but they never answered.

The court directed another survey of the land, which was made by the same John Pryor, deputy surveyor of Amherst, who had before made a survey for Jones. According to this last survey, the whole tract contained but 725½ acres, being 59½ acres less than the quantity called for by the deed.

The only deposition filed in the cause was that of a witness for the defendants, which was excepted to by the plaintiff and disregarded by the court.

At the final hearing, the circuit superior court for the town of Lynchburg (to which the cause had been regularly transferred) held that the sale was by the acre; that the deficiency was 59½ acres, which, at 15 dollars per acre, entitled the plaintiff to an abatement from the purchase money equal to 892 dollars 50 cents; that the plaintiff was therefore entitled to a perpetual
452 injunction *to the judgment at law, and, deducting 600 dollars, the balance of principal money remaining due on the assigned bond, from the 892 dollars 50 cents, was entitled to recover back 292 dollars 50 cents, with interest from the date when the assigned bond fell due, viz. the 17th of November 1820; and thereupon rendered the decree above mentioned.

In their petition, the appellants insisted that the decree was erroneous for the following reasons:

1. Because Jones's representatives not being parties to the suit, the questions made by the bill could not properly be adjudged by the court.

2. Because after the long acquiescence in the first survey, which, after all, was probably as near the truth as either of the two subsequent surveys; and after one bill of injunction entertained, heard and dis-

missed, the court ought not to have entertained this bill.

3. If any relief at all should have been granted, that relief ought to have been against the vendors of the land, not against the assignees of one of the bonds executed to one of the vendors. If the court ought to have enjoined the balance due on the bond, it should have made the vendors of the land pay the whole amount enjoined. And as to the surplus over and above that balance, there was no pretence for decreeing that against the assignees. It was neither alleged nor proved that they had received it; and if it had been so alleged and proved, still there would have been no equity for the plaintiff to recover it back from them.

4. Because one half the surplus, if due from the defendants at all, was due to Jones's representatives and not to M'Daniel.

In the argument of the cause in this court, by C. and G. N. Johnson for the appellants, and Leigh for the appellee, besides the points above stated, another
453 question *was discussed; namely, whether the second injunction could properly be extended to the damages accruing upon the dissolution of the first?

ALLEN, J. There is no difficulty on the main point in controversy between these parties. The right of the vendees to compensation for the deficiency in the quantity of land sold is clear. The evidence of the contract is contained in the deed. The land is described as containing by survey 785 acres. Two adjoining tracts are conveyed. After describing the first tract by metes and bounds, the deed contains the following clause: "this part containing 765 acres; and another part attached to the same tract, containing 20 acres, and making up the full amount of 785 acres:" shewing very clearly that no hazard was contemplated. Each party laboured under a mistake; each supposed he was dealing for a specific quantity. The consideration to be paid shews that the price was 15 dollars per acre. This I do not consider as material, except as furnishing evidence of the character of the agreement, and that the parties dealt for the land under the impression that it contained a certain quantity; that it was this specific quantity the vendors contracted to sell, and the vendees to purchase. In the case of *Blessing's adm'rs v. Beatty*,* all the decisions of this court were reviewed by judge Baldwin. The principle deduced from them was, that equity entertains jurisdiction and gives relief upon the ground of mistake: that the question is not affected, whether the sale was at so much per acre, or a sale of a tract supposed by both parties to contain a certain number of acres, for an aggregate sum or gross price: that in either case, if there was a mistake as to the quantity, equity will relieve, and give compensation for the excess or deficiency, though no

*Reported ante, p. 287.

454 fraud or misrepresentation *appear. In the opinion then delivered I fully concurred.

Nor is there any thing in the conduct of the parties, or the time of filing the bill, which affects the claim to relief. A previous injunction had been obtained, because of some alleged defect of title. In this the purchasers failed. The mistake as to quantity was not discovered until afterwards; and thereupon this bill was filed. The cases of *Nelson v. Carrington & others*, 4 Munf. 332, and *Carter v. Campbell*, Gilmer 170, shew that where there is a sale by the acre, a right of surveying exists, whether expressly reserved or not, and that if no time is limited for making the election to survey, it may be done at any time before the whole business is closed between the parties.

The decree enjoined not only the principal due, but the damages which accrued during the pendency of the previous injunction. As that injunction was dissolved and the bill dismissed, the defendants insist on their right to those damages, and that their claim to them rests on the same foundation with their claim to the costs incurred in that suit. The question seems not to have been expressly decided, though it was presented in the case of *Carter v. Campbell*, before cited. In that case there had been a previous injunction, which had been dissolved, and a suit and judgment on the injunction bond. A deficiency being made out in the second suit, both damages and principal were enjoined. The decree as to this was affirmed, but the particular question now raised was not discussed. It seems to me there is nothing in it. The interest accrued is always enjoined. And damages are given in lieu of interest. They are entire. The court has no right to divide them, and say that 6 per cent. as interest shall follow the principal, and 4 per cent. be recovered as a penalty. Being allowed by way of interest, though denominated damages, they are an incident to the main subject. The last suit
455 *ascertains that the money was never due; and damages ought not to be allowed for withholding money to which the party was not entitled.

So far I think the decree right. But errors have been committed in the details, for which it must be reversed.

The vendees purchased from three individuals and their wives, the husbands holding in right of their wives. A bond executed by the purchasers to one of the vendors, was by him assigned to another of the vendors and a third person. A portion of this bond (600 dollars) being unpaid, the assignees recovered a judgment for the amount against the purchasers. This judgment was enjoined. It is ascertained that on allowing for the deficiency, the bond is extinguished, and the purchasers have overpaid for the land actually conveyed. So far as the decree enjoins the judgment, it was correct. In the actual condition of the cause, it would have been

improper to decree over in favour of the assignees, against the assignor of the vendors. One of the assignees occupied both relations, of vendor and assignee. There was nothing to shew the state of accounts between the vendors; and the purchasers had nothing to do with this matter. By taking the assignment, the assignees occupy the position of the assignor, so far as the purchasers are concerned. Whether the assignees will be entitled to recover from the assignor, will depend on the contract between them. No issue is made up in this case between them, nor any admissions made, which would justify the court in decreeing over against the assignor for the amount of the bond.

But the decree not only enjoins the judgment, but makes the assignees liable for the amount overpaid by the purchasers. It does not appear upon what ground they were held responsible for this excess. The bond assigned to them had been partially paid, though to whom does not appear. The court, perhaps considering that they had received all but the balance, held
456 *them liable for that reason. As

assignees they had a right to receive all that was voluntarily paid to them. It was paid without any notice of the plaintiff's equity, and they are entitled to hold what they legally received. The remedy of the plaintiff for the excess is against the vendors, and not the assignees, who have equal equity and the legal possession.

It seems to me that the court also erred in rendering any decree without having the representatives of Jones before it. M'Daniel and Jones were joint purchasers, received a joint conveyance, executed their joint notes for the purchase money, were jointly sued, and were joint plaintiffs in the first injunction. Jones afterwards died, and M'Daniel filed the present bill without joining the representatives of Jones as plaintiffs, or making them parties.

The general rule that all persons materially interested should be made parties, is too familiar to require authority to support it. And in regard to the nature of the interest, it is wholly unimportant whether it be a legal or an equitable interest of the absent parties in the subject matter of the suit. Story's Eq. Pleading 137. This constitutes one of the leading distinctions between proceedings at law and in equity. A person with a mere equitable or remote interest cannot sue at law, and if he be improperly joined, the suit may fail. The analogies, therefore, derived from legal proceedings do not apply. Conceding that the right to recover here was a joint right which survived, and that M'Daniel might therefore have sued at law, it is equally clear that the representatives of Jones had an interest in the suit, so far as it went to establish a deficiency, and, for any thing appearing, a right to a moiety, possibly to the whole, of the money overpaid. Serious injustice might be sustained by them if the question of deficiency is to be determined in their absence; and a total

loss inflicted on them, if the survivor be permitted to pocket the excess
 457 *recovered. Whenever there is a community of interest between the parties, which may be affected by the decree, they should all be before the court. Thus in case of joint bonds or obligations, all the parties, obligors and obligees, are required to be made parties to the suit. 16 Vesey 326; Story's Eq. Pleading 159. And the same rule is applied where one of the obligors is dead; for in such case his personal representatives, as well as the survivors, must be made parties to a suit in equity brought for payment of the debt, whether it be for payment by the survivors alone, or out of the assets of the deceased. It seems to me that the correlative of the rule thus laid down is equally true, and that the representatives of the joint purchaser should be made parties here. In reality, this case is stronger than cases growing out of joint bonds, partnerships, and the like. These were joint purchasers of land. The right of survivorship as to the land is taken away; and though the breach here may have been incurred in the lifetime of both, yet it was an incident to a subject which did not survive, and in a suit to ascertain the extent of the breach, the amount of the deficiency, the representatives of the decedent were necessary parties. For this cause also, I think that the decree must be reversed, and the cause remanded in order that the representatives of Jones may be brought before the court.

BROOKE and BALDWIN, J., concurred in the opinion of Allen, J.

STANARD, J. Notwithstanding I dissented from the majority of the court that decided the case of Blessing's adm'rs v. Beatty, and still retain the opinion I formed of that case, I entirely concur in the opinion of my brother Allen on the main question in this case, respecting the right of the purchaser to an abatement from the purchase money for the deficiency of
 458 the land. In this *case the proof is satisfactory that the sale was by the acre, and not in gross. I think it a sound general rule, that where the purchase money of a tract of land is a multiple of the number of acres specified as the contents of the tract, at a rate per acre in pounds, shillings and pence, or dollars and cents, corresponding with coins in use, or not being fractional, the just implication is, that the purchase money is ascertained by the multiplication of a rate per acre by the number of acres specified, and that the sale and purchase is by the acre; and in such a case the purchaser is entitled to an abatement for a deficiency, and is chargeable for the excess, unless such implication be controlled by express stipulation, or other satisfactory evidence ascertaining that such was not the real contract. This case furnishes this ground of implication, and much to strengthen, and nothing to impair or control it. On the contrary, where a tract of land by given metes and bounds, the

contents or supposed contents of which are specified, is sold for a gross sum, not a multiple of the specified number of acres, but which would make a fractional rate per acre, not corresponding with any coins in use, or aggregations thereof, the just implication is, that the sale is by the tract in gross, and the specification of the number of acres but descriptive of the tract; and in such case the purchaser is entitled to the land comprehended within the designated metes and bounds, without right to abatement if the quantity be less than that specified, and without liability if it be greater. Such, I thought, was the nature of the sale in the case of Blessing's adm'rs v. Beatty, furnishing an ample foundation for the implication that the sale was in gross, and consequently that the purchaser was only entitled to have the land within the specified metes and bounds, and getting that, was not entitled to recover for the deficiency of quantity, and would not have been responsible had there been
 459 an excess. I thought there was nothing in the case to control *that implication, but much to reinforce it, and require the application of the general rule I have before indicated.

I do not concur in that part of the opinion which respects the necessity of making the representatives of Jones parties. The claim is for money jointly paid, or paid on joint account, upon a joint contract with M'Daniel and Jones, the consideration of which has failed. While Jones lived, it was a joint demand of himself and M'Daniel on the vendors, for money, and for money only. That demand, and the right at law to sue for it, survived to M'Daniel. It may be, that on adjusting the account of the joint purchase between the joint purchasers, they would be entitled to the amount of this demand in moieties, or in unequal shares, or one of them be entitled to the whole. But in this the vendors liable to the demand have no interest. They are discharged by accounting to the survivor, to whom the legal right to this joint pecuniary demand has survived. The only plausible reason for requiring that Jones's representatives should be parties would be, that the rights of the joint purchasers in the money that may be recovered should be adjusted, and their respective shares thereof decreed. Now this could not be done without involving in this case a settlement between the joint purchasers. In this settlement the vendors have no interest. On the one hand, this absence of interest precludes the parties liable to the demand from the right to require Jones's representatives to be made parties. On the other hand, I apprehend, those parties might justly object that the case should be incumbered with such an account, or that it and they should be retained in court until that account might be adjusted.

The decree of the court of appeals declared, that there was no error in the decree of the circuit court in allowing for the deficiency of quantity of the land,

460 and in *perpetuating the injunction; but that the said decree was erroneous in proceeding to decree in the cause before the representatives of Richard Jones were made parties, and also in decreeing against the appellants for the sum of 292 dollars 50 cents, the amount overpaid by the purchasers of the land for the quantity actually conveyed: therefore it was decreed and ordered, that the said decree, so far as the same is above declared to be erroneous, be reversed and annulled, and that the residue thereof be affirmed, with costs to the appellants. And the cause was remanded to the circuit court, with instructions to make the proper parties, and to be further proceeded in pursuant to the principles of the foregoing opinion and decree.

461 *Brown v. Glascock's Adm'r.

December, 1842, Richmond.

(Absent CABELL, P.)

Principal and Surety—Subrogation*—Case at Bar.—

A personal decree against an administrator being recovered by a creditor of the decedent, the administrator appeals, giving an appeal bond with surety; the decree being affirmed, an arrangement is made between the creditor and the surety in the appeal bond, by which the decree is transferred to the surety, who makes a part of the amount due thereon by execution against the administrator, and then brings an action on the administration bond, in the name of the creditor as relator, against the surety therein bound, in which action a judgment is recovered for the balance due on the affirmed decree, being less than the amount of damages incurred by the appeal. **Held**, the surety in the administration bond has no claim to be substituted to the remedy of the creditor on the appeal bond, and equity will not interfere in his favour by injoining the judgment.

In April 1820, Joseph Fauntleroy recovered a personal decree against Samuel Templeman administrator of Peter Northern deceased, in the superior court of chancery for the Fredericksburg district, for 1815 dollars 68 cents, with interest on 1398 dollars 47 cents from the 25th of April 1816, on account of a debt due to Fauntleroy from Northern in his lifetime; from which decree Templeman prayed and obtained an appeal to the court of appeals, upon giving bond with security to prosecute his appeal with effect, or to satisfy and pay the decree with damages and costs, in case the same should be affirmed. Templeman gave bond accordingly, with Richard T. Brown his surety therein. The decree was affirmed by the court of appeals, (see Templeman v. Fauntleroy, 3 Rand. 434,) after which, Brown the surety, having made an arrangement with Fauntleroy by which he procured from him a transfer of the decree, sued out execution upon it against Templeman, on which the

462 sum of *2568 dollars 40 cents was

made by the sale of property of Templeman, and applied to the discharge of the decree on the 28th of May 1827, leaving the balance then due 882 dollars 8 cents, being less than the amount of damages and costs incurred by the appeal, which was 1079 dollars 6 cents. Brown then caused an action to be instituted on the administration bond of Templeman, in the name of Fauntleroy as relator, against George Glascock administrator of Richard M. Glascock, who was one of Templeman's sureties therein, in which action a judgment was recovered against the defendant for 882 dollars 8 cents, the balance remaining due as aforesaid on the decree, with interest from the 28th of May 1827 till paid, and the costs of suit.

Glascock's administrator thereupon filed his bill in the superior court of chancery for the Fredericksburg district, against Brown, Fauntleroy, and the justices to whom the administration bond was taken (nominal plaintiffs in the action at law), setting forth the foregoing facts, insisting that Brown, as surety in the appeal bond, was bound to indemnify the sureties in the administration bond against the decree appealed from, and therefore praying that all proceedings on the judgment might be enjoined.

The injunction was awarded.

Brown answered, controverting the claim of equity asserted by the plaintiff in his bill, and insisting on his right to enforce the judgment. As to the other defendants, the bill was taken pro confesso.

At the final hearing on the 28th of June 1833, the circuit superior court of law and chancery for Spotsylvania county (to which the cause had been transferred) decreed that the injunction be perpetuated with costs. From which decree Brown appealed to this court.

C. and G. N. Johnson, for the appellant, said, the court below had perpetuated 463 the injunction upon the *authority, no doubt, of Parsons v. Briddock, 2 Vern. 608, and the cases in this court decided upon the same principle. But this case was plainly distinguishable from all of them. In Parsons v. Briddock, the original surety was bound in an obligation for the payment of an ascertained sum of money acknowledged to be due from the principal; and the undertaking of the bail to the action against the principal was strictly an additional security acquired by the creditor for the same debt. Here the surety in the administration bond was not bound for the payment of a debt to Fauntleroy, or any other creditor of the decedent; this obligation was only for the administrator's performance of his duty by faithfully administering the assets, and the extent of his responsibility was measured by the amount of assets which the administrator might misapply. In case of such misapplication, the surety would at all events be liable to those entitled to the estate, whether Fauntleroy succeeded or failed in his claim. When the administra-

*See monographic note on "Subrogation" appended to Janney v. Stephen, 2 Pat. & H. 11.

tor appealed from the decree in favour of Fauntleroy, the surety in the appeal bond undertook to satisfy the amount of that decree with damages and costs, in case of affirmance. His responsibility was to be measured by the decree alone; that of the surety in the administration bond by the amount of assets misapplied, without any reference whatever to the amount of the decree. Glascock and Brown, then, being subjected to liabilities different in amount, which were to be enforced upon wholly different events, and for the benefit, it might be, of different persons, could not be regarded as occupying the same mutual relation as the successive sureties in *Parsons v. Briddock*. They were in no sense sureties for the same debt. Again, in *Parsons v. Briddock*, the demand against the principal was for his own individual debt, which he must have known to be justly due, and the interposition of the bail enabled him, it may be, to protract a vexatious litigation, and certainly *deprived the

464 creditor and the original surety of that security for the payment of the debt which was afforded by the imprisonment of the debtor. Here, the principal debtor is an administrator, charged in his official, not in his individual character, with a demand the justice of which he could not personally know; and the due performance of his official duty justified if it did not absolutely require him to take the opinion of the court of last resort as to the validity of the claim against the estate, and for that purpose to give the bond and security demanded of him. And it cannot be said that any security which the sureties in the administration bond possessed has been withdrawn from them by the appeal, or their rights in any wise impaired thereby. Notwithstanding the appeal, they had at all times their remedy under the statute or by bill in equity, to exonerate themselves from responsibility or secure the assets of the estate. The principle of *Parsons v. Briddock* ought not to be farther extended, since its operation is to throw the whole burthen on one surety in exoneration of another. No case has hitherto occurred, in which the court has actively interposed to charge a subsequent for the benefit of a prior surety, by taking from the subsequent surety, a legal advantage fairly obtained, even though both of them were strictly sureties for the same debt, which it has been shewn that Glascock and Brown are not. Brown has fairly obtained the advantage of a judgment at law against Glascock, ascertaining a devastavit by the administrator Templeman, for which Glascock as one of his sureties is legally responsible: he seeks no aid of equity, but merely asks that the court will leave him to the undisturbed prosecution of legal rights, which he insists it was nowise against conscience for him to secure.—As to the principle on which sureties for the payment of money are held to be exonerated by a new contract giving indulgence to the principal debtor without their con-

465 currence, it could *have no application to this case, though the intermission of the surety in the appeal bond were considered to produce the same effect on the rights of the prior sureties, as a new arrangement entered into by the creditor himself with the administrator would have. It would be most mischievous to deny the creditor the privilege of making such arrangement unless at the peril of discharging the sureties in the administration bond. Those sureties have no right to interfere with the question whether the debt claimed be justly due or not, or to call upon the administrator to pay it.

Berry, for the appellees, argued, that the decree against Templeman, being personal, ascertained that he had in his hands assets sufficient to discharge the claim of Fauntleroy, and properly applicable to that purpose. If he failed to make the application, the sureties in his administration bond would become responsible. The effect of the decree, therefore, was to make them sureties for the payment of an ascertained sum of money due from Templeman in his individual character to Fauntleroy. Being thus invested with the character of ordinary sureties for the payment of a debt, they were consequently invested with all the rights appertaining to such sureties. Glascock, as one of these sureties, thus acquired in equity a right to the benefit of all additional securities for the debt, obtained by Fauntleroy the creditor in the prosecution of his claim against the principal debtor. The obligation of Brown in the appeal bond was such additional security: and therefore Brown was in equity liable to discharge the debt for the relief of Glascock. *Parsons v. Briddock*, 2 Vern. 608; *Wright v. Morley*, 11 Ves. 22; *M'Mahon &c. v. Fawcett &c.*, 2 Rand. 514; *Douglass v. Fagg*, 8 Leigh 588; *Givens & al. v. Nelson's ex'or & al.*, 10 Leigh 382.—Further, the sureties in the administration bond had a right to pay off the decree, and take a cession of the creditor's rights in the same for their indemnity. The effect

466 of giving *the appeal bond was to suspend the remedies of the creditor, and consequently those of the sureties, to enforce payment of the decree from Templeman the principal debtor; an effect which, had it been produced by the act of the creditor himself, would in equity have discharged Glascock the surety. This effect having been produced by the voluntary act of Brown in becoming surety in the appeal bond, he could acquire no right in equity to enforce payment from Glascock the first surety; particularly when the whole balance unpaid by the principal debtor, and sought to be recovered from Glascock, consists of damages incurred by the appeal, and so is an accretion of the debt resulting from the interference of Brown himself. It is conceded that an arrangement by a creditor of a decedent with the administrator, for forbearance of suit, will not in general have the effect of discharging the sureties in the administra-

tion bord. But it is otherwise when the administrator has become liable for a devastavit, and the responsibility of the sureties has become direct to the particular creditor; which is the case here.

STANARD, J., delivered the opinion of the court as follows:

The court is of opinion that the sureties in an administration bond are not to be regarded as sureties for the debts due from the estate, but for the due application of the assets that may come to the hands of the administrator, and that the remedies of such sureties to be relieved from or indemnified against their responsibilities are provided by statute, and such remedies are not impaired or delayed by an appeal of the administrator from a judgment or decree charging him to any one creditor in respect to such assets. The result of any such appeal does not affect the measure of the responsibility of the sureties in the administration bond, because whether

the appeal be or be not successfully
467 *prosecuted, the responsibility of the sureties, being measured by the assets, is not enlarged or diminished. If the administrator succeeds in such appeal, the assets would be liberated from the claim of the particular creditor, but would still remain liable to other creditors, or to legatees or distributees, and the sureties would remain liable for the application of them to such other creditors, legatees or distributees: if the administrator fails, the liability of the sureties still remains restricted to the measure of the assets, and if those assets be not sufficient to pay the costs and damages on the appeal, in addition to the judgment or decree appealed from, the sureties could not be made responsible therefor. The court is further of opinion that as the sureties have been charged by the judgment at law with the amount of the decree, damages and costs, it must be intended that assets to that amount were in the hands of the administrator, for the due application of which the sureties were responsible; and it cannot be material whether that responsibility be made subservient to the claim of the creditor in this case, or, by a liberation from that claim, left chargeable by other creditors, or legatees and distributees: that the principle of the case of *Parsons v. Briddock*, and other kindred cases, does not warrant the claim of sureties such as the appellee, to be substituted to the remedy of the creditor on the appeal bond; and that the decree in this case, founded on such supposed right of substitution, is erroneous. Therefore,

Decree reversed with costs, and bill dismissed.

468 *Hunter v. Matthews.

January, 1843, Richmond.

Mills and Milldams—Judgment—Validity of.—A judgment granting leave to the proprietor of the lands

**Mills and Milldams—Erection of Dam—Eminent Domain—Constitutionality of Statute.*—See foot-note to

on both sides of a stream to erect thereon a mill and dam, is valid and sufficient, though the record does not set forth to whom the bed of the stream belongs, and though the owner of the land which the inquisition finds will be overflowed had no notice of the time of making the application for the writ of ad quod damnum, or of the time of executing the same.

Same—Same—Same—Ownership of Damaged Land.—

Where, upon an application to a county court for leave to erect a mill and dam, the inquisition finds that a certain quantity of land not belonging to the applicant will be overflowed, and assesses damages to the proprietor, it is erroneous for the judgment granting leave to erect the mill and dam, to provide, that upon payment of the damages so assessed, the land overflowed shall become vested in the applicant in fee simple: and upon appeal to the circuit court by the proprietor of the land, that court must reverse the judgment with costs, though the appellee himself suggest the error and move that it be corrected.

Same—Jury of Inquest—Communication with—Setting

Aside Inquisition.—The jury impaneled under a writ of ad quod damnum awarded on an application for leave to build a mill, having found difficulty in agreeing upon the damages to be assessed for the overflowing of certain land, it is announced by the sheriff that they are not likely to agree in a verdict: whereupon the applicant requests that the jury will make another effort to come to an agreement, saying the business is a tedious and troublesome one, and he is willing to pay whatever damages they may think reasonable. A juror then states, that the other jurors wish to assess an amount of damages which he himself thinks too large, and that he is unwilling to concur with them, unless the applicant will consent to pay the damages: and he puts the question to the applicant, whether he is willing to pay the amount (naming it) which the other jurors have fixed upon? The applicant replies that he is; and this juror thereupon concurring with the others, the inquisition is completed. The communications aforesaid take place openly, before the sheriff and all the jurors, as well as other persons assembled: though the owner of the land to be overflowed is not present at the taking of the inquisition. HELD, this is not such an interference of the applicant with the jury, as to make it proper to set aside the inquisition.

On the 9th of August 1841, the county court of Campbell, on the application
469 (ore tenus) of Washington *Hunter, "setting forth that he is the owner of the land on both sides of Archer's creek in the county of Campbell, where he proposes to erect a water grist and saw mill and dam," made an order that a writ of ad quod damnum be awarded him, returnable to the next term of the court, the jury to meet on the 19th day of the said month of August.

The writ of ad quod damnum was accord-

Mairs v. Gallahue, 9 Gratt. 94. The principal case is cited in *Varnier v. Martin*, 21 W. Va. 546. See monographic note on "*Mills and Milldams*" appended to *Calhoun v. Palmer*, 8 Gratt. 88: monographic note on "*Eminent Domain*" appended to *James River & Kan. Co. v. Thompson & Teays*, 3 Gratt. 270, and monographic note on "*Constitutional Law*" appended to *Commonwealth v. Adcock*, 8 Gratt. 661.

ingly issued, and an inquisition taken in the usual form: whereby it was found, that the applicant might erect a dam across the creek at the place proposed, of the height of 22 feet, and that the health of the neighbourhood would not be annoyed by the stagnation of the water, but that five acres of the land of Edwin Matthews would be overflowed; for which damages were assessed to the amount of 239 dollars 81 cents.

At the return of the writ and inquisition, it was ordered that Matthews be summoned to shew cause why Hunter should not have leave to build the mill and dam. The summons being issued and served upon Matthews, he appeared at December term 1841, and was entered defendant to the application. The cause was continued from time to time until April term 1842; when Matthews moved the court to quash the writ of ad quod damnum, on the grounds, 1st, that neither the writ, nor the record awarding it, stated that the land at the bottom of the stream across which it was proposed to erect the dam belonged to the applicant or to the commonwealth; and 2dly, because the defendant had no notice of the time of making the said application. He also moved to quash the inquisition, because he had no notice of the time when the same was taken. The court overruled both motions, and the defendant filed a bill of exceptions to the opinions overruling the same. Whereupon, on consideration of the inquisition, and on hearing the examination of sundry witnesses on behalf of the plaintiff and defendant, and all circumstances being weighed," *the

470 court ordered, that Hunter have leave to build his mill and dam pursuant to the inquisition; that he become seized in fee simple of the five acres of land therein mentioned, upon his paying to the defendant the sum of 239 dollars 81 cents, the valuation thereof found by the jury; and that he recovered against the defendant his costs about his motion expended.

Matthews appealed from the judgment to the circuit superior court of Campbell. In that court no evidence was adduced by either party as to the ownership of the bed of the watercourse. There seemed to be no controversy on that point. But on the questions, whether the amount of damages assessed to Matthews by the inquisition was sufficient and whether the health of the neighbours, particularly the health of Matthews and his family, was likely to be annoyed by the stagnation of the waters in the mill pond, numerous witnesses were examined on both sides; and there was great discordance in their testimony. This court, it will be seen, was of opinion that upon the whole the evidence justified the finding of the inquisition and the judgment of the county court in those particulars. The only part of the testimony which it is material to set forth related to still a different matter, and was to the following effect.

John Rosser, the deputy sheriff who took

the inquisition, being examined as a witness for the appellant Matthews, deposed, that after the jury had agreed (which they did without difficulty) upon the damages for overflowing the land of Matthews, they differed in opinion as to the damages which ought to be awarded him for stopping up his road, and attempted to come to an agreement by putting down the amount which each juror was willing to assess, and dividing the aggregate of all the assessments by twelve. When the result was ascertained, which the witness thinks was something upwards of 80 dollars, Fariss, one of the jurors, said he was not satisfied; that the damages were too low.

471 *After some conversation among the jury, they concluded that they could not agree upon a verdict, and leaving the place where they had been consulting, came up to the rest of the company some 40 or 50 yards distant. Witness announced that the jury would not probably agree upon a verdict. Hunter then remarked, that he should be much pleased if the jury could agree upon a verdict, as it was a tedious and troublesome business; that he was willing to pay whatever damage they might agree upon: and he requested the jury to retire again, and make another effort to agree. The jury did accordingly retire, and again attempted to come to an agreement by the same method as before. On this second trial, the aggregate of their estimates divided by twelve amounted to something upwards of 100 dollars. After this result was ascertained, David Pugh, another of the jurors, refused to concur in a verdict for that amount of damages, saying it was too high. The jury thereupon returned to the company, and Pugh stated in the presence of Hunter, that the jury were not likely to agree unless Hunter was willing to pay the amount of damages which the eleven other jurors wished to assess; that he himself (Pugh) would not sign a verdict for more than 100 dollars for the road, unless Hunter would consent to pay it. Hunter said, he was willing to pay any damages which the jury thought fair and reasonable. Pugh then asked him if he was willing to pay the sum (naming it) which the other jurors had agreed upon? He said that he was. Pugh thereupon concurred with the other jurors, and the inquisition was completed; the damages for overflowing the land and for the road being added together, and the aggregate inserted in the inquisition. Hunter did not interfere with the jury in any other way than as above mentioned; and every thing said or done by him on the occasion was public, and in the presence of the sheriff and the whole jury.

472 *Testimony in substance the same with that of the deputy sheriff was given by two other witnesses examined for Matthews, of whom the juror Fariss was one. Fariss proved also that Matthews was not present when the inquisition was taken.

On the 27th of April 1842, the parties ap-

peared in the circuit court, and it being suggested by the appellee Hunter, that an error was made in the form of the judgment and order of the county court, in providing, that on the payment of the damages which had been assessed by the jury of inquest to the appellant Matthews, for the five acres of his land to be covered by the appellee's proposed pond, the said five acres of land should become vested in fee simple in the said appellee;* "on the motion" (the record states) of the appellee by counsel, that error is now corrected by this court." The court then proceeding to consider the case upon the evidence adduced and the arguments of counsel, delivered the following opinion and judgment:

"The court is of opinion that the interference on the part of the appellee Washington Hunter, and the remarks made by him to the jury of inquest on the day on which they met to execute the writ of *ad quod damnum*, and the influence thereof on the jury, and the conduct of the jury, which are disclosed and set forth in the evidence, vitiate the verdict and all the subsequent proceedings had in pursuance of said writ of *ad quod damnum*; and without considering any other question in the case, or intimating any opinion whatever on the merits of the controversy, it is therefore consid-

473 ered by *the court, for the reasons above stated alone, that the judgment of the county court be reversed and annulled, that all the proceedings in that court, back to the awarding the writ of *ad quod damnum*, be set aside, and that the appellant recover against the appellee his costs about his appeal in this behalf expended, and his costs about his defence in the county court expended. And it is further ordered that the motion of the appellee Hunter be sent back to the county court for further proceedings to be had therein."

On the petition of Hunter, a supersedeas was awarded to the judgment of the circuit court.

Cooke, for the plaintiff in error, maintained that the interference of Hunter with the jury of inquest, as shewn by the evidence, was in no degree improper, and did not warrant the judgment of the circuit court. Upon the merits, he said, the evidence greatly preponderated in favour of the application.

Garland, contra, insisted that the interference of Hunter was improper, and that the judgment was sustainable on that ground. But however that might be, there was another ground on which the circuit court might properly have made the very

same disposition of the cause. The petitioner had neither stated in his application, nor offered any evidence to shew, in whom was the title to the bed of the watercourse on which he proposed to erect his dam. Unless the property of the bed were in himself (wholly or in part) or in the commonwealth, the leave he asked could not properly be granted. This was an essential ingredient of his title, and ought to appear on the record. *Richards v. Hoome*, 2 Wash. 36; *Home v. Richards*, 4 Call 441; *Martin v. Beverley*, 5 Call 444; *Mead & others v. Haynes*, 3 Rand. 33.

He submitted, without argument, the other objections taken in the county court to the writ and inquisition.

474 *Upon the evidence, he said, it was most probable that the millpond would injuriously affect the health of Matthews and his family, and that the damages awarded to Matthews were insufficient. Under such circumstances, the application ought not to be granted.

Cooke, in reply to the objection that it did not appear to whom the bed of the stream belonged, cited and relied upon *Wroe v. Harris*, 2 Wash. 126, as directly in point to the present case. In the cases cited by the defendant's counsel, the applicants did not own the lands on both sides of the stream. According to the opinion of judge Green in *Mead & others v. Haynes*, and the universal practice of the country, no form is necessary in making the application to the court; it may be made *ore tenus*, and the applicant may shew, at any stage of the proceedings, that the circumstances of the case justify his claim for leave to build the mill.

The judgment of the court of appeals was as follows:

The court is of opinion that the judgment of the said circuit superior court is erroneous; therefore it is considered that the same be reversed with costs. And this court proceeding to give such judgment in the premises as the said circuit superior court should have given, it seems to the court here that the county court erred in deciding that the plaintiff should become seized in fee of the land overflowed, upon payment of the damages found by the inquest: therefore it is further considered that so much of said judgment as directs that the plaintiff should become seized in fee of the land overflowed be reversed and annulled, and that the residue thereof be affirmed; and that the defendant recover against the plaintiff his costs by him expended in the prosecution of his appeal in the said circuit court.

475 *Turner v. Harris's Ex'or & C.

January, 1843, Richmond.

Ca. Sa.—Motion to Quash—Oath of Insolvency—Charging Debtor in Execution.—After a ca. sa. against a judgment debtor has been returned non est inventus, and a scire facias sued out against the special bail, the debtor and the bail move to quash

*2 Rev. Code, ch. 285, § 6, p. 227, provides, that "if the party applying obtain leave to build the said mill, machine or engine, and erect the said dam, he shall, upon paying respectively to the several parties entitled, the value of the acre located" (see *Id.* § 2, p. 226), "and the damages which the jurors find will be done by overflowing the lands above or below, become seized in fee simple of the said acre of land, and be authorized to proceed to erect such mill, machine or engine, and dam."—Note in Original Edition.

the ca. sa. upon the ground that before the same was issued, and since the judgment was rendered, the debtor took the oath of insolvency at the suit of another creditor, and that the said ca. sa. was issued without the direction of the court. The creditor, plaintiff in the execution and scire facias, resists the motion. It appears that the debtor, having been surrendered to the sheriff by his special bail at the suit of the other creditor, and brought before two justices of the peace, subscribed and delivered in a schedule of his estate, made oath thereto in due form of law, and was thereupon discharged by warrant from the justices, which recited that he had "complied with the directions of the general assembly for the relief of insolvent debtors." No other evidence is adduced to shew that the debtor was ever charged in execution by the creditor at whose suit he was surrendered. HELD, the motion to quash the ca. sa. must be overruled.

On the 31st of May 1823, Lemuel Turner recovered a judgment in the county court of Nelson against Richard H. Burks and William B. Jacobs, for 1400 dollars and costs, to be discharged by the payment of 700 dollars with interest from the 27th of November 1821 till paid, and the costs; subject to credits for payments made at different times amounting to 537 dollars 17 cents. Pending the action, William Lee Harris had become special bail for the defendants. On the 24th of November 1823, ca. sa. was issued upon the judgment, directed to the sheriff of Nelson and returnable to January term 1824, on which the sheriff made the following return: "29th November, 1823, executed on Jacobs and committed to jail; Burks not found." On the 11th of December 1824, after the death of William Lee

Harris the special bail, a writ of scire facias was sued out against Lee W. Harris his executor. Various proceedings were had upon the scire facias, and it was still pending and undetermined on the 27th of August 1834. On that day, Harris's executor and Richard H. Burks moved the county court of Nelson to quash the ca. sa. so far as it affected the said Burks, upon the ground that before the same was issued, and since the recovery of the judgment, Burks had taken the oath of insolvency at the suit of other creditors, and that the said ca. sa. emanated without the order of the court. This motion was resisted by Turner, the plaintiff in the execution and scire facias.

In support of the motion, Harris's executor and Burks produced a warrant under the hands and seals of two justices of the peace for Amherst county, dated the 23d of August 1823, and directed to the keeper of the jail of said county, in the following terms: "We hereby command you, in the name of the commonwealth, forthwith to release and set at liberty Richard H. Burks, a prisoner now in your custody by virtue of the following bail pieces: One in the name of William Morgan &c. against the said Richard H. Burks &c. for 4800 dollars, to be discharged by the payment of 2400 dollars with interest &c. and costs; John Van Lew

& Co. against Richard H. Burks &c. for 269 dollars 20 cents with interest &c. and costs; and one in the superior court of Amherst, in the name of Archibald Robertson assignee &c. against Richard H. Burks, for 200 dollars with interest &c. and costs: the said Richard H. Burks having complied with the directions of the general assembly for the relief of insolvent debtors." It further appeared, by a receipt under the hand of the sheriff of Amherst, dated the same 23d of August 1823, that Burks was on that day surrendered to the said sheriff by William Shelton, his bail at the suit of Van Lew & Company, and thereupon committed to jail. The warrant for bringing

Burks before the justices, and the 477 schedule subscribed *and delivered in by him, were also produced; and it was proved by the testimony of two witnesses, that Burks, previous to his discharge under the warrant first above set forth, made oath to the said schedule in due form of law. But except the warrant of discharge itself, there was no evidence proving, or tending to prove, that Burks was charged in execution by any of the creditors in the said warrant mentioned, when he took the oath of insolvency and obtained his discharge as aforesaid.

Upon this evidence the county court of Nelson held that the execution ought to be quashed, so far as Burks was concerned, as it had been issued without the direction of the court, and after Burks had taken the oath of insolvency at the time and in the cases above stated; and ordered that the same be quashed accordingly. This order was affirmed by the circuit superior court of Nelson, on a supersedeas thereto obtained by Turner; and thereupon, on his petition, this court allowed him a supersedeas to the judgment of affirmance.

Rhodes, for the plaintiff in error, submitted, that Burks was not duly discharged, not having been charged in execution by any creditor, and consequently that Turner's ca. sa. was rightfully issued.

There was no counsel for the defendants.

PER CURIAM. Judgments of both courts reversed, and motion to quash the ca. sa. overruled.*

478

*Morriss v. Coleman &c.

January, 1843, Richmond.

(Absent CABELL, P.)

Sale of Land—Equity Jurisdiction—Rescission—Quiet-ing Title—Decree between Codefendants;—The owner of a tract of land conveys the same in trust to secure a debt, and afterwards, in May 1819, sells 100 acres of the tract to a party having notice

*See also Green v. Garrett, 3 Munf. 330, and Higginbotham v. Browns, 4 Munf. 516. (Reporter.)

†Equity Jurisdiction—Quiet-ing Title to Land.—The principal case is cited in Moore v. Harper, 27 W. Va. 368.

‡Same—Decree between Codefendants—See foot-note to Allen v. Morgan, 8 Gratt. 60, and foot-note to Mundy v. Vawter, 3 Gratt. 519.

of the incumbrance, who receives from the vendor a deed and the possession of the land, pays him a part of the purchase money, and engages to pay the residue when the vendor shall make him a good title; no time being limited for perfecting the title, and both parties believing that several years will elapse before it is perfected. The whole tract is sold under the trust deed, and conveyed by the trustee to the purchaser; who, in 1820, brings suit in chancery against the original owner, his vendee of the 100 acres, and a third person, by whom a lien on the land is claimed under a trust deed prior in date to that under which the plaintiff purchased: the object of the suit being to have the plaintiff's title quieted, and possession of the land delivered to him. The vendee of the 100 acres, having failed to answer the bill though duly served with process, is brought into court in June 1823 to answer interrogatories, and the plaintiff thereupon offering him the election, to take a conveyance from the plaintiff of his title to the 100 acres, and pay him the residue of the purchase money stipulated with the vendor, or else to surrender his own title under the vendor's deed, he answers, declining to have his contract with the vendor carried into execution, and reclaiming the purchase money he has paid him. The land has then become greatly depreciated in value. In 1838 it is decided that the first deed of trust has been satisfied, and that the defendant claiming under it has no lien. In 1834 the court not only decrees that the plaintiff be quieted in his title and possession against all the defendants, but, holding that the vendee of the 100 acres has been unreasonably delayed in his title, and that the tender by the plaintiff was too late, proceeds to decree that the contract and deed for the 100 acres be annulled, and that the vendor repay to the vendee the purchase money he has received. The vendor appeals from the decree, and in the court of appeals objects, 1. That equity has no jurisdiction of the plaintiff's case. 2. That the vendee ought to have been required to take the title offered by the plaintiff. 3. That the case is not one in which a decree can properly be rendered between codefendants. But the court of appeals affirms the decree.

479 *By deed dated the 12th of June 1817, Jesse Jones sold and conveyed to Robert Morris a tract of land in Campbell county containing 600 acres. Morris, on the same day, executed a deed conveying the land to Micajah Moorman and Howard Bennett, in trust, for securing to Jones the payment of the purchase money, amounting to 4905 dollars 75 cents, for which Morris had given his three bonds payable respectively on the first of January 1819, 1820 and 1821.

Both deeds were duly recorded in Campbell county court. In October 1818, it was agreed between Morris and Jones, that Jones should take from Morris a conveyance of another tract of land in Campbell county, containing about 780 acres, in satisfaction of the purchase money due for the 600 acre tract. Jones was put in immediate possession of the 780 acre tract; and on the 18th of November 1818, he surrendered Morris's three bonds, endorsing thereon a receipt in full, and taking Morris's written

promise to make him a deed for the land; which was accordingly executed on the 8th of January 1819, and recorded in the county court of Campbell on the 8th day of February 1819. But no release of the trust deed to Moorman and Bennett was executed.

After the contract between Morris and Jones respecting the tract of 780 acres was entered into, but before the land was conveyed to Jones, namely, on the 12th of November 1818, Morris conveyed the same land, with other property, to Christopher Winfree in trust for the purpose of securing a large debt to D. W. & C. Warwick. This deed was duly recorded in the corporation court of Lynchburg on the 4th of March 1819; and being produced to the county court of Campbell on the 12th of April 1819, with the certificate of the registry in the corporation court endorsed upon it, was thereupon ordered to be recorded in the county court. When Jones received his conveyance from Morris, he had, it seems, no notice of the trust deed to Winfree for the benefit of the Warwicks.

480 *On the 12th of March 1819, Morris conveyed the tract of 600 acres to Samuel Garland and John H. Smith, trustees, for the purpose of indemnifying Robert L. Coleman and Nicholas Harrison, who had endorsed his notes to a large amount. When Coleman and Harrison took this conveyance from Morris, they knew that the trust deed conveying the same tract to Moorman and Bennett, for securing the payment of the purchase money to Jones, had never been released; but they were also apprized of the contract between Morris and Jones, by which the latter had surrendered Morris's bonds, and accepted the conveyance of the 780 acre tract in payment.

Shortly after the execution of the trust deed to Garland and Smith, John Dinwiddie, with full notice of that deed, contracted with Morris for the purchase of 100 acres parcel of the 600 acre tract, at the price of 2000 dollars, 500 dollars to be paid in cash, and the residue (for which he executed his three bonds to Morris) to be paid when Morris should make him a good title to the land. No particular time was limited for perfecting the title; and both parties believed that several years would elapse before it would be perfected. Meanwhile Dinwiddie was to have possession of the land, and his bonds were to remain in the custody of J. N. Cardozo. Dinwiddie accordingly paid Morris 500 dollars in part of the purchase money; his bonds for the residue were delivered to Cardozo; and he received from Morris the possession of the land, and a conveyance of the same, bearing date the 1st of May 1819.

Coleman and Harrison, having been compelled to take up notes endorsed by them for Morris to the amount of 6500 dollars, required the trustees Garland and Smith to make sale of the 600 acre tract, in pursuance of the deed of the 12th March 1819. The said trustees accordingly sold the land at public auction, on the 23d of July 1819.

Coleman and Harrison became the
481 purchasers, *for a sum less than the amount which Morris owned them; and the land was conveyed to them by the trustees, by deed dated the 24th of July 1819. Before the property was set up to be sold, Jones forbade the sale, and made known to Coleman and Harrison and the trustees, that he claimed a lien on the land for the purchase money which would be due him from Morris, in case his title to the tract of 780 acres, conveyed to him by Morris as aforesaid, should fail.

Morris having also made default in the payment of the debt to the Warwicks, secured by the trust deed to Winfree, the tract of 780 acres was sold by Winfree in conformity with the provisions of that deed, and purchased by Daniel Warwick, (one of the firm of D. W. and C. Warwick,) to whom Winfree accordingly conveyed the same, by deed dated the 4th of September 1820. At the time of this sale, Jones was in actual possession of the land, claiming it under his purchase from Morris. Before the property was sold, he made his claim known both to D. Warwick and the trustee, and publicly forbade the sale.

In May 1820, Coleman and Harrison filed their bill in the superior court of chancery for the Lynchburg district, against Morris, Jones and Dinwiddie, together with Moorman and Bennett the trustees in Morris's deed for the benefit of Jones; setting forth their endorsements for Morris; his execution of the trust deed to Garland and Smith for their indemnity; their payment of the endorsed notes; the sale under the trust deed, and their purchase of the land; Morris's sale of 100 acres to Dinwiddie; and Jones's claim of a lien on the whole tract for purchase money. Dinwiddie, it was alleged, was in the possession of the whole 600 acres; of 100 as purchaser from Morris, and of the residue as Morris's tenant at will. The prayer of the bill was, that the
482 plaintiffs might be quieted in their title to the land, *and have the possession thereof delivered to them; and for general relief.

Jones answered, insisting on his lien for purchase money under the trust deed executed to Moorman and Bennett, the release of which, he said, it would be contrary to equity to exact from him, unless he were quieted and made secure in his title to the tract of 780 acres, against the claim set up thereto by D. W. and C. Warwick; especially as Morris was notoriously insolvent.

Morris answered, admitting all the allegations of the bill, and assenting to the relief prayed thereby.

Process was duly served on Dinwiddie; but he long failed to answer the bill. The suit remained pending in the superior court of chancery until 1831, when it was duly transferred to the circuit superior court of law and chancery for the town of Lynchburg. In June 1832, on the motion of the plaintiffs, the court ordered that Dinwiddie should be brought in by a special messenger, to answer interrogatories. He was brought

in accordingly on the 14th of June 1832; when the plaintiffs propounded to him the interrogatories following: 1. Whether, under the conveyance made to him by Morris, he claimed title to the 100 acres of land therein mentioned? 2. Whether he would elect to have his contract with Morris carried into execution, by a surrender of the plaintiffs' title to him, he accounting to them, as the assignees of Morris, for the balance of the purchase money with interest; or to surrender his conveyance, and release his title under the same, accounting with the plaintiffs for the reasonable rents and profits of the land from the date of their purchase? To these interrogatories Dinwiddie answered, that he claimed no title to the 100 acres by virtue of Morris's conveyance; and that he was not willing to have his contract with Morris carried into execution at this late day, when the land had become greatly depreciated in value. By the leave of the court, he at
483 the same time put *in an answer to the bill; wherein he again declined the execution of his contract with Morris, and claimed that the 500 dollars he had paid to Morris should be refunded to him with interest. He also admitted that when he purchased the 100 acres, he was in possession of the whole tract, under a lease from Morris for three years; and that he was still in possession of the whole at the time this suit was commenced; but he alleged that he then held the possession as tenant to the plaintiffs, the land having been leased to him from year to year, for several years, by Coleman; to whom he averred that he had paid the whole of the rents.

The long pendency of Coleman and Harrison's suit was owing to a cross suit instituted by Jones. His bill was filed in October 1820, against Coleman and Harrison, Morris, D. W. and C. Warwick, Winfree, and Moorman and Bennett, praying to be quieted in his title to the tract of 780 acres, and his possession thereof, as against the Warwicks; or, in case their title should be held superior to his, then that his lien on the tract of 600 acres, for the purchase money due him from Morris, might be enforced, and the land sold to satisfy the same according to the provisions of Morris's deed to Moorman and Bennett. Hereupon a controversy arose between Jones and the Warwicks, which was long protracted. Jones dying, the suit of Coleman and Harrison was revived against his administrator and heir, Thomas Jones; and the cross suit was revived in the name of the same party. In October 1825, an amended bill was filed by Thomas Jones, charging that Morris's deed to Winfree for the benefit of the Warwicks was never recorded according to the laws of the land, so that the same was void as to creditors and subsequent purchasers without notice. Thomas Jones having also died pending the controversy, the cross suit was revived in the names of his devisees, and the original suit was revived against them.

484 *The cross suit was finally heard and determined on the 8th of August 1833. The court held that the deed of trust from Morriss to Winfree for the benefit of the Warwicks, never having been recorded pursuant to law in the county court of Campbell, was void as against Jesse Jones and those claiming under him; and therefore decreed that Winfree and the Warwicks, for the purpose of quieting the plaintiffs (the devisees of Thomas Jones) in their title to the tract of 780 acres in the proceedings mentioned, should, by a proper deed, release to the said plaintiffs all the right, title, interest and claim of them the said Winfree and Warwicks in and to the said tract: and that the defendant Morriss should pay the plaintiffs their costs of suit.

After the determination of the cross suit, namely, on the 4th of January 1834, the deposition of Robert L. Coleman, one of the plaintiffs in the original suit, was taken on behalf of Morriss, to be read as evidence between Morriss and his codefendant Dinwiddie. Coleman deposed, that shortly after the execution of the trust deed to Garland and Smith, Morriss requested Harrison and the deponent to let Dinwiddie have the land which he Morriss had sold him: that they consented to do so, and proposed to Dinwiddie to complete his title as far as they could, upon his paying them 1500 dollars, the amount of his bonds to Morriss for the purchase money; which Dinwiddie refused to do: that there was a very great decline in the price of lands after Dinwiddie's purchase; and that deponent was always willing and desirous to take the 1500 dollars, the amount of Dinwiddie's bonds, for the land, and never could get it.—Dinwiddie excepted to this deposition, on the ground that the deponent was a party directly interested in the result of the suit.

The original suit of Coleman and Harrison came on to be heard the 29th of January 1834; when the court decreed, that as it appeared the representatives of

485 *Jones had been quieted in their title to the tract of 780 acres, therefore the plaintiffs should be forever quieted in their title to the tract of 600 acres, against the defendants and all claiming under them; and that the defendant Howard Bennett (whose cotrustee Moorman was now dead) should release to the plaintiffs, who admitted themselves to be in possession of the land, all the right and title to the same, which was conveyed by Morriss's deed to the said Moorman and Bennett. "And the court deeming it unreasonable that the defendant John Dinwiddie should have been so long delayed in his title to the 100 acres conveyed to him by Robert Morriss by deed of bargain and sale of the 1st day of May 1819; and that the plaintiffs were too late in tendering him a title; and he having elected to abandon said contract; doth adjudge, order and decree that the contract and deed last aforesaid be set aside as null and void." The court then proceeded to direct an account of the rents and profits of the land while it was held by Dinwiddie, either un-

der the contract aforesaid or as tenant, and of all payments made by him to Morriss on account of his said purchase.

After the last mentioned decree was rendered, the deposition of J. N. Cardozo was filed in the cause. This witness was examined on behalf of Morriss. Besides proving the terms of the contract between Morriss and Dinwiddie, and the understanding of those parties at the time, as detailed in a former part of this report, the deposition contained the following statement: "This deponent thinks that Dinwiddie considered the use and occupancy of the land as more than equal to the interest of the 500 dollars," (the cash payment) "this being tobacco land, and that article being in demand, and lands of this quality scarce." Dinwiddie's bonds, which (as already mentioned) were deposited in the custody of deponent, were kept by him 3 or 4, perhaps

5 years; and the deponent being then 486 about to remove *from Lynchburg, the bonds were, with the consent and in the presence of both Morriss and Dinwiddie, either destroyed, or placed in the hands of some other person; deponent could not remember which.

On the 31st of January 1835, the cause was further heard "upon the decretal order of January 1834, the deposition of J. N. Cardozo, and the agreement of the counsel of the defendants Morriss and Dinwiddie of the rent at 150 dollars;" On consideration whereof, the court, "being of opinion that the deposition of Cardozo proves that the rent of the land was considered and estimated to be equal and more than equal to the interest of the money paid in hand, and from which it fairly results that the money was to be repaid by the defendant Morriss to Dinwiddie in the event of the former failing to make the latter a good and sufficient title to the 100 acres of land in the proceedings mentioned,"—decreed that Morriss pay to Dinwiddie 500 dollars with interest from the 14th of June 1832 until paid, subject to an offset of 150 dollars, the amount of the rent as agreed upon by the parties, to be credited as of that day.

Morriss applied to a judge of this court for appeal from the decrees of the 29th January 1834 and the 31st January 1835; which was allowed. In his petition, he assigned the following grounds of objection to the said decrees:

1. That Dinwiddie, having received a conveyance from Morriss and the possession of the land, and never having been evicted by any legal process or even threatened with eviction, could not surrender his title at his pleasure to Coleman and Harrison, and hold Morriss responsible for the purchase money.

2. That Dinwiddie having purchased with the knowledge of the previous conveyance to Garland and Smith, and with the understanding that Morriss was to procure from the parties interested in that convey-
487 ance a ratification *of the contract, and Coleman and Harrison having proposed soon after their purchase to convey

the land to him, which he refused, the contract is obligatory upon Dinwiddie, and he cannot be released from it by Coleman and Harrison at the expense of Morris.

3. That as there was a conveyance by Morris to Dinwiddie and possession given, which he has never been required to surrender until the decision of this cause in January 1834, as no time was limited in which Morris was to procure the conveyance for the purpose of assuring Dinwiddie's title, and as the delay which has occurred may be mainly attributable to his neglect in filing his answer, the offer of Coleman and Harrison in 1832 was not too late to bind him, so as to release Morris.

4. That a chancery court is not the tribunal to determine between parties both of whom claim a legal title to the property. *Stuart's heirs v. Coalter*, 4 Rand. 74; *Wisely v. Findlay*, 3 Rand. 361.

5. That this is not a case in which the court may decree between codefendants. *Templeman v. Fautleroy*, 3 Rand. 434.

Grattan argued the cause for the appellant: there was no counsel for the appellees.

PER CURIAM. Decrees affirmed.

488 **Foushee Adm'r &c. v. Blackwell & Wife.*

February, 1843, Richmond.

(Absent CABELL, P., and STANARD,* J.)

Slaves—Treaty of Ghent—Widow's Interest in Money Received for Deported Slaves.—Under the first article of the treaty of Ghent, and the subsequent conventions between the United States and Great Britain, of London in October 1818, and of St. Petersburg in July 1822, the owners of slaves which were carried away from the territories of the United States by the British forces at the close of the late war, were entitled to indemnity for all such slaves, but not to the slaves in specie; and a citizen of Virginia, the owner of certain slaves so deported, having died in 1825 without issue, leaving his wife surviving him, and his administrator having afterwards received, under the act of congress of the 2d March 1827, a sum of money as indemnity for those slaves, the widow is entitled to half the distributable surplus of that money, as her absolute property, not merely to such interest therein as she would have been entitled to in the slaves.

During the late war between the United States and Great Britain, certain slaves, the property of Kenner W. Cralle, late of Northumberland, eloped to and were carried away by the enemy, and never returned or were restored to the owner. Cralle died in 1825, leaving his wife Mary him surviving, but without any child or issue. Administration of Cralle's estate was granted to Griffin H. Foushee, who preferred a claim before the commissioners appointed to award indemnity for slaves deported by the enemy, under the treaty of Ghent, and received a large sum of money upon that

claim. Mary, the relict of Cralle, married Thomas Blackwell.

Blackwell and wife, in a bill filed in the superior court of chancery for the Fredericksburg district, against Foushee administrator and distributee of Cralle, claimed one half of the money which he had received as indemnity for the deported slaves, to hold in absolute property, in 489 *like manner as Mrs. Blackwell's distributive portion of any other money belonging or due to Cralle's estate. And Foushee in his answer insisted, that the plaintiffs were entitled only to such interest in that money, as they were entitled to in the slaves for which the money was received as an indemnity, namely, an estate for Mrs. Blackwell's life in her distributive portion thereof.

The circuit superior court of Northumberland, (to which the suit had been transferred,) in an interlocutory decree pronounced the 19th of October 1832, declared that the money received as an indemnity for the deported slaves was to be regarded as part of the goods and chattels of the intestate generally, and not as part of his slave property, and decreed for the plaintiffs accordingly. From which decree Foushee appealed to this court.

Stanard, for the appellant, contended, that under the 1st article of the treaty of Ghent, and the conventions between the United States and Great Britain which subsequently grew out of it,* the United 490 States, at the period *of Cralle's death,

*"All territory, places and possessions whatsoever, taken by either party from the other during the war, or which may be taken after the signing of this treaty, excepting only the islands hereinafter mentioned, shall be restored without delay, and without causing any destruction, or carrying away any of the artillery or other public property originally captured in the said forts or places, and which shall remain therein upon the exchange of the ratifications of this treaty, or any slaves or other private property." Treaty of Ghent, art. 1. (1 *Blaren's Law U. S.* p. 604.)

"Whereas, under the first article of the treaty of Ghent, the United States claim for their citizens, and as their private property, the restitution of, or full compensation for, all slaves who, at the date of the exchange of the ratifications of the said treaty, were in any territory, places or possessions whatsoever, directed by the said treaty to be restored to the United States, but then still occupied by the British forces, whether such slaves were, at the date aforesaid, on shore, or on board any British vessel lying in waters within the territory or jurisdiction of the United States; and whereas differences have arisen whether, by the true intent and meaning of the aforesaid article of the treaty of Ghent, the United States are entitled to the restoration of, or full compensation for, all or any slaves as above described, the high contracting parties hereby agree to refer the said difference to some friendly sovereign or state, to be named for that purpose; and the high contracting parties further engage to consider the decision of such friendly sovereign or state to be final and conclusive on all the matters referred." Convention of

*He had been counsel for the appellant.

had a right to demand on his behalf, and Great Britain was bound to restore, the specific *slaves of Cralle which had been deported; that the claim did not become a money demand until the convention of November 1826, after Cralle's death; and that the money received by his administrator was impressed with the same character as the property on account of which it was received. The character, he said, of property belonging to the estate of a decedent, and the respective rights of parties interested in it, are ascertained at the time of the decedent's death. If the will directs land to be sold and the money to be paid to a legatee, the failure to make the sale is immaterial: though the legatee die before the land has been actually converted into money, it nevertheless passes as money, to his personal representatives, not to his heirs. *Tazewell & al. v. Smith's adm'r*, 1 Rand. 313, 320; *Ashby v. Palmer*, 1 Meriv. 296. On the other hand, an improper conversion of property belonging to the estate is equally ineffectual to change the rights of parties. If an administrator sell the slaves of his intestate, under the mistaken belief that such sale is necessary for the *payment of debts, the widow can claim no greater interest in the money than she would have been entitled to in the slaves. *Godwin's adm'r v. Godwin's adm'r &c.*, 4 Leigh 410. Between that case and the present there is no distinction in principle.

London, October 30, 1818, art. 5. (Appendix to acts of 18th congress, 2d session, p. 82.)

"The United States of America are entitled to claim from Great Britain a just indemnification for all property which the british forces may have carried away: and as the question relates to slaves more especially, for all the slaves that the british forces may have carried away, from places and territories of which the treaty stipulates the restitution, in quitting these same places and territories. The United States are entitled to consider as having been so carried away, all such slaves as may have been transferred from the above mentioned territories to british vessels within the waters of the said territories, and who for this reason may not have been restored." Decision of the emperor of Russia. (Appendix to acts of 17th congress, 2d session, p. 1, 2.)

"The decision of the two commissioners, or of the majority of the board, as constituted by the preceding article, shall in all cases be final and conclusive, whether as to number, the value, or the ownership of the slaves or other property for which indemnification is to be made. And his britannic majesty engages to cause the sum awarded to each and every owner in lieu of his slave or slaves or other property, to be paid in specie, without deduction, at such time or times and at such place or places as shall be awarded by the said commissioners, and on condition of such releases or assignments to be given, as they shall direct." Convention of St. Petersburg, July 12, 1822, art. 6. (Same appendix, p. 9.)

"Difficulties having arisen in the execution of the convention concluded at St. Petersburg on the 12th day of July 1822, under the mediation of his maj-

This case may also be assimilated to an agreement between individuals, that the one will restore specific slaves to the other. [Allen, J. Would not the remedy be by action for damages?] The right to the specific slaves would not be the less because of such agreement.

Cooke, for the appellee. The entire basis of mr. Stanard's argument is taken away by the examination of the treaties and conventions which he himself has referred to. None of them provides for the restitution in specie of slaves in the situation in which these were at Cralle's death, but only (at most) for indemnification to the owners. Indeed no british minister would have dared to make such a stipulation, knowing the theory of the law of England in respect to slavery on the english soil. The claims of american owners of deported slaves are recognized and treated, from first to last, as money claims, not as claims to specific property. The property in the slaves had been divested by the act of deportation *jure belli*. And even if the british government had expressly agreed to restore the slaves deported, such agreement would not have had the effect to revest the property; it would have been merely an executory contract of the british government to restore, and nowise equivalent to the actual restitution. The fund then was money de facto when it came to the hands of the administrator, and there was nothing in the transactions between the two governments which impressed on it the character of slave

esty the emperor of all the Russias, between the United States of America and Great Britain, for the purpose of carrying into effect the decision of his imperial majesty upon the differences which had arisen between the said United States and Great Britain, on the true construction and meaning of the first article of the treaty of peace and amity concluded at Ghent on the 24th day of December 1814,—his majesty the king of the united kingdom of Great Britain and Ireland agrees to pay, and the United States of America agree to receive, for the use of the persons entitled to indemnification and compensation by virtue of the said decision and convention, the sum of 1,204,060 dollars current money of the United States, in lieu of, and in full and complete satisfaction for, all sums claimed or claimable from Great Britain by any person or persons, whatsoever under the said decision and convention. Both the final adjustment of those claims, and the distribution of the sum so paid by Great Britain to the United States, shall be made in such manner as the United States alone shall determine: and the government of Great Britain shall have no further concern or liability therein." Convention of London, November 13, 1826, art. 1, 4. (Appendix to acts of 19th congress, 2d session, p. 56, 57.)

An act of congress, approved March 2, 1827, (3 Story's Laws U. S. p. 3048,) made provision for the adjustment of claims of persons entitled to indemnification under the 1st article of the treaty of Ghent, and for the distribution among such claimants of the sum paid by Great Britain under the convention of November 13, 1826, by a board of commissioners to be appointed for the purpose.—Note in Original Edition.

property. Indeed Cralle never had, under the treaties, a right to claim even pecuniary compensation for the loss of these slaves;

though his administrator did obtain
493 such compensation *by an equitable construction made by the american commissioners for distributing the fund which the british government had paid.

Cralle, therefore, having no property in these slaves at the time of his death, the cases cited on the other side are wholly inapplicable.

Leigh, in reply. The dispute between the american and british governments as to the construction of the first article of the treaty of Ghent, related to slaves and other property on board the british vessels lying in our waters at the exchange of the ratifications of the treaty. Our government contended that Great Britain by that article had stipulated not to carry away, but to make restitution of, all slaves and other property of american citizens which might be in that situation. Suppose the slaves then on board the british vessels had been, in conformity with that construction, actually landed on our coast, and relinquished by the british forces: there can be no doubt that the property would have remained in specie to the original owners. The construction maintained by the american government was the true construction of the article, and the slaves ought to have been so landed and relinquished. The award made by the emperor of Russia proceeds upon that construction: it declares that the United States are entitled to claim a just indemnification for all private property carried away by the british forces; not because the treaty bound Great Britain to pay a pecuniary equivalent for such slaves and other property of american citizens as she should think proper to carry away, but because she had thereby stipulated not to carry away any such property at all, but on the contrary to leave it with the american authorities, for the purpose of restoration to the owners. The appellee's counsel interprets the word indemnification as importing a pecuniary equivalent only. This interpretation is too narrow. In the case

of a lawless or unjust deportation of
494 specific property, the *best and most perfect indemnification is always the restitution of the property itself. Besides, by the 6th article of the convention for carrying the award into execution, the sum awarded to each owner of slaves was to be paid to him "in lieu of his slaves," and "on condition of such releases or assignments to be given" as the commissioners should direct; that is, releases or assignments of the right to the slaves in specie. The owner retained the right to demand, and the british government the right to make, the restitution of the specific property if to be had: the alternative value was to be paid in money, if the property could not be restored in specie. Suppose Cralle had died having an unsatisfied judgment in detinue, for a slave or the alternative value: could it be contended that in the event the

slave could not be had, the widow would be entitled to regard the right of the intestate as a right to a sum of money merely, and to claim an absolute property in her distributive share?

If the appellee's counsel is correct in his idea that Cralle had no right even to pecuniary compensation for the loss of his slaves, then the administrator has received money to which the estate was not entitled, and the widow has no just claim to any part of it.

ALLEN, J. The first article of the treaty of Ghent between the United States and Great Britain stipulated for the restoration of all territory &c. taken by either party from the other, without causing any destruction or carrying away any of the artillery or other public property, originally captured in said forts or places, which remained there upon the exchange of the ratifications of the treaty, or any slaves or other private property.

The two governments differed as to the true construction of this article; the american government insisting that it extended to all slaves within their territory at
495 *the time, whether on land, or on board the british cruisers; the english government, that the article applied to such slaves as were on shore. The two governments, not being able to agree, made and concluded a convention on the 20th day of October 1818, by which they referred the difference to the decision of the emperor of Russia. In this convention it was recited that the United States claimed for their citizens, and as their private property, the restitution of, or full compensation for, all slaves which were embraced by their construction of the treaty as aforesaid.

On the 22d of April 1822, the emperor of Russia made his award, sustaining the construction given to the treaty by the american government: the words of the award being, that "the United States of America are entitled to claim from Great Britain a just indemnification for all private property which the british forces may have carried away, and as the question relates to slaves more especially, for all the slaves that the british forces may have carried away, from places and territories of which the treaty stipulates the restitution, in quitting these same places and territories;" and that "the United States are entitled to consider as having been so carried away, all such slaves as may have been transferred from the above mentioned territories to british vessels within the waters of the said territories, and who for this reason may not have been restored." On the 12th of July 1822, a convention was executed to carry into effect this award. By the first article, commissioners were to be appointed to ascertain and determine the amount of indemnification which might be due to citizens of the United States under the award. The average value to be allowed for each slave for whom indemnification might be due, was to be fixed. The evidence in support of the

claims for indemnification was to be examined and decided on. And after the commissioners should have decided, the
 496 british government engaged *to cause the sum awarded to each and every owner in lieu of his slaves, to be paid at the times and places awarded, and on condition of such releases or assignments to be given, as the commissioners should direct. Difficulties having arisen in the execution of this convention, on the 13th of November 1826 another convention was made, by which Great Britain agreed to pay and the United States to receive, for the use of the persons entitled to indemnification and compensation by virtue of the decision of the emperor of Russia and the subsequent convention, a specific sum in lieu of and in full and complete satisfaction for all sums claimed or claimable from Great Britain by any person under the said decision and convention. And the adjustment of the claims and distribution of the sum paid was to be made in such manner as the United States alone should determine. This ended the controversy between the two governments; and on the 2d of March 1827 an act of congress passed, creating a commission to determine on the claims, and directing the distribution of the money.

Certain slaves, the property of the appellant's intestate, had been carried away. He died in 1825, leaving a widow; and after his death, his administrator preferred a claim and received a sum of money on account of these slaves. As the intestate died without issue, his widow claims, under our act of distributions, one half of the sum received as indemnity for the deported slaves, as her absolute property; and the administrator contends that she is entitled only to such interest in the money as she would have been entitled to in the slaves for which it was received, that is, an estate for life.

As Great Britain stipulated to restore the slaves and private property which remained in the places designated, it is unnecessary to enquire what would have been the effect of the capture upon the title of the
 497 first *owner. By the *jus postliminii*,

if the property so captured had been restored, and had come again into the power and possession of the original owner, his title would not have been considered as divested by the capture. But the property in question was not restored; the possession of the original owner was never resumed; and it would not be contended that under the provisions of this treaty, he could have followed the property, and asserted his claim to it as against individuals into whose hands it had fallen. His claim was, through his government, upon the government of Great Britain, and not to the specific chattel wherever it might be found. To constitute a complete title to the thing, possession must have been acquired; and that not being resumed, the claim of the original owner was, through his government, upon the foreign government for indemnity. It therefore would seem to follow, that as soon

as it was ascertained that the property was not or could not be reclaimed, that fact destroyed all title to the identical property. Whatever was afterwards received on account of it, was so received by way of indemnity and compensation for the loss. If the case stood therefore upon the treaty of Ghent alone, it seems to me that in the event which has happened, the money paid could not, as between these parties, be regarded as slaves. To liken it to the case of private individuals, here was an executory contract to restore property, the title to which, under the laws of war, was divested by the capture, and by the continued possession of the enemy. Under the treaty and by right of postliminy, if the possession had been restored, the original title would have been revested and have overreached the capture. But it was not so restored; the title never did revest, and the claim of the party was for compensation for the breach in not restoring.

But the subsequent conventions between the governments would seem to remove
 498 all difficulty, as the owner *could claim only through the acts of his government. It had full authority to surrender his rights, or commute them, or accept such compensation for them as it thought proper. By the convention of 1818, the United States claimed for their citizens the restitution of, or full compensation for, all slaves carried away against the treaty as they construed it. This claim, thus stated in the alternative, was submitted to the arbitrator. He decided that they were entitled to indemnification from Great Britain for the slaves so carried away; and to render it perfectly certain for what this indemnity was to be paid, he further stated that they were entitled to consider as having been so carried away, all such slaves as might have been transferred &c. and who for this reason had not been restored; thereby shewing that after such carrying away, restitution could not be made, and therefore indemnification was given. The claim for restoration was submitted; the decision put an end to it by awarding indemnity, and is conclusive as to the title to the specific property.

After this award, restoration of the property is no more heard of. The convention of 1822, for carrying the award into effect, speaks of the indemnity alone, and fixes the mode by which the amount is to be ascertained and paid.

Some reliance was placed upon the clause in the treaty, by which the british government engaged to pay the sum awarded to the owner in lieu of his slaves, on condition of such releases and assignments to be given, as the commissioners should direct. I do not understand this as recognizing a right then subsisting to have the specific thing, (for that would be contradicting the words of the award and treaty), but simply as shewing that the money was paid as an indemnity for the specific property for which compensation was awarded. And as to the releases or assignments, it is to be observed that, by the treaty, Great

499 Britain was to pay to each owner.

The decision of the commissioners would furnish evidence of the claim; and it was necessary for her security that some authentic evidence of the payment should be furnished. This, it seems to me, was the object of this cause. Cralle died after the ratification of this treaty. His right then, as secured by his government, was a right to a pecuniary indemnity for his loss, and the subsequent treaty and law merely provided for the payment, but did not vary the character of the subject. His administrator received it as a pecuniary compensation to which his intestate was entitled, and is bound to distribute it as other money of the estate.

I think the widow is entitled to claim the moiety as her absolute property, and that the decree should be affirmed.

BROOKE and BALDWIN, J., concurring, decree affirmed.

The Bank of Alexandria v. Patton and Others.

February, 1843, Richmond.

Corporations—Expiration of Charter Pending Appeal—Previous Assignment of Rights.*—A bill in equity by corporation being dismissed at the hearing, and an appeal taken from the decree, pending the appeal the charter of the corporation expires. A motion is made to the appellate court, upon the authority of *Rider v. The Union Factory*, 7 Leigh 154, that the appeal be entered as abated for that cause. In opposition to the motion it is suggested, that during the existence of the corporation, it made an assignment of its rights in the subject in controversy. **Held**, the appellate court may enquire whether the fact of assignment exists, as a guide for its action on the motion to abate, and upon being satisfied of the fact, may permit the case to proceed, without noticing on the record the dissolution of the corporation.

*Corporations—Expiration Pending Appeal—Assignment of Rights during Existence—Effect.—The principal case is cited in *May v. State Bank of North Carolina*, 2 Rob. 99, 40 Am. Dec. 735, for the proposition that in the case of a corporation whose existence may have terminated pending appeal or writ of error, and to which there is no legal succession nor can be a legal representative, but whose rights, at least in equity, may have passed to others by assignment for value during its existence, the appellate proceedings are continued to judgment or decree in the appellate court, irrespective of the fact that the corporate existence has expired.

Same—Same—Similar to Death of Individual.—The principal case is cited in *May v. State Bank of N. Car.*, 2 Rob. 73, 74, to the point that the extinction of a corporation by efflux of time cannot be distinguished, as regards disability, from that of an individual by death. See, in accord, *Rider v. Union Factory*, 7 Leigh 154, in which case **TUCKER, P.**, delivering the opinion of the court, places them both upon the same footing.

See monographic note on "Corporations (Private)" appended to *Slaughter v. Com.*, 13 Gratt. 767.

Principal Case Distinguished.—In *Booth v. Dotson*, 93 Va. 237, 24 S. E. Rep. 935, it was said: "The fact,

500 *Infants—Answer by Guardian ad Litem—Evidence.—No rule is better settled, than that an answer of an infant by guardian ad litem cannot be read against him at all, for any purpose. Per **BALDWIN, J.**

Voluntary Conveyances—Subsequent Creditor.;—In March 1807, a voluntary conveyance was made,

which is also agreed between the parties here, that George A. Booth the day before his death assigned his judgment sued on in this action to his son E. L. Booth, is relied on to bring the case under the ruling in the case of *Bank of Alexandria v. Patton* (1 Rob. 499); but it will be readily observed that the appeal in that case was properly pending in this court, having been awarded to and against living parties, which differentiates the case widely from the case here." See foot-note to *Reid v. Strider*, 7 Gratt. 76.

Practice—Death of Either Party—Revival.—In *Reid v. Strider*, 7 Gratt. 85, it is said: "Though there is no abatement of appellate causes in this court, whether of law or equity, and our statutes for revival of actions or suits have no application to them; yet a practice prevails here, probably borrowed in substance from that of the English House of Lords, in equity, requiring in case of the death of either party a revival of the appeal or writ of error by consent or by *scire facias*. *Bank of Alexandria v. Patton*, 1 Rob. R. 499."

Upon this general subject, the principal case is further cited and distinguished in *May v. State Bank of North Carolina*, 2 Rob. 84, 87, 93, 95, 100; *Bradley v. Ewart*, 18 W. Va. 506.

Infants—Answer by Guardian ad Litem—Evidence.—The principal case is cited in *Dalingerfield v. Smith*, 33 Va. 91, 1 S. E. Rep. 599. See monographic note on "Infants" appended to *Caperton v. Gregory*, 11 Gratt. 505.

Voluntary Conveyances—Existing and Subsequent Creditors—Rights of—Opposing Views.—See foot-note to *Hunters v. Walte*, 3 Gratt. 26, *Hutchison v. Kelly*, 1 Rob. 123, and *Johnston v. Zane*, 11 Gratt. 532.

The principal case is cited in *Lewis v. Overby*, 21 Gratt. 618; *Johnston v. Zane*, 11 Gratt. 539; *Hunters v. Walte*, 3 Gratt. 45, 50, 55, 67; *Lockhard v. Beckler*, 10 W. Va. 99, 100, 103; *Hunter v. Hunter*, 10 W. Va. 34.

See generally, monographic note on "Fraudulent and Voluntary Conveyances" appended to *Cochran v. Paris*, 11 Gratt. 348.

Same—Same—Same.—The principal case is cited in *Johnston v. Zane*, 11 Gratt. 506, to the point that subsequent creditors will be let in upon a fund fraudulently alienated wherever the conveyance has been or might be successfully assailed upon the ground of actual fraud by prior creditors.

See foot-note to *Hutchison v. Kelly*, 1 Rob. 123.

Same—Effect of Paying Prior Debts.—In *Greer v. O'Brien*, 36 W. Va. 289, 15 S. E. Rep. 78, the court said: "The very fact of the payment of prior debts, as was remarked in the case of *Bank v. Patton*, 1 Rob. 536, repels the presumption of fraud as to prior creditors, because it shows that the grantor was not insolvent, and, secondly, that he intended no fraud against creditors whom he has thus faithfully paid."

Imputing Fraud as Matter of Law Repudiated.—For the proposition that the doctrine of imputing fraud as matter of law has been repudiated, the principal case is cited in *Cribbins v. Markwood*, 13 Gratt. 508. The principal case is cited in *Sutherland v. March*, 75 Va. 236.

See foot-note to *Hutchison v. Kelly*, 1 Rob. 123.

settling real and personal estate for the benefit of a wife and children. It was attested by highly respectable and intelligent witnesses, and immediately placed upon record. Eighteen years afterwards, a bill was filed to impeach this conveyance, by a creditor whose debt originated some years after the conveyance was made, and who, it appeared, had notice of the conveyance when not more than a fourth of the debt had been contracted. The bill alleged, that at the time of the conveyance the grantor was very much involved, and largely indebted to many persons. But in the opinion of the court it was proved that he was then, and for several years afterwards, able to meet all his engagements; the owner of property to a considerable amount; in good credit and extensive business; having the command of large sums of money, and not indebted except to a single individual, the debt to whom was not large, considering the grantor's estate. HELD (in accordance with the principles laid down by BALDWIN, J., in *Hutchison and others v. Kelly*, ante, p. 182), that the bill of the creditor in this case cannot be sustained.

Same—Same—Statute of Eliz.—Notice of Prior Settlement.—The policy of the statute of 27 Eliz. ch. 4, and of so much of the virginian statute to prevent frauds and perjuries as relates to purchasers, investigated by BALDWIN, J. And the principle laid down by him and concurred in by the court, that a voluntary settlement, without actual fraud, made by the grantor upon his wife and children, is not to be deemed conclusively fraudulent and void as to a subsequent purchaser from him for valuable consideration, when such purchaser has full notice of the prior settlement.

On the 21st of March 1807, a deed was made between Robert Patton junior of the county of Fairfax of the one part, and James Sanderson and William Stewart junior of the town of Alexandria of the other part, whereby Patton, for a nominal consideration, (to wit, ten dollars) conveyed unto Sanderson and Stewart a tract of land in Fairfax county containing 128 acres, sixteen slaves, a chariot and harness, seven horses, all the cows, sheep and farming utensils belonging to him, the liquors of every kind in his cellar, and all his household furniture and kitchen utensils.

501 *On the same day another deed was made, between Sanderson and Stewart of the one part, and Ann Clifton Patton, wife of Robert Patton junior, of the other part, whereby Sanderson and Stewart, for a like nominal consideration, conveyed the same property unto the said Ann Clifton Patton during her life, and after her death to the several children of the said Ann Clifton Patton by the said Robert Patton junior her husband.

The first mentioned deed was attested by George Youngs, R. J. Taylor, Edmund J. Lee and William Moss; the other was attested by the three first named witnesses. They were both proved in the court of Fairfax county, the first by Taylor on the 21st of April 1807, by Moss on the 18th of May 1807, and by Youngs on the 21st of September 1807; the other by Taylor on the 21st of April 1807, and by Youngs and Lee on the

21st of September 1807. On the day last mentioned, both were admitted to record

A deed bearing date the 10th of April 1811, purporting to be from Patton and wife to William Herbert junior, and to convey the same property, was executed by Patton and signed by his wife, and also attested by four witnesses; but she was never privily examined in respect thereto, and it was never recorded. This deed, after describing the property, states expressly that it is the same that was "conveyed by James Sanderson and William Stewart jr. to the said Ann Clifton wife of the said Robert Patton jr. by deed bearing date the 21st of March 1807 and duly recorded in the county court of Fairfax." A reconveyance of the property from Herbert to Patton himself, bearing date the 7th of May 1811, was admitted to record in the court of Fairfax county the 15th of July 1811, upon Herbert's acknowledgment. The reconveyance, after describing the property, stated in terms that it was the same conveyed by Patton and wife to Herbert.

502 *On the 27th of April 1811, a deed was made between Robert Patton junior and Ann Clifton his wife, of the one part, the president, directors and company of the bank of Alexandria, of the second part, and William Herbert jr. of the third part, whereby,—after reciting that Patton did, by deed bearing date the 29th of March 1811, convey unto Herbert 2000 dollars worth of stock in the Farmers bank of Alexandria, together with other property, for the purpose of securing the payment of any sum or sums of money which the president and directors of the bank of Alexandria might have or should thereafter agree to loan him, and after reciting it to be the wish of Patton to convey the premises therein after mentioned in lieu of the said stock and as an additional security for the president and directors of the said bank,—it was witnessed that Patton and wife conveyed to Herbert the same tract of 128 acres of land, being the tract on which Patton then lived, called Spring bank, and also two other tracts of land, one of them conveyed to Patton by Hepburn in April 1809, and the other conveyed to him by Scott and others in June 1810, upon trust and with power to Herbert to sell the said premises, if Patton should at any time thereafter, when required by the president and directors of the bank of Alexandria, fail to pay them whatever sum or sums of money he might owe them by note or otherwise, with any discount or interest that might have become due thereon. This deed was attested by R. J. Taylor, N. J. Herbert and Thomas Swann, all three of whom were likewise witnesses to the reconveyance of the 7th of May 1811. There was a commission to examine mrs. Patton privily and take her acknowledgment of the deed of the 27th April 1811. And on the 18th of November 1811, the deed being proved in the court of Fairfax county as to Patton

and Herbert by three witnesses, was admitted to record.

503 *On the 29th of September 1824, a deed was made between Robert Patton junior and Ann Clifton his wife, of the first part, William Herbert of the second part, Colin Auld and Robert J. Taylor of the third part, and the president, directors and company of the bank of Alexandria, of the fourth part, wherein it was recited that Patton stood indebted to the president, directors and company of the bank of Alexandria in the sum of 8920 dollars 62 cents, with interest on 8864 dollars 74 cents from the first of April 1823, and on the residue from the date of the deed (September the 29th 1824), being the amount of sundry loans of money and discounts theretofore made by the bank for his use and accommodation, for the security of which, in part, the said Patton had theretofore conveyed in trust to the said Herbert a part of the lands therein after described. It was farther recited, that the bank had agreed to forbear and give further day of payment for the said debt to the said Patton for the term of 3 years; and if, at or before the expiration of the said term, Patton or his representatives should pay to the bank or its assigns one full third part of the said debt with interest thereon, then the bank or its assigns would allow the further term of two years, making five years from the date; and if, at the end of the said five years, Patton or his representatives should pay one half of the balance, the bank would allow the further term of two years, or seven years from the date, for the payment of the residue: and that Patton, on his part, agreed to give farther and more effectual security for the payment of the said debt to the bank. Whereupon it was witnessed that Patton and wife and Herbert (for such interest as he had therein) conveyed to Auld and Taylor the three tracts of land mentioned in the deed of the 27th of April 1811, and also another tract of land, in trust to permit Patton and wife and their representatives to retain possession and to receive the rents and

504 profits thereof *without account, according to their respective interests therein at the time of the execution of this deed, until default should be made in any one of the payments; and if there should be a failure to make payment of the debt and interest in the manner before mentioned, in trust that Auld and Taylor should sell the premises (or so much thereof as might be necessary to satisfy the whole amount of the debt and interest remaining unpaid, with all reasonable costs of sale) in the manner set forth in the deed. No sale was to be made of the Spring bank tract of land until the other two tracts should have been first sold and the proceeds thereof ascertained to be insufficient. And the deed was in trust that if Patton should pay off the whole amount of the debt, charges of insurance, and interest; or if the same should be raised, with expenses of sale, from the sale of the other tracts; or

if the same should in part be so raised, and the said Ann Clifton Patton, or any one of her children, or any one on his or their behalf, should pay to the bank the balance which should be due, then the parties of the third part should thenceforth hold the said tract of land called Spring bank to the sole and separate use of the said Ann Clifton for her life, free from the power and control of her husband, and after her death to the use of such child or children of the said Robert and Ann, then born or thereafter to be born, and for such interests and estates, as the said Ann, by any instrument of writing under her hand, attested by two or more credible witnesses, or by her last will and testament or letter of appointment attested as aforesaid, notwithstanding her coverture, might direct and appoint; and in default of such appointment, to the use of the right heirs of the said Ann according to the statutes regulating descents. The deed made provision for keeping the buildings on the Spring bank tract insured; declared that the sums advanced by the bank for premiums 505 of insurance should *be considered secured by the deed, with interest from the times of such advancements; and provided that if the same, with interest, should not be refunded to the bank within 60 days from the advancement, all claim to further credit should cease, and the trust be executed on the request of the bank. Two justices of the peace of Fairfax county took the acknowledgment of Patton, and also the privy examination and acknowledgment of his wife; and the deed with their certificates was admitted to record in the office of Fairfax county court on the 25th of October 1824.

On the 22d of March 1825, the president, directors and company of the bank of Alexandria commenced a suit in the superior court of chancery formerly holden for the Fredericksburg district.

Their bill, which was filed at June rules 1825, set forth the deeds herein before mentioned; described Patton as being, at the time of executing the deeds of March 1807, "very much involved, and indebted to many persons to a considerable amount;" and mentioned the deed of the 27th of April 1811 as being "in trust to secure a debt of 2000 dollars to the bank of Alexandria, and to secure any further loans that the bank might make to Robert Patton junior." It avers that the debt of 8864 dollars 74 cents, secured by the deed of the 29th of September 1824, is still due to the bank with interest &c. and states that the plaintiffs are advised that the tract of land called Spring bank, and the other lands conveyed by that deed, are liable for the said debt, but their claim to have the tract called Spring bank subjected to the payment of their debt is resisted, upon the ground that it had been previously conveyed by Sanderson and Stewart, by the deed of the 21st of March 1807, to Ann Clifton Patton for life, and after her death to her children, one of whom only was in esse at the date

of the deed, to wit, Eleanor Patton, 506 *who afterwards intermarried with George Mason. The complainants contend that the deed from Patton to Sanderson and Stewart, being a voluntary deed without consideration, and made with the sole view to a settlement upon the wife and family of the said Patton, and that too at a time when he was largely indebted to many persons, must, as to the complainants, be considered fraudulent, null and void; that the deed from Sanderson and Stewart to Mrs. Patton and her children is null and void, because no such settlement as was contemplated by the parties could be made without the interposition of a trustee, and as a settlement after marriage, without any contract precedent to the marriage, it cannot be supported against any creditor, either prior or subsequent; that at all events, whatever might be its effects as to the subsequent creditors, it is void in law as to any purchaser, either prior or subsequent; and that as to the complainants, who claim both as creditors and purchasers, both deeds are fraudulent and utterly null and void. Robert Patton and Ann C. his wife, Mary S. Patton, Robert Patton, George Patton, Rosalie W. Patton, Sophia Patton, Elisha C. Patton, Benjamin R. Patton, and George Mason and Eleanor his wife, formerly Eleanor Patton, are made defendants. The bill prays, that Robert Patton may answer and say whether the deed from himself to Sanderson and Stewart was not voluntary and without consideration, and with a view to have the property settled upon his wife and children, and whether, at the date of the said deed, he was not largely indebted to many persons? that the said deed, and the deed from Sanderson and Stewart to Mrs. Patton and her children, may, as to the complainants, who are both creditors and purchasers, be decreed to be null and void, and that the land called Spring bank may be made or left subject to the just and legal liens and incumbrances, which the complainants have upon it.

507 *At May rules 1826, the defendants Robert Patton and Ann C. his wife filed their answer. In this they admit that the facts stated in the bill, so far as they relate to the deeds for the tract of land called Spring bank, are true, and that the deed from Patton to Sanderson and Stewart was voluntary, and without other consideration than what appears on the face of it, except as follows—

They state that Patton, in 1804, contracted an engagement for marriage with Ann C. Reeder (now Ann C. Patton), and being about to embark for Europe, made a will which he left with his brother James Patton, since deceased, wherein he devised the Spring bank land, which he had recently purchased, to the said Ann C. Reeder, together with 5000 dollars, and sundry slaves and household furniture; and not having received the conveyance of the said land, he desired his said brother to cause it to be made to the said Ann C.

Reeder, which however he failed to do. That after his return from Europe, to wit, in 1805, he was married, and the conveyance of Spring bank was subsequently made to himself. That while in England, he became acquainted with the house of Thomas Pinkerton, then a contractor with the British government for the supply of flour, bread, peas and beans in the British West India islands, and entered into an engagement with the said Pinkerton to forward such supplies monthly from the United States to the West Indies, to meet the contract of the said Pinkerton: in the profits of which engagement, he gave his brother James Patton a large share. That soon afterwards Pinkerton failed, and he (Robert Patton) again visited England, and made a similar arrangement with the firm of Ingles, Ellico & Co. which latter business was conducted by himself alone, and was continued until 1809, when that house also failed, leaving him to take up bills of exchange to a large amount, as he had done to a considerable extent in the failure of Pinkerton. The said de-

508 fendant *Robert Patton states, that during the greater portion of the period occupied by these transactions, he believed his circumstances to be good and prosperous, and it was during that period that the deeds of March 1807 were made; but he admits that when those deeds were made, he did owe sundry debts, some of them of considerable amount, and among them a debt to John Laird of Georgetown, D. C. amounting to 678 pounds 11 shillings and 9 pence sterling, with interest from the 31st of December 1806. He states that he is under the impression that a part of the sum obtained from the complainants was paid to Laird, in part of his debt; and adds, "It is with grief and mortification this defendant must own that to this moment he remains indebted to the said John Laird a part of that debt."

At June rules 1826 an answer was filed for the other defendants (except Mason and wife) by guardian ad litem. The guardian states in the answer, that he has no doubt the claim of the complainants for 8864 dollars 75 cents with interest, on account of moneys advanced and loaned by them, is a just and fair claim; and that he has understood that the said Robert Patton junior, at the time the deed to Sanderson and Stewart was executed, was indebted to John Laird in a considerable sum of money, and perhaps to other persons also. Both the deeds of March 1807, he says, "appear to be very vaguely and inartificially drawn, and to have a very precarious effect." Whether the interest vested in the children is such a one as a court of chancery will hold valid against creditors and purchasers, he is not advised; but he states his belief that the said Robert Patton has it in his power to substitute property of equal value for that sought by the complainants to be subjected to the payment of their claim.

At October rules 1826, Mason and wife filed their answer. They state, that per-

sonally they know nothing of the facts: that they have always been informed 509 and *believe that the deed to Sanderson and Stewart was a fair and bona fide deed, and not intended to defeat or injure any creditors whatever: that they do not know whether Robert Patton junior was indebted at the time, but they have been informed and believe that his debts at that time were not considerable, and have all been long since paid. They admit that Eleanor Ann was the only child then in esse.

All the answers were signed and sworn to; that of Patton and wife by each of them; that for the infant defendants by Nathaniel S. Wise, who was then their guardian ad litem; and that of Mason and wife by each of them.

On the 24th of April 1827, the suit abated as to the defendant Robert Patton by his death. Whereupon, for reasons appearing to the court, the order appointing Wise guardian ad litem was set aside, and Ann C. Patton was appointed in his stead: and on the motion of the defendants Ann C. Patton and Eleanor Ann Mason, respectively, by counsel, leave was given to the said Ann C. Patton to answer de novo for herself and the infant defendants, and to the defendant Eleanor Mason to file a separate answer.

At March rules 1828, answers were filed. The answer of Ann C. Patton for herself, and of the infant defendants by her as their guardian states, that the conveyance to Sanderson and Stewart was made in accordance with a long cherished wish on the part of Robert Patton junior to provide for his wife and children a security against the vicissitudes of fortune, by setting apart for them a small portion of his property: and it mentioned the will made by Robert Patton junior on the eve of embarking for Europe, and the instructions given by him to his brother in relation to the conveyance of the Spring bank tract of land, in like manner as they are mentioned in the former answer. It was his intention, she

said, at the time of making the will, 510 that she *should complete the improvements at Spring bank, and reside there; and that property, and the improvements then making, were understood among their families and friends to be settled upon her. The answer further states, that at the time of the deeds of March 1807, Patton was not at all involved; that he was in the possession of much real property besides the Spring bank estate, and that he had the command of much money, ground rents &c. solely his own; that he was at that time engaged in prosperous mercantile enterprise, and concerned in shares of many vessels, besides having other considerable resources. The respondents aver that it was a conviction honestly entertained by him, that he could make provision for his wife and children, to the extent of the property comprised in the said deeds, without the slightest injustice or hazard of loss to his then creditors.

They admit that he was at that time indebted for some shop and mechanics' accounts contracted after the commencement of the year 1807, which were paid (as was usual then and for many years after) when presented at the close of the year, and that he also owed a debt to John Laird, part of which, amounting with interest to about 1200 dollars, still remains unpaid. Every debt which he owed at that time, with the exception of that to Laird, they aver has been paid. Why that was not paid they cannot state, but presume it was because Laird did not want the money. It could not be, they say, from the incompetency of the said Robert Patton jr. to discharge the same, if Laird had required and pressed it. They mention that in the spring of 1826, Humphrey Peake as agent for the bank, by persuasion, and by threatening an immediate sale of the other lots at the then reduced prices of land, importuned and at length induced the said Robert Patton junior to answer, or to allow him to draw an answer, to the complainants' bill, and to state that he owed sundry debts besides

the debt to Laird, which statement 511 *they say was without foundation, except as just mentioned in relation to the shop and mechanics' accounts. They deny that any part of the money received from the bank was ever applied to pay Laird; that debt having, as they allege, been reduced from other sources. They state that the transactions of the said Robert Patton junior with the bank did not commence until January 1809, and that he did not receive any accommodation on his own paper for a considerable time after; and the credit given him was upon his own responsibility, without contemplating any claim or charge upon the Spring bank estate. The deeds of March 1807 were never intended to be kept secret; the attorney of the bank was one of the subscribing witnesses to the same, and they were well known to the friends and acquaintances of the said Robert Patton junior in the town of Alexandria (where he carried on his business) some of whom were directors of the bank. And the respondents insist that both law and justice condemn such a claim as is made here by a subsequent creditor or purchaser, especially when the credit is given and the purchase made with a full knowledge of the voluntary conveyance, as they are informed was the case.

The answer of Eleanor Ann Mason states, that she was an infant at the time the deeds of March 1807 were made by her father; but she declares her belief that they were bona fide and upon just and good consideration, and were not made, as alleged in the bill, to defraud his creditors, or any other persons. She avers that her father was then possessed of a large real and personal estate; that if he were at all indebted, it was to a very small amount compared with the actual value of his estate; and that all the debts he then owed, she has been informed and believes, have been since paid. She calls for proof of the

allegation that he was at that time very much involved and indebted. She charges that the debts claimed to be due to the 512 complainants *were contracted long after the execution of those deeds, and that at the time they were contracted the complainants had full knowledge of the existence of the said deeds, and of the interests and estates created by the same.

The deposition of John Laird was taken the 12th of March 1828. It is very brief, consisting of two questions by the plaintiffs, and his answers. Being asked, first, whether he was acquainted with the business and affairs of the late Robert Patton? he answers, "Not at all." And then this question being propounded to him, "Was he not largely indebted to you about the year 1807, at and before that period?" his answer is, "He owed me in 1806, and several years afterwards, 678 pounds 11 shillings and 9 pence sterling money."

At October rules 1828, the death of the defendant Ann C. Patton was suggested on the record.

Depositions were taken on behalf of the surviving defendants in March 1829.

The deposition of Peter R. Beverley was in these terms: "From the year 1809 to 1812, I was intimate with the late Robert Patton junior, and often looked over his books, and from my knowledge of his circumstances then, believe he was worth, after the payment of his debts (which were then trifling), from 60 to 70 thousand dollars. From 1812 to 1816, his circumstances were good and his credit unshaken; his debts inconsiderable. In 1816 and 1817, I had extensive transactions with the said Robert Patton junior, and we jointly loaded two vessels to St. Domingo. His credit was then good, but his fortune much reduced by the failure of Pinkerton and losses on shipments and transactions. From 1817 to 1820, I knew him to be punctual in heavy transactions."

James Sanderson, in answer to the first question propounded to him, deposed, that during the period therein mentioned, to wit, from September 1805 to April

513 1807, *he was intimately acquainted with Robert Patton junior; that his circumstances were good, and generally considered so; that he was in possession of much real property, besides ground rents, was concerned in shares of several vessels, and had command of a considerable sum in cash. In answer to a second question, he deposed, that from the year 1807 until many years after, the said Patton was in good credit. In 1816, deponent sold him bills on England, upon a credit, for upwards of 8000 dollars, upon the sole notes and responsibility of him the said R. Patton junior; and they were duly paid. The third question was, Whether the said Patton owed any debts previous to the year 1807, and to what amount? To this he answered, that previous to the year 1807 he understood the said Patton owed a debt to John Laird, which he understood was about 2000 dollars. To another question, he

made this answer: "In the spring of the year before Mr. Patton died, I was consulted by him, stating he had been importuned by the bank of Alexandria, the plaintiffs, to make an answer to a bill (that they had dictated) that he was indebted to persons in a considerable amount previous to March 1807, and upon such an answer they would give them longer indulgence. I told him, if he did make such an answer, and I was ever called upon in a court of justice, I should most certainly contradict him; that I knew his circumstances at the time, and well recollected our conversation when he executed a deed to one Stewart and myself for the estate of Spring bank, and that he only owed the debt due to Mr. Laird, as before stated. He was in expectation, by getting indulgence, to be enabled to pay off the debt due to the bank of Alexandria from some other resources. I never understood, until after his death, that he had made the answer required by the said bank of Alexandria."

Richard Veitch, in answer to the first question propounded to him, deposed, 514 that during the period therein mentioned, to wit, from September 1805 to April 1807, he had many transactions in business with the said Robert Patton junior; that he was in possession of a large property, real and personal; that his circumstances and credit were by the deponent considered very good, and he believes were generally so considered. In answer to the second question asked him, he deposed, that from the year 1807 until many years after, the said Patton was in good credit, and in the year 1815 deponent took his notes for a considerable amount, payable at different periods, which were regularly paid. In answer to the third question he said, he had no knowledge of the said Patton's owing any debts previous to the year 1807.

On the 16th of April 1830, John Stanard, marshal of the court, was appointed guardian of the infant defendants in the place of the said Ann C. Patton, who had died.

In September 1830 and August 1831, depositions were taken on behalf of the plaintiffs, and some documents, exhibited therewith. But it is unnecessary to state in detail the evidence so introduced by the plaintiffs. It was, "for the most part, of a loose, indirect and unsatisfactory description." And though it "tended somewhat to shew that the grantor (Robert Patton junior), from the nature of his engagements and connexions in business, had reason to apprehend a disastrous turn in his affairs," yet it was deemed by the court of appeals, as well as the court of chancery, "too vague and inconclusive to justify the imputation of fraud."

Under the judicial act of April 16, 1831, (Sess. Acts 1830-31, p. 73, ch. 11, § 97,) the cause was transferred to the circuit court of Spotsylvania.

On the 8th of September 1831, it came on before that court to be heard upon its merits, and the court, on consideration

thereof, decreed that the bill of the plaintiffs be dismissed, and that they pay to the defendants their costs.

From this decree an appeal was allowed.

515 *Pending this appeal, the charter of the bank of Alexandria expired. By an act of congress of the 25th of February 1836, the charter was extended, continued and limited to the fourth day of March 1839. Sess. Acts 1835-6, p. 16. And by an act of the 5th of July 1838, the charter was further extended to the 4th of March 1841. Sess. Acts 1837-8, p. 97.

In February 1842, the counsel for the appellees, alleging that the corporation had become extinct, moved for an order directing the abatement of the appeal. This motion was argued before a full court, by Patton and Harrison in its support, and by C. and G. N. Johnson against it.

Patton for the appellees. "Nothing can be more obvious," (as is remarked by judge Tucker in *Rider v. The Union Factory*, 7 Leigh 155,) "than the impossibility of proceeding with a suit, however well brought, where there are no parties before the court, or where one of them is no more, and has not and cannot have any person to represent him. If this be the case where the charter of a corporation has expired or been dissolved, it must follow that the appeal, and the suit itself, must abate." It is as undeniable here that there is no person capable of representing the bank of Alexandria, as it was in that case that there was no person capable of representing the Union factory. And the rule is applicable in this case, which was laid down in that, that where the charter of a corporation expires during the pendency of an appeal, the appeal must abate, whether the corporation be appellant or appellee.

G. N. Johnson for the appellants. Under the authority of the stockholders of the bank, the debt to the bank which is the subject of this suit, and other debts due to it, were assigned to trustees before the 4th of March 1841, and the deed containing that assignment is ready to be shewn to

516 the court. While therefore it *may be, that but for this assignment the court would direct the appeal to abate, because of there being no person in existence having right to claim, yet there would be an obvious impropriety in directing such abatement here. It was never doubted, in the case of the bank of the United States, that the transfer made by it before the expiration of its charter, prevented its rights from being extinguished. The only question is as to the remedy. Now the general rule in equity is, that where a right in litigation is assigned, the assignee is entitled to continue the suit. 2 Madd. Ch. Pr. 519. And there is no reason why the rule should be different in an appellate court. In ordinary cases, where the assignor dies, and has a representative, there is no necessity to notice the assignment. In this case, one of two modes should be adopted; either the fact of the expiration of the charter should not be noticed, or there should be

some process or rule on behalf of the assignees. Otherwise an acknowledged right will be defeated. For if the appeal abates, there can be no remedy in a court of original jurisdiction, the decree of the court below being against the corporation. That decree may be clearly erroneous, but unless the error be corrected in the appellate court, no relief can be given the assignees elsewhere. Nor is there necessity for legislation. This court has plenary power over its process and proofs, without any farther legislative act. Its power to award all reviving and other process is recognized by the act in 1 R. C. 1819, p. 194, ch. 64, § 17, without any limitation as to the nature of the process. It may be for every requisite purpose. *Id.* p. 192, § 11. And by the act of 1831 it was provided that all process consequent upon appeals should be regulated by the laws and usages then in force and in practice. Sess. Acts 1830-31, p. 53, ch. 11, § 31; Supp. to Rev. Code p. 149. The judges may direct the form of writs in such manner as they shall deem advisable.

517 1 R. C. *1819, p. 195, ch. 64, § 23. And the process should be moulded and regulated to effect justice. There is analogous legislation. No suit in equity now abates by the death or marriage of the plaintiff, but it may, on motion without notice, be conducted in the name of the heir, devisee, executor or administrator of the deceased plaintiff, or the husband of the feme plaintiff. Sess. Acts 1825-6, p. 15, ch. 15, § 2; Supp. to Rev. Code p. 130. No suit at law or in equity in the name of a curator or committee of an estate will abate by the grant of letters testamentary, or of administration, on that estate. Sess. Acts 1839, p. 42, ch. 66, § 1. In *Paradise's adm'rs v. Cole &c.*, 6 Munf. 218, a suit at law against a committee was revived against the administrators of the insane person's estate. How shall the court of appeals effect the object in this case? A scire facias is frequently at law in the nature of an action, *Winter &c. v. Kretchman*, 2 T. R. 45, and in equity is analogous to a supplemental bill or bill of revivor. It may state the fact of marriage, death, devise, descent or bankruptcy, involving issues of law or fact. And though it is not usual, yet there is no reason why an assignee may not have a scire facias, even in an appellate court. Bankruptcy is a case of assignment by operation of law. 1 Bac. Abr. title Bankrupt. letter F. And in a case of bankruptcy, a scire facias is frequently requisite. The rule is, that a scire facias lies where a new person is to be benefited or charged. 2 Tidd's Pract. 1166. There may in this case be no necessity for a scire facias; but if so, a refusal to abate the appeal is proper. There is no valid objection to establishing the fact of assignment by evidence out of the record. The court may examine such evidence and pass upon it, on the principle recognized in *Erskine v. Henry &c.*, 6 Leigh 384, 5, and *Hite's heirs v. Wilson &c.*, 2 Hen. & Munf. 268. And when it finds the fact of the assignment

established, it may suffer the appeal
518 to *continue in the name of the corporation. There is no necessity, in any case, to revive in this court: where there is no revival here, any further proceedings which are requisite may be had in the court below, after the decision here. In England, if the plaintiff in error die after errors assigned, it does not abate the writ; and in no case does the writ abate there by death of the defendant in error, whether the death happen before or after the errors assigned. 2 Tidd's Pract. 1219, 20; 2 Archb. Pract. 1204. According to our practice, the assignment of errors is in the petition for the appeal. If in England, where an appellant becomes bankrupt, and is thus divested of his interest in the subject and his capacity to sue for it, the proceedings may nevertheless be conducted in the appellate court in his name, there can be no valid objection, where a corporation is appellant and the charter expires pending the appeal, to permitting the proceedings to be continued in the corporate name. The decision in *Buckner & wife v. Blair*, 2 Munf. 336, is a strong one against the necessity of any revival in the court of appeals; for the provision in 1 R. C. 1819, p. 498, ch. 128, § 38, that if a party die between verdict and judgment, the judgment shall be entered as if both parties were living, is obviously intended for the court below, and cannot dispense with a revival in the appellate court, if such revival would have been necessary in case the death had occurred after judgment. Where, too, a party dies after his cause is argued in this court, there is no revival here.

C. Johnson on the same side. In the case of *Rider v. The Union Factory*, there was no right to reverse the decree, because it could have been of no consequence to reverse it. But here it is suggested that there has been an assignment, and the assignees assert their right to have the correctness of the decree against the validity of the claim enquired into. Can it be possible that the right derived from the corporation
519 while it was *existing, is extinguished because the charter has expired? And if the right be not extinguished, what is the remedy proposed for it by the counsel on the other side? There must be some peculiar defect, if in such a case there be no remedy at all. [Stanard, J. Suppose the decree of the court below had been in favour of the bank, instead of against it, and an abatement were entered here?] That shews conclusively the unsoundness of the position taken on the other side; for in such a case, the appeal being abated, the decree would remain in force, and might be carried into execution upon a bill by the assignee. When the fact of assignment is urged against the motion to abate, the court may receive and decide upon all evidence adduced in regard to the fact. This is a jurisdiction which arises out of its very existence, and which it must have for the preservation and protection of its powers. When, however, the fact of assignment is ascertained, there

is no necessity for a revival in the court of appeals: no law requires it; the law is only permissive. From the terms of the act in 1 R. C. 1819, p. 497, ch. 128, § 38, it is manifest that it does not apply to the appellate court; and if it did apply, the act provides that the suit shall not abate. Our statutes not requiring a revival, the argument from the english practice is conclusive. There, after a plaintiff in error becomes bankrupt, the assignees still go on with the writ of error in the bankrupt's name. *Kretchman v. Beyer*, 1 T. R. 463. And this appeal may proceed equally well in the name of the corporation. If there were any difficulty upon a supersedeas to a judgment at law, there can be none upon an appeal from a decree in equity.

Harrison in reply. A perfect stranger to the record claims to come here and take advantage of new matter, only available by an original bill. This court has no right to create a new remedy, not given by
520 the common *law or by statute. Any proceeding in the court below by a new party, introducing new matter, would necessarily be by an original bill. On what principle is it that the assignees claim to come here, and be relieved from the necessity of proceeding as they would have to do below? How can they be heard here ore tenus and by evidence, when they could not be heard in that way below? It is true, this court has a right to enquire into matters necessary for the continuance of its jurisdiction. But it can only decide between living parties; its orders and judgments are void in case of death. The cases cited on the other side do not involve the question of right. Here the court is called upon to exercise a new original jurisdiction, and determine upon the validity of a new right claimed to have arisen since the decree of the court below. Suppose the appellant were a natural person, and were dead without a representative; would the court take notice of one claiming to be his assignee? In *Tolson v. Elwes*, 1 Leigh 436, it was held that a motion against a sheriff for money made under execution, by the party entitled to it, could not be sustained, because he was no party to the record. If the subject recovered were real estate, and the party recovering had died without heirs, could the court take jurisdiction for the appellant? At common law, in cases of abatement, it was necessary there should be a new original, or new action. And now, in personal actions or suits, if there be no personal representative, the case must abate. The judgment of this court would be a nullity, after the extinction of the corporation: it could not be revived by any process, nor entered in the court below; if the decree be reversed, the court below must treat the reversal as a nullity. The *scire facias* suggested would be an original bill in the nature of a supplemental bill. There is no instance of a *scire facias* for a stranger, except in bankruptcy. In bankruptcy,
521 the assignees have a right *to use the name of the bankrupt. But if

the bankrupt dies before judgment, the revival must be in the name of his personal representative.

STANARD, J. The appellees, alleging that the appellants as a corporation have become extinct pending this appeal, by the expiration of the term of their incorporation, have moved for an order directing the abatement of the appeal. In opposition to this it is suggested, that during the corporate existence of the appellants, they made an assignment of their rights in the subject involved in this case; and on behalf of the assignees it is insisted that the appeal should not be abated, but should be heard and decided in the names of the parties to the appeal, or that if the expiration of the charter of the appellants preclude the hearing of the case, and to that hearing a revivor in the name of some existing person, legal or natural, be necessary, process of revivor should issue in the name of the assignees. The appellees, without conceding the fact of the assignment, contend that the case cannot proceed but in the names of existing parties, and must be abated unless it can be revived in such names; and that it cannot be revived in the names of assignees claiming to be such by act in pais; that of such fact this court cannot take judicial cognizance, as it is matter for supplemental bill in the nature of an original bill. Without ascertaining the fact of the assignment (for it would be useless to enquire into that fact if the appellees be right) the questions arising on the motion have been discussed, and the opinion of the court sought on the matters of law and practice they involve, leaving the fact for further investigation, should the opinion of the court on the matters of law and practice render such investigation necessary.

The questions, then, for solution on this motion are, 1. Is it indispensably necessary to the hearing and decision *of an appeal, that it should be revived in the name of existing parties, legal or natural? 2. If not, can the court enquire into a fact in pais, to shew that such appeal ought to proceed to hearing and decision without such revivor; and is the fact of assignment to parties who cannot revive, sufficient to shew that the appeal ought to be so proceeded in? 3. If such revivor be necessary, may the parties claiming as assignees be allowed to revive?

Proceedings in error have never been subjected to the rules that govern the proceedings in the original suit, in respect to abatements and revivors.

Until the statute of 1806 was passed, an original suit was abated by the death of either party before interlocutory judgment, and could not be continued by or against the representative; and prior to the statute of 1792, the case had been the same even where the death occurred after interlocutory judgment. (See 1 Rev. Code of 1819, p. 497, ch. 128, § 38, and 1 Rev. Code of 1814, p. 153, [110,] ch. 76, § 20.) But appeals and writs of error did not abate by

the death of either party. The other party, or the representative of the deceased might in such case revive the appeal or writ of error, by scire facias. And the general rule of practice in this court required such revivor preliminary to the hearing and decision of the case. But even this general rule of practice did not require such revival at the time of the judgment or decree of this court, if the death had occurred subsequent to the argument. And if an appeal was taken from a judgment in favour of a party dead at the time of the judgment, no process from this court was required to make the representative of the decedent party by name to the appeal.

I have no doubt that the practice of this court was settled in analogy to proceedings in error in England, with modifications however of that practice, which considerations of convenience suggested. According *to the practice in England, the proceedings in error abated if the plaintiff in error died before the assignment of errors. If the plaintiff's death occurred after the assignment of errors, then the defendant was bound to join issue on the assignment, and proceed to have the judgment affirmed, if not erroneous; and this without a scire facias against the representatives of the plaintiff in error. But the death of the defendant in error did not abate the writ, whether it happened before or after assignment of errors. If before, then the plaintiff in error might make the executors or administrators parties by scire facias ad audiendum errores, and thereby compel a joinder in error. But if the defendant died after the assignment of errors, the case proceeded until judgment of the court of error, as if the defendant were living. 1 Arch. Prac. 216, and cases there cited.

According to our practice, some of the predicaments provided for by the english practice did not occur; for by it, in all cases now, as in all cases before the organization of the courts under the new constitution, where the supersedeas, writ of error or appeal was allowed on application to the court of appeals or a judge thereof, the errors assigned at the time of the allowance of the supersedeas, writ of error or appeal: and had our practice been framed in strict conformity to the english practice, no scire facias would have been necessary on account of the death of either party after the case got into this court. Our practice however, as before stated, has required a scire facias against or in favour of the executor or administrator, on the death of either the plaintiff or defendant in error. But this must necessarily be confined to those cases in which it is practicable to sue out such scire facias, and admitted of exceptions even where it was practicable, as in the case of death between the hearing and judgment. We then ascertain that the objection to proceeding in error unless there

*be existing parties, legal or natural, at the time of hearing and judgment, is not insuperable.

The extinction of one of the parties without any legal representative or succession, would, if standing alone, forbid further proceedings, because all such proceedings must, from the very fact of such extinction, be wholly abortive. And were this case so situated, the case of *Rider v. The Union Factory, 7 Leigh 154*, is a distinct and precise authority in favour of the motion. But here a suggestion is made, that the rights involved in this case passed by assignment to living persons before the legal extinction of the party on the record, and that if this case be proceeded in, and those rights be sustained by the judgment of the court, such judgment will not be abortive, but may be enforced by and for the assignees: and the question is, can this court take notice of the fact of assignment, as a consideration to influence the exercise of its discretion to proceed, though the assignees are not or cannot be made parties by *scire facias*?

If such an assignment has been made, I do not doubt that the right, legal or equitable, which passes to the assignees by it, is in no degree impaired by the subsequent dissolution of the corporation that made the assignment. As such a right may be in the assignees by virtue of the assignment, the power of this court to make a provisional enquiry whether the fact of assignment exists, as a guide for its action on the question propounded by the motion, is inherent in the very nature of the power that the motion proposes to call into action; if that fact being ascertained should influence the exercise of the discretion to which the motion is addressed, provided such right would be jeopardized by one course, and no right on either side be compromised by the other.

Suppose this appeal should be abated; then the error (if any) in the decree
525 of the court below is not open *to the correction of this court, and the counsel on neither side has suggested a mode by which it can be corrected, or the judgment of the appellate court be had on it. I should very reluctantly sanction the united propositions, that the case cannot proceed here without revivor, that it cannot be revived and must be abated, and that the error, (if any) in the decree cannot be corrected by any proceedings that the party whose rights are or may be affected by it, may institute. Look to the consequences of the maintenance of these propositions. They leave the decree of the court below in full vigour, however erroneous it may be, and deny the application of the correcting hand of this court, or any other, to the error. Suppose the decree had been for a large sum of money in favour of the then existing but now dissolved corporation, and that after the decree, and before or after the allowance of the appeal, the corporation still existing had assigned the decree. The dissolution of the corporation pending the appeal would furnish the same inexorable necessity for the abatement of the appeal as now exists. Such abatement would leave the decree in force, and the appellants lia-

ble to be charged with it by the assignees, in like manner as though no appeal had been allowed: the decree might be enforced at the instance of the assignees, and the parties charged by it might have no means of correcting the error, however gross. Such a consequence infers the unsoundness of the argument or pretension that leads to it. Without saying that there is no other remedy to protect the rights that may arise out of the suggested assignment, against the effect of the error (if there be one) in the decree, the most compendious means of giving that protection is to permit the case to proceed without notice of the dissolution of the corporation appellant, if that be within the power of the court: and

I am satisfied that that power exists.*
526 *The other judges concurred.

Whereupon (the fact of the assignment by the bank not being now further controverted) the cause came on to be heard upon its merits, before the president and judges Brooke, Allen and Baldwin,† and was elaborately argued by C. and G. N. Johnson for the appellants, and Patton and Harrison for the appellees.

*Note by the reporter. The case of the State Bank of North Carolina v. Cowan &c., 8 Leigh 238, was an action of debt brought by the bank, in which the circuit court gave judgment for the defendants, and the court of appeals in April 1837 reversed that judgment and rendered judgment for the bank. After the judgment of the court of appeals, execution issued in favour of the bank against the defendants Cowan, May, Smith and Jones, which was levied on the goods of May, and he gave a forthcoming bond with surety, which was forfeited. When a motion was made on the forfeited forthcoming bond, the defendants produced evidence shewing that the charter of the bank had expired pending the appeal, to wit, on the 1st of January 1836, and on this ground asked the court to quash the forthcoming bond, and the execution under which it was taken. But it appearing that the judgment on which the execution issued was entered in the circuit court on the 12th of May 1837, in pursuance of the judgment of the court of appeals, and that the execution was in strict conformity to that judgment, the circuit court overruled the motion to quash, and rendered judgment on the bond. On a supersedeas to this judgment, the court of appeals (JUDGES BROOKE, STANARD and ALLEN concurring) reversed the judgment of the circuit court, and entered judgment quashing the execution and forthcoming bond. BALDWIN, J., dissented, on the ground that it was incompetent to the defendants to shew that the charter had expired at a period anterior to the judgment of the court of appeals. The three other judges, not regarding that judgment as ascertaining the continued existence of the corporation at its date, held that the execution issued illegally in favour of a corporation whose charter was shewn by the evidence to have expired. This decision was in May 1848, and the case will be found under the name of May &c. v. The State Bank of North Carolina, in reports of that period.

†JUDGE STANARD had been counsel for the appellees, and was unwilling to sit in the case when its merits were to be considered.—Note in Original Edition.

BALDWIN, J. The appellants seek to set aside the voluntary settlement made by Robert Patton upon his wife and children; and claim the right to do so in the
527 *character of subsequent creditors, and also in that of subsequent purchasers. Let us first examine their pretensions as creditors.

In the case of Hutchison and others v. Kelly, ante, p. 123, I had occasion to examine the principles upon which, under the statute against fraudulent alienations, conveyances are treated as fraudulent and void in regard to creditors; and to express the opinion, that the statute of 13 Elizabeth, ch. 5, from which so much of ours as relates to that subject is substantially taken, looks mainly to the intent with which the act is done, and if that be fraudulent avoids it, not only as against creditors who are actually, but also against those who might be disturbed, hindered, delayed or defrauded; thus treating creditors as a class of persons entitled to the protection of the law, and embracing not only those existing at the time, but moreover subsequent creditors: that where there are no existing creditors, the fraudulent intent, if conceived, must of course be prospective, with a view to future indebtedness; but that where directed against existing creditors, it operates also in relation to those subsequently arising, a fraudulent intent as to one or more creditors being fraudulent as to all: that upon the question of fraudulent intent, the courts have of necessity resorted to a legal presumption arising out of the general nature of the case, and to marks or badges of fraud furnished by the particular circumstances: that the legal presumption is founded upon a comparison of the consideration for the conveyance, with that which constitutes the just claims of creditors; and though voluntary conveyances are not mentioned in the statute, their true character and effect are necessarily involved in its application: and that the legal presumption of an alleged fraudulent intent arises where the conveyance is voluntary, though meritorious, if the grantor be indebted at the time, but is only prima facie, and may be repelled
528 or confirmed *by the particular circumstances of the case; but is rendered conclusive, if the debts be unsecured, by a degree of indebtedness amounting to or approaching insolvency. For the reasoning and authorities that were relied on to sustain these propositions, I must refer to the reported case; and I recur to them now with the view of ascertaining how far they are applicable to the case before us.

In the present case, it will be seen from an inspection of the bill, that it does not charge a fraudulent intent against the plaintiffs or any other subsequent creditors of the grantor; nor even a fraudulent intent in point of fact against his creditors existing at the time of the settlement: but, merely averring that the settlement was voluntary, and made when the grantor was greatly indebted, relies upon the supposed inevitable conclusion, that in point of law

it is fraudulent and void against the plaintiffs and all his other creditors, whether prior or subsequent to the conveyance. The bill, moreover, does not even allege that the plaintiffs have in fact been disturbed, delayed or hindered in the recovery of their demand; and all the circumstances of the case shew that no such impediment has been occasioned by the settlement in question. On the contrary, the delay has been altogether voluntary on the part of the plaintiffs, and occasioned by the course of conduct which they have thought proper to pursue in relation to the subject. The bill, in stating the original debt to the plaintiffs, goes no further back than the 27th of April 1811, the date of the deed of trust executed by Patton and wife to W. Herbert, to secure any sum or sums of money then, or which thereafter might be, due from Patton to the president and directors of the bank: which deed conveys the Spring bank tract of land, embraced in the settlement in question, and also two other tracts of land, one of them conveyed to Patton by Hepburn in April 1809, and the other conveyed to
529 *him by Scott and others in June 1810.

It appears from the recital of this trust deed, that the bank had already been secured on the same account, by Patton's conveyance in trust to the same W. Herbert, about a month previously, of 2000 dollars worth of stock in the Farmers bank of Alexandria, and other property; in lieu of which he was permitted to substitute the security last furnished.

I think there can be no doubt, that at the time of the making of this trust deed of the 27th of April 1811, the plaintiffs had notice of the deed from Patton to Sanderson and Stewart, and the deed from them to Mrs. Patton and her children, the former of the 20th and the latter of the 21st of March 1807; which two deeds constitute the voluntary settlement now impeached. The property, real and personal, which was the subject of that settlement had, at the date of the trust deed, been conveyed to the trustee W. Herbert, by an absolute deed of the 10th of April 1811, executed by Patton and wife, but not perfected by the privy examination of the latter, which deed expressly refers to the deed from Sanderson and Stewart. In all probability, the deed of the 10th of April was intended to divest the right acquired by Mrs. Patton under the settlement, in order that it might be reconveyed by Herbert to Patton, and by him conveyed in trust for the bank; for we find that such a reconveyance was made by Herbert, but by some mistake is posterior in date to the trust deed. However this may be, it is manifest that Herbert, the trustee, had notice of the settlement: and without relying upon the legal inference from that fact, of notice to the bank, the fact itself, taken in connexion with the due recordation of the deeds of settlement, and the attestation of them by several eminent professional gentlemen of the town of Alexandria, one of whom is also a witness to the trust deed, renders it extremely improbable that the

530 plaintiffs were ignorant of the existence *of those deeds; and every doubt upon the subject must be removed by the silence of the plaintiffs, who make no pretence of such ignorance in their bill, though it would have been a material circumstance, if the voluntary settlement had been concealed from them, and they induced to trust the grantor upon the faith of property embraced therein.

The bill gives no information of the intermediate dealings between the plaintiffs and Patton, from the date of the trust deed of the 27th of April 1811, until the procurement of that of the 29th of September 1824, executed by Patton and wife to Colin Auld and Robert J. Taylor as trustees, conveying the same property, to secure the amount therein stated to be due from Patton to the bank, of 8920 dollars 60 cents principal, with some interest. After this delay of the plaintiffs in the prosecution of their original demand, of between 13 and 14 years, a further, and, I would think, unusual forbearance for a bank towards its debtor was stipulated by the terms of the last deed; which gave indulgence for the whole debt for three years, with the privilege of extending it, in part, to seven, by paying up one third at the expiration of the three years, and one half of the remainder at the expiration of five. This new indulgence, thus made the subject of contract, though granted without any additional security, was not, it seems, without a new consideration intended to enure to the benefit of the plaintiffs. There is abundant reason to believe it was connected with an arrangement, by which the debtor was to act in concert with the bank, for the purpose of getting rid of any future adverse claim on the part of the grantees in the settlement in question. It will be seen from the provisions of the last incumbrance, that it was not contemplated the settlement should be wholly avoided, but only postponed to the lien of the bank, and subject to that lien, rendered more effectual to the gran-
531 tees; for it was *stipulated, that Patton and his wife, and their representatives, should retain possession and receive the rents and profits of the property conveyed, without account, "according to their respective interests therein at the time of the execution of this deed;" and also that no sale should be made of the Spring bank tract of land (the one embraced in the deeds of settlement) until the other two tracts should have been first sold, and the proceeds thereof ascertained to be insufficient; and moreover that if Patton or his executors &c. should, at any time before sale made, pay off the whole amount of the debt &c. or if the same should be raised from the sale of the other tracts, or in part so raised, and Mrs. Patton or any of her children, or any one in their behalf, should pay the balance which should be due to the bank, then that the trustees should thenceforth hold the Spring bank tract to the sole and separate use of Mrs. Patton for her life, free from the power and control of her

husband, and after her death to the use of the children of herself and her husband, with a power of appointment on her part of their respective interests.

This suit was instituted on the 22d of March 1825, about six months after the execution of the last trust deed, and two years and six months before the expiration of the stipulated forbearance. The bill contains no specific prayer, for the sale of the property by a decree of the court. Though it states that "the just claim of the plaintiffs to have the tract of land called Spring bank subjected to the payment of their debt, is resisted on the ground that it had been previously conveyed" by the deeds of settlement, it does not state by whom such resistance is made, or that any obstacle is thereby presented to the enforcement of the trust by the trustees. If it were proper to infer such an obstacle from that loose statement, as existing in regard to the Spring bank tract, none such could have existed in relation to the other two tracts, and

532 no reason is assigned *for not subjecting them to sale in the first instance, nor is it alleged that those two tracts were not of sufficient value to produce the amount due, or that Patton had refused or was unable to make payment, or that any legal measures had been resorted to for the purpose of coercing it. And the only specific prayers in the bill (besides those merely formal) are, that Patton may say in his answer, "whether the deed of the 21st of March 1807, from himself to James Sanderson and William Stewart, was not entered into without consideration, and with a view to have the property therein mentioned settled upon his wife and children; and whether at the date of that deed he was not largely indebted to many persons: and that the said deed, and the deed of the same date from the said Sanderson and Stewart to Mrs. Ann Clifton Patton and her children, may be decreed, as against your complainants, who are both creditors and purchasers, fraudulent and null and void; and that the land called Spring bank may be made or left subject to the just and legal lien and incumbrance, which the bank of Alexandria or your complainants have upon it."

Thus it will be seen that the object of the suit was not to coerce payment of the debt, but to render the incumbrance therefor paramount to the title of the grantees in the settlement. This was not in conflict with the individual interest of the grantor; and on the other hand he could not, either at the date of the incumbrance or in the progress of the cause, resist the wishes of the bank on this subject, without forfeiting all claim to further forbearance, though he might hope that an extended indulgence might enable him to relieve himself from his difficulties, without ultimate injustice to his family. We see from the bill, drawn with a studied avoidance of offensive imputations, that the plaintiffs sought to obtain from him an admission which they thought would subserve their purpose;

533 and his answer shews that they were not disappointed. He does admit in his answer (filed for himself and wife) that at the date of the voluntary settlement, "he did owe sundry debts, some of them of considerable amount;" an admission too broad, as will be presently seen, for the facts of the case, and against the making of which he was warned by the witness Sanderson, who swears that he was well acquainted with his circumstances at that period, and that he told him, that if called upon as a witness, he would have to contradict him. An answer was moreover procured from a guardian ad litem for the infant grantees, who had been appointed on the motion of the plaintiffs, which is of an extraordinary character; for the drift of it is to impugn rather than sustain the rights of those defendants.

This state of the case was quite unfavourable to the grantees, and no active defence was made on their part until the death of Patton, when a new aspect was given to the cause. The guardian ad litem was removed by an order of the court, and Mrs. Patton, then *sui juris*, appointed in his stead; and she was permitted to answer *de novo*, as well for herself as the infant defendants: and Mrs. Mason, the only adult amongst the children, and who had formerly answered with her husband, by leave of the court filed her separate answer. And the parties, for the first time, proceeded to the examination of evidence.

The foregoing views have not been presented for the purpose of shewing that if the plaintiffs have made out their case upon the merits, by establishing the settlement of 1807 to be fraudulent and void against the creditors of the grantor, relief should be denied them because of a defective structure of their bill, or of the course of conduct they have pursued, either before or since the institution of this suit. My purpose has not been to go into the consideration of any such questions; but merely to deduce, from the facts I have stated, the two following propositions:

534 *1. The plaintiffs not having charged in their bill that the settlement was made with a fraudulent intent in point of fact, they must prove the averments relied on by them as warranting the conclusion that the transaction was fraudulent and void by intendment of law; and instead of relying upon a *prima facie* presumption from mere indebtedness, to throw the burthen of proof on the opposite party, ought to establish such an extent of indebtedness and inadequacy of resources, as will serve to shew that the grantor, at the time of the settlement, was in a condition amounting to or approaching insolvency.

2. The plaintiffs having notice of the voluntary settlement, and instead of resorting to legal proceedings for the purpose of placing themselves in an attitude to complain of being delayed, hindered or defrauded thereby, (*Colman v. Croker*, 1 Ves. jun. 160,) having, by taking their first incumbrance, assumed the settlement to be

fraudulent; and instead of proceeding to enforce that incumbrance, as they were authorized by its terms to do, within a reasonable time, so as to give those claiming under the settlement an opportunity to assert and prove its validity, having continued to indulge and deal with the grantor for a number of years; and having thereafter taken a second incumbrance on the same property, by which they bound themselves to extend still further forbearance; and having, by a combination with the grantor, enlisted him against the interests of his own family, whose disabilities required his protection; these circumstances furnish a strong presumption against the pretensions of the plaintiffs, which ought to be overcome by unobjectionable and plenary proofs on their part.

If these propositions be correct, the merits of the plaintiffs' cause, in their character of creditors, will require but a brief consideration. Let us first dispose of the admissions in the pleadings on the part of

535 the defendants. *If the admissions in the answer of Patton be evidence against his grantees, as to which, in such a case as this, I express no opinion, still I can give no weight to them, for reasons already suggested. As to the separate answer of Mrs. Mason and the previous joint answer of herself and husband, they put the most material allegations of the bill in issue. But there is an admission in the answer of Mrs. Patton, filed for herself and as guardian ad litem for the infant defendants, which seems to require a cursory notice. After denying that her husband was involved in debt at the time of the settlement, and alleging on the contrary that he was in unembarrassed and prosperous circumstances, and able to meet all his engagements, she admits that he owed at that time a debt to John Laird of Georgetown, on which a balance still remained due, including interest, of about 1200 dollars. This admission she does not profess to make on her own personal knowledge, and we need not enquire how far it was correct; for though it might conclude her in her lifetime, and her representatives after her death, it could not affect the other grantees, as they do not claim under her; and it cannot be used against them as having been made by their guardian ad litem, for no rule is better settled than that an answer of an infant by guardian cannot be read against him at all, for any purpose. 2 Madd. Ch. Pract. 278; Mitf. Plead. 314, 315; 1 Stark. Ev. Pt. II. p. 278.

Let us now briefly advert to the evidence which has been examined in relation to the degree of the grantor's indebtedness, and the extent of his resources. And it is remarkable that the testimony establishes only a single debt as due from him at the date of the settlement, to wit, a debt of £678. 11. sterling money, to the above mentioned John Laird. It was material for the plaintiffs to prove, if they could, not only that this debt was subsisting at the date of the voluntary settlement, but that it has

ever since continued; for their right
 536 to impeach *the settlement depended, under the circumstances of the case, upon the question whether it was fraudulent and void against creditors then existing. Now, if it was fraudulent and void against such creditors, though it follows that it would also be liable to be so treated by subsequent creditors, and that the mere fact of the debtor afterwards paying off the demands of the former would not render the transaction valid as to the latter, yet it would be a circumstance entitled to weight upon the question of fraud. That the debt to Laird remained unpaid, if such was the fact, the plaintiffs had not only the complete power to prove, but it lay directly in their way to prove it; for they examined Laird as a witness in their behalf; and he deposed that Patton owed him about the year 1806, and several years afterwards, the debt above mentioned. But there they suffered the examination to rest; and the reasonable inference from his deposition surely is, that the debt was in some way discharged, some years after 1806; the more especially when we couple with his evidence the presumption arising from the great lapse of time, and his failure to assert a demand. It is not easy to account for the language of his deposition, and his quiescence, but by the supposition that the debt has been either paid or secured to him. Such may not be the fact, but it is the legitimate deduction from the evidence, which cannot be repelled by the admissions above noticed.

But if it were even granted that the debt to Laird still remains unsatisfied, the evidence is far from establishing that Patton was at the time of the settlement insolvent or greatly embarrassed in his circumstances. On the contrary, I think it is proved that he was then, and for several years afterwards, able to meet all his engagements; the owner of property to a considerable amount; in good credit and extensive business; having the command of large sums of money; and unindebted except to

537 *been a most indulgent and even careless creditor. The plaintiffs have introduced a good deal of evidence, for the most part of a loose, indirect, and unsatisfactory description, tending somewhat to shew that the grantor, from the nature of his engagements and connexions in business, had reason to apprehend a disastrous turn in his affairs; from which it has been argued that the purpose of the settlement was to make some provision for his family and himself against the misfortunes which afterwards fell upon him. But this evidence is too vague and inconclusive to justify the imputation of fraud, the more especially upon a bill which charges no fraudulent intent in point of fact. And though there are circumstances in the matter, the manner and the details of the settlement, calculated to attract the vigilance of suspicion, and which have been laid hold of and handled by the appellants' counsel with great address and ability, they will be

found upon examination to be more imposing than substantial. It is manifest that there was no secret trust in favour of the grantor, nor even an immediate benefit secured to the grantees; and no disguise as to the nature and effect of the conveyances. The deed to Sanderson and Stewart was avowedly without consideration, and merely to avoid the formal difficulty of a direct conveyance from the husband to the wife; and their conveyance to her, being without the intervention of a trustee, of course subjected the property, during the marriage, to the marital rights, dominion and control of the husband, and, to the extent of her estate in the subject, to the legal process of his creditors. His continuance in possession was not inconsistent but perfectly compatible with the title; and the use and enjoyment of the property, even of those portions of it which would necessarily be consumed in the use, (subordinate however to the remedies of his creditors) was a

legitimate incident of his limited
 538 *interest. In this respect the case of *Parker v. Proctor*, 9 Mass. Rep. 393, was far stronger than this; for there the continuance in possession of the grantor, he being the father and natural guardian of the infant grantee, was not considered indicative of fraud, though otherwise inconsistent with the terms of the deed. The circumstance, therefore, that the deed was to the wife and children, instead of a trustee for them, is not a mark of fraud, but the reverse; since if a fraud was contemplated, it must have been in securing the property to the grantor's family after his death, against his creditors, without intermediate advantage to himself; a design which, though not impossible, must be admitted to be of but rare occurrence. A circumstance, moreover, not without its weight in estimating the fairness of the transaction, is the due and prompt recollection of the deeds, (*Sexton v. Wheaton*, 8 Wheat. 251), besides the attestation of them by highly intelligent and respectable witnesses; thereby precluding the idea of intended concealment.

The foregoing views of the question have led me to the conclusion, that the pretensions of the plaintiffs in their character of creditors cannot be sustained. It remains for me to notice their pretensions in the character of purchasers.

The plaintiffs, as incumbrancers, can stand upon no higher ground than absolute purchasers who have paid a full consideration and received a direct conveyance of the property. There is no charge in the bill that they were induced to become incumbrancers by the fraud of Patton, or that they had not notice, at the time, of the settlement he had made upon his wife and children. The naked question is therefore presented to this court, for the first time, whether a voluntary conveyance of that kind is fraudulent and void in regard to a subsequent purchaser for valuable consideration, who had notice thereof at the time of his purchase.

539 *Our statute against fraudulent

alienations is contained in the 2d section of the "act to prevent frauds and perjuries," 1 R. C. p. 372, ch. 101, and is a condensation into one joint enactment, of the most important provisions as well of the statute 27 Eliz. ch. 4, in regard to purchasers, as of the statute 13 Eliz. ch. 5, in regard to creditors. In the construction however of our statute, it must be considered distributively; there being material points of distinction arising out of the difference between the two subjects, to wit, frauds against creditors and frauds against purchasers. Fraudulent conveyances in relation to purchasers must in the nature of things be exclusively prospective, as they cannot be directed against existing interests, but only against those thereafter to arise. The indebtedness of the grantor at the time of the conveyance is, as we have seen, a material circumstance in reference to even subsequent creditors. But I regard it as wholly immaterial in reference to subsequent purchasers. There is, it is true, a dictum of lord Mansfield to the contrary in *Doe v. Routledge*, Cowp. 713; and in *Holcroft's case*, Dyer 294, in note, (cited in *Atherley on Marriage Settlements*, p. 199, note 1), the circumstance of the grantor's freedom from indebtedness is relied on; and so that idea is expressed in *Style 446*, (cited in 9 East 63,) and is adopted by baron Gilbert in his law of Evidence, p. 307. But a moment's reflection will serve to shew that the grantor's indebtedness can only be material in regard to creditors; for a fraudulent purpose against them can have no connexion with, or tendency to promote, a fraudulent purpose against a subsequent purchaser. Besides, the reason why a voluntary conveyance is ever regarded as fraudulent against creditors, is, that it withdraws the grantor's property from their preeminent demands; whereas the grantor owes no duty to a purchaser till the relation between them is about to arise; and then his only duty

540 is to abstain *from selling to him what he had previously conveyed away to another. It is the violation of this duty which constitutes the fraud against a subsequent purchaser; and not the mere intent with which the voluntary conveyance is made; for though that is a prominent matter in the statute, it is obviously idle unless it be accomplished, as there must be a purchaser to be defrauded, as well as an intent to defraud; which concurrence amounts to actual fraud.

Thus, according to my reading of the statute, the purchaser must be actually defrauded; and how that can be where he has notice of the prior voluntary conveyance, is altogether beyond my conception. *Quod non decipitur qui scit se decipi*, is a maxim of law, as well as of common sense; and the disregard of it by the expounders of the law can result in nothing but unqualified mischief. What protection can it afford to a purchaser with notice, to avoid the previous conveyance, except against the consequences of his own officious intermed-

dling? Was that the mischief intended to be provided for? Most assuredly not. The spirit of the statute is to set aside conveyances by which subsequent purchasers are deceived, and would otherwise be injured; and such is the fair import of its language. It was enough to make void the accomplishment of a fraudulent design on the part of the vendor, directed against the purchaser, and to sacrifice to that object the rights of the voluntary grantee, however innocent of all participation in the covinous purpose. In this result the statute goes beyond the common law, which recognized a conveyance to an innocent grantee, if made for a good consideration, such as natural affection, as paramount to the claim of a subsequent purchaser for a valuable consideration, though without notice. But it goes no further. It could never have been contemplated to sacrifice the innocent grantee, without necessity, to protect a purchaser who could only be

541 injured *by his own folly or his own injustice. As to a purchaser without notice, the deceitful act of concealing the previous voluntary conveyance may well be referred back to an original fraudulent design on the part of the vendor when he made the conveyance: but when there is no effectual concealment, there is no room for such relation; and if the conveyance be held void, it must be upon the idea that the statute was directed not only against all fraudulent, but against all voluntary conveyances, however fair and meritorious, and was intended to enable the grantor to revoke his grant at pleasure, by means of a combination with a subsequent purchaser. If such had been the intent of the legislature, why was it not directly expressed, instead of leaving so important and comprehensive a provision to a vague and circuitous implication? And why should the courts strain the words of the enactment, upon the imagination of a policy not only absurd but mischievous? It is easy to perceive that the effect of such a construction is to defeat the just expectations of innocent grantees, and of their families and creditors, and to destroy their vested rights and lawful enjoyment, whenever the grantor, from passion or caprice, or the undue influence or improper practices of others, may be induced to recall the provision or advancements he has made, not only upon a meritorious consideration, but in obedience to a sacred duty. I am not prepared for such a result, unless driven to it by an irresistible pressure of authority.

The precise proposition, be it observed, which we are called upon to decide is, that a voluntary settlement of real estate, made, without actual fraud, by the grantor upon his wife and children, is by operation of the statute to be deemed conclusively fraudulent and void, against a subsequent purchaser from him for a valuable consideration, with full notice of the prior conveyance. The negative of this

542 proposition, as remarked *by lord

Ellenborough in *Doe v. Manning*, 9 East 63, where he reviews the cases, is expressed in some of those nearest to the statute of 27 Elizabeth, but the affirmative has been held by numerous decisions, and must now be regarded as the settled doctrine of the english courts; though a construction condemned by lord Mansfield in *Doe v. Routledge*, Cowp. 705, and opposed to the opinions of lord Hale, lord Rolle, chief baron Gilbert and chief justice Eyre, as observed by Spencer, J., in *Verplank v. Sterry*, 12 Johns. 555, and which is disapproved, though submitted to, by lord Ellenborough, lord Thurlow, and sir James Mansfield, (*Doe v. Manning*, above cited; *Evelyn v. Templar*, 2 Bro. C. C. 149, and *Doe v. Martyr*, 4 Bos. & Pul. N. R. 335,) and controverted by several respectable writers; 1 Fonbl. Eq. 280, n.; *Atherley on Marriage Settlements*, p. 196, 197, 198. An examination of the cases will serve to shew, that while the weight of authority decidedly sustains the affirmative construction, it strongly impugns its correctness; for in most if not all the latter cases, the judges yield merely to what they consider the current of adjudication, and though without a struggle, yet not without evident disapprobation or regret. The ruling motive with them is entitled to commendation: they are unwilling to disturb an established error, lest by so doing they should disturb the titles to estates. I think we may safely refuse to adopt it, for the like reason. In Virginia, so far as my information extends, there is no reason to apprehend that any estates are held by so frail a tenure as the expectation of the adoption of an unreasonable and unjust principle, which has never yet received the sanction of our judicial tribunals, nor the approbation of the legal profession. The structure of our society and the habits of our people have led to the surrender and distribution by parents, while living, of portions of their estates amongst their children; and when these are perfected by conveyances *duly registered, the grantees become known to the world as both ostensible and real owners of the property, enjoying all the rights and incidents of ownership. This state of things would be most mischievously affected, both retroactively and prospectively, by the establishment of the doctrine in question: whereas in England the evil has been greatly mitigated by the practice of marriage settlements, in our country as yet almost unknown. It is difficult to believe that our legislature, when they were engaged in 1785, shortly after the consummation of our independence, in condensing and abridging the english statute, thought they were adopting a construction of it not then established by the english courts; the more especially when we find that by the omission of the preamble, and part of the enacting clause, they have stricken from the advocates of the affirmative proposition their most plausible argument, by which the latter have made the proviso to mean

directly the contrary of what it expresses. The proviso of the statute 27 Elizabeth, and of our statute, excepts out of the operation of the act conveyances made "for a good consideration and bona fide," while the preamble of the english statute speaks of purchases for money or other good consideration, and the enacting part declares that fraudulent conveyances shall be void against purchasers for money or other good consideration. And from this it has been argued (see *Atherley on Marriage Settlements* 190, 191), that by the words "good consideration" in the proviso must be understood valuable consideration. I need not consider the weight of this argument, which makes the proviso a mere nullity. It is enough for our purpose, that it has no foundation to rest upon in our statute.

The decisions of the english courts since our separation from the mother country, though entitled to great respect, are not obligatory here. The cases prior to that period are certainly not in harmony; 544 and *Spencer, J.*, *states, in *Verplank v. Sterry*, 12 Johns. 555, (though in opposition to the idea of chancellor Kent, as reported in the case from the court below under the name of *Sterry v. Arden*, 1 Johns. Ch. R. 270,) that the preponderance in weight and number is decidedly adverse to the doctrine which now prevails in the courts of Westminster hall. However that may be, in *Cathcart &c. v. Robinson*, 5 Peters 264, chief justice Marshall, delivering the opinion of the court, says: "There is some contrariety and some ambiguity in the old cases on the subject; but this court conceives that the modern decisions establishing the absolute conclusiveness of a subsequent sale to fix fraud on a family settlement made without valuable consideration—fraud not to be repelled by any circumstances whatever—go beyond the construction which prevailed at the american revolution, and ought not to be followed. The universally received doctrine of that day unquestionably went as far as this: A subsequent sale without notice, by a person who had made a settlement not on valuable consideration, was presumptive evidence of fraud, which threw on those claiming under such settlement the burthen of proving that it was made bona fide. This principle, therefore, according to the uniform course of this court, must be adopted in construing the statute of 27 Elizabeth as it applies to this case." Let this last proposition be conceded, though I express no opinion how far a purchaser might be affected by a culpable negligence in not searching the registry, especially when coupled with open possession on the part of the grantee; still it can avail the appellants nothing in the present case. Apply the presumption to the appellees here; and if my views are correct, it is completely repelled by the fact of actual notice on the part of the appellants when they took their incumbrances.

For the reasons above stated, I am of opinion that the appellants have not

545 sustained their pretensions, *whether in the character of creditors, or in the character of purchasers; and, therefore, that there is no error in the decree of the circuit court dismissing their bill.

ALLEN, J., and CABELL, P., concurred.

BROOKE, J., was absent at the time of the decision: but the president stated that he was authorized by him to say, that if present he would also have concurred.

Decree affirmed.

Garland and Others v. Lynch.

February, 1843, Richmond.

(Absent BROOKE and STANARD,* J.)

Forthcoming Bond—Forfeiture—Effect on Original Judgment.—The decisions in Randolph's adm'r v. Randolph, 3 Rand. 490, Taylor v. Dundass, 1 Wash. 92, and Downman v. Downman's ex'or, 2 Wash. 189, approved. In conformity with the principle of the first case, HELD, that if judgment be rendered against two, and one gives a forthcoming bond with security, which is forfeited, the other is not discharged from the original judgment, if the obligors in the forthcoming bond prove insolvent. But also HELD, according to the decisions in the two last cases, that the forfeited forthcoming bond will prevent any execution or other proceeding on the original judgment, until the same be quashed.

Same—Creditor's Right to Quash.—Even after execution has been awarded on a forthcoming bond,

*He had been counsel for the plaintiffs in error.

+Forthcoming Bond—Rights of Sureties—Subrogation.—A surety in a forfeited forthcoming bond is a surety for the debt; and when he pays it as such surety, he is entitled to all the rights of the creditor against the original debtor, subsisting at the time he became bound for the debt; and the judgment, for the benefit of the surety so paying, is not extinguished but transferred with all its obligatory force against the principal, and constitutes a legal lien upon his real estate owned at the date of the judgment, and thereafter acquired. Hill v. Manser, 11 Gratt. 525, citing the principal case; Powell v. White, 11 Leigh 309; Robinson v. Sherman, 2 Gratt. 178; Leake v. Ferguson, 2 Gratt. 419. See *foot-note* to Hill v. Manser, 11 Gratt. 525; Robinson v. Sherman, 2 Gratt. 178. The principal case is cited in this connection in Robinson v. Sherman, 2 Gratt. 181; Leake v. Ferguson, 2 Gratt. 481, 484; Coffman v. Hopkins, 75 Va. 648; Dent v. Walt, 9 W. Va. 48. See monographic note on "Subrogation" appended to Janney v. Stephen, 2 Pat. & H. 11, and monographic note on "Statutory Bonds" appended to Goolsby v. Strother, 31 Gratt. 107.

Same—Same—Same.—In Sherman v. Shaver, 75 Va. 10, the court said: "If an execution against principal and surety be levied on property of the principal, and a third person, at the request of the principal but without the consent or concurrence of the surety, intervene and bind himself as surety in a bond for the forthcoming of the property on the day of sale and the bond be forfeited, although such third person thus becomes bound as surety for the debt (Garland v. Lynch, 1 Rob. R. 576), yet he is not entitled on making payment to be substituted for contribution to the original judgment against the

the bond may be quashed on the motion of the creditor, to enable him to have execution on the original judgment. If the case be one in which the execution on the forthcoming bond has proved unavailing, without any default of the creditor.

Same—Security—Sufficiency of—Liability of Sheriff.

Where the sheriff takes from the owner of goods levied on under execution a forthcoming bond with security, and, upon the same being forfeited and execution awarded thereon, the obligors prove insolvent, the sheriff will not

546 generally be liable to the creditor on account of such insolvency, if he can establish that the security was sufficient at the time of taking the bond. But where execution against two is levied on the goods of one, and he gives a forthcoming bond with the other as his only surety, such surety, being already bound, is not security such as the law requires; and if the execution on the forthcoming bond prove unavailing, the sheriff will in this case be liable to the creditor, although he may prove that the surety in the forthcoming bond was sufficient in point of estate at the time of taking the bond.

Same—Same—Same—Same—Measure of Damages.—In

a suit on a sheriff's bond under the act 1 R. C. 182, ch. 78, § 13, p. 279, there is a demurrer to the evidence, and it appearing thereby that the party for whose use the suit is brought had an execution against two, which was levied on the goods of one, who gave a forthcoming bond with the other as security, and that, the bond being forfeited, the execution awarded thereon proved unavailing, the circuit court holds the evidence sufficient to

original surety (Givens v. Nelson, 10 Leigh 363; Stout v. Vause, 1 Rob. R. 169, 180)."

Same—Security for Debt—Quashing Bond—Grounds

for.—The principal case is cited in Rhea v. Preston, 75 Va. 774, for the proposition that a forfeited forthcoming bond stands as a security for the debt, and though while in force no execution can be taken out or other proceeding be had at law to enforce the original judgment, yet the bond is not an absolute satisfaction. For if it be faulty on its face, or the security when taken be insufficient, or the obligors, though solvent when the bond is taken, become insolvent afterwards, the plaintiff may, for these or other good reasons, on his motion, have the bond quashed and be restored to his original judgment. And though the bond be not quashed, if it appear that it may properly be, a court of equity, which looks to substance, and when occasion requires, treats that as done which ought to be done, will regard the bond as a nullity, and the original judgment as in full force. See Jones v. Myrick, 8 Gratt. 179, and note.

The principal case is cited in this connection in Cooper v. Daugherty, 85 Va. 351, 7 S. E. Rep. 337.

Same—Effect of Forfeiture on Original Debtors.

The execution and forfeiture of the forthcoming bond by one of several joint debtors does not utterly discharge the original joint debtors; but if the forthcoming bond proves unavailing, it will still be competent to proceed on the judgment against the other joint debtors, until satisfaction is obtained; and, therefore, the security in a forthcoming bond, given by one, is entitled, on paying the debt, to the remedies of the creditor against the others. Leake v. Ferguson, 2 Gratt. 481, citing, as authority for this statement, the principal case, and Robinson v. Sherman, 2 Gratt. 178.

support the action. Some of the evidence which had been introduced tending to shew that part of the debt might have been made under the execution on the forthcoming bond if the creditor had not interfered, the counsel for the defendants then insists that the jury should weigh the evidence in assessing the damages. But the opinion of the circuit court is, that the plaintiff must recover the amount of his debt, or nothing, and that the evidence cannot be urged before the jury in mitigation of damages. *Held*, that in fixing the damages absolutely at the amount of the debt and thus taking from the jury all discretion, the circuit court erred. *Accord*. Perkins and others v. Gilles governor, 9 Leigh 297.

In March 1820, an action of debt was brought in the county court of Amherst, in the name of Jones P. Preston governor of the commonwealth of Virginia, for the benefit of John Lynch jr. against David S. Garland late sheriff of Amherst county, John London, William Turner and John Coleman, on a bond executed the 15th of September 1817, to Preston as governor of the commonwealth, by Garland and the other obligors as his sureties, with a condition (as prescribed by the last form in 1 R. C. 1819, p. 278, § 12,) for the faithful execution and performance by Garland of the office of sheriff of Amherst county, during his continuance therein. In the 547 *condition, the commission was recited as dated the — day of — past. The declaration, after setting forth the bond and condition, averred that Garland, having duly qualified as sheriff of Amherst under his said commission, appointed one Benjamin Harrison his deputy, who duly qualified as such. And it assigned three breaches. 1. That Lynch, having obtained a judgment in the superior court of Amherst against Leroy Camden and Jabez Camden for 300 dollars with interest from the 2d of October 1816, and 7 dollars and 75 cents costs, caused a writ of fieri facias to issue therefor against their goods and chattels, which writ was delivered to Harrison, the deputy of Garland, to execute: that Harrison executed the same upon a negro boy named Harry, the property of Leroy Camden, and suffered the boy to remain in his possession, upon his giving bond to have the boy forthcoming at the day and place of sale, with the said Jabez Camden as security therein, and with no other security: that the boy was not delivered at the day and place of sale, and the said Leroy Camden and Jabez Camden became, after the time of taking said bond, wholly insolvent: and that Lynch, by the misconduct of the said deputy sheriff in the premises, had wholly lost his debt. 2. That Lynch obtained a judgment against Leroy Camden, and caused an execution to be sued out upon it, which was put into the hands of Harrison, then a deputy sheriff for Garland; and Harrison could have levied it upon property of Camden sufficient in value to have satisfied the execution, but there was a failure to levy the same, and the debt

has been lost. 3. That Lynch, having obtained a judgment against Leroy Camden and Jabez Camden, caused a fi. fa. to be issued upon it, which was delivered to Harrison, the deputy of Garland as sheriff; that the same was executed by Harrison on a negro boy, the property of Leroy Camden, who was of value sufficient to pay the amount of the judgment, and the said boy was returned by Harrison 548 into the possession of *Camden, without the judgment being paid or discharged, and the said boy was not advertised and sold, or otherwise legally disposed of, by Garland as sheriff, or by any of his deputies, and the said boy was never after taken possession of by Garland as sheriff, nor by any of his deputies, and the said judgment has never yet been paid.

At May term 1822, the defendants pleaded conditions performed, and issue was joined.

At November term 1822 they offered two pleas, to wit: 1. that a forthcoming bond was taken in discharge of the execution, which forthcoming bond, being forfeited, was accepted by the plaintiff in the execution without objection thereto, and on his motion an execution was awarded thereon; 2. (after craving oyer of the condition of the bond in the declaration mentioned) that the defendants "have well and truly performed the said condition, as by law the said David S. Garland was bound to do." The court refused to permit these pleas to be filed, and the defendants excepted.

The defendants then tendered four other pleas, which were received; to wit, 1. that at the time of the execution of the forthcoming bond, the obligors were solvent, and of sufficient ability to pay the debt, and the failure to take security in said bond was by the leave and license of the creditor: 2. that although no security was taken in the forthcoming bond, yet the creditor in said bond waived his right to have security therein: 3. that the debt has not been lost on account of any negligence or misfeasance in office of the sheriff: 4. that if the debt has not been made, it has been owing to the negligence of the creditor, and not owing to any fault or negligence of the sheriff. To the second, third and fourth of these pleas, the plaintiff replied generally. To the first he replied that the obligors in the forthcoming bond, at the time of taking the same, were not both of them solvent, and that the said Jabez 549 was not good security, and that the failure in taking security in said bond was not by leave and license of the creditor. The replication concluded to the country.

At August term 1823, after a suggestion of the death of the defendant London, a jury was impanelled, but failed to agree.

At June term 1824, a verdict was found for the defendants, and judgment rendered thereupon, from which the plaintiff appealed.

In the superior court of law, on the 2d of October 1824, the judgment was reversed with costs, and it was ordered that a new

trial be had; and for that purpose, by consent of parties, the cause was retained in the superior court.

At the first trial in the circuit superior court, a verdict was found for the defendants; but it was set aside.

Afterwards, to wit, on the 10th of September 1832, another jury being impanelled, the plaintiff introduced the following evidence, to wit: 1. A record of the county court of Amherst at September term 1817, stating that David S. Garland, sheriff of the said county, appeared in court, and entered into and acknowledged bonds with John Coleman, William Turner and John London his sureties, conditioned according to law. 2. The bond of Garland as sheriff, mentioned in the declaration. 3. A record of the qualification of Garland as sheriff; which, as copied, was without date, and stated that Garland produced in court a commission from his excellency Linah Mims lieutenant governor of the commonwealth, appointing him sheriff; that he had theretofore entered into three several bonds, in the penalties and with the conditions required by law, and that he took the several oaths required by law, and was, agreeably to said commission, appointed sheriff of the county. 4. A record of the qualification of Benjamin Harrison as deputy; which, as copied, was also without date, and stated that on the motion of David S. Garland sheriff of the county, Benjamin Harrison and Richard H. Burks were qualified and admitted as deputies

550 *under said Garland. 5. The record of the case of Lynch against Camden, in which the judgment mentioned in the declaration was obtained; shewing, that on the 5th of May 1818 a fieri facias was issued on the said judgment against Leroy Camden and Jabez Camden: that a return was made thereon in these words—"Executed, 23d May 1818, on one negro boy named Harry, the property of Leroy Camden; D. bond, and forfeited 25th June 1818. B. Harrison D. S. for D. S. Garland sh'ff:" that the forthcoming bond was executed only by Leroy Camden and Jabez Camden: that after the same was forfeited, judgment was rendered thereon against Leroy Camden at September term 1818: that upon that judgment a fieri facias issued the 5th of October 1818, returnable to the first monday of December following, which was delivered to Benjamin Harrison, and was returned with this return thereon—"Not time to execute. Alex'r Mundy D. S. for David S. Garland sheriff;" and another fieri facias issued thereon the 4th of January 1819, on which the following return was made—"No effects found. J. S. Dillard D. for J. Dillard:" that subsequently a judgment was rendered on the forthcoming bond against Jabez Camden, after which a fieri facias issued against both the said Leroy and Jabez the 4th of May 1819, which was returned, "No effects whereon I can make the money. Wm. Dillard D. S. for J. Dillard sh'ff;" and afterwards a capias ad satisfaciendum issued against them the

10th of June 1819, which was returned "Not found," and two other writs of fieri facias were issued, which were returned without effect. 6. A sheriff's ticket in these words: "John Lynch jr. ass'ee of C. Anthony, to the sh'ff Amherst. 1818. To commission on execution v.

Camden and bail,	-	-	\$15 75
D. bond 63, notice 50,	-	-	1 13

B. Harrison D. S. Garland sh'ff." 551 *7. A witness who deposed, among other things, that the execution of the 5th of October 1818 was delivered to the witness by Harrison a few days before November court 1818, which happened on the 16th of that month; that the witness was at that time acting as deputy for Garland, who was sheriff; that the witness acted by virtue of a contract with Harrison; that the term of Garland expired at November court 1818, and that Harrison and the witness acted till that time, and then went out of office with Garland. There was other evidence shewing that the original qualification of Garland as sheriff, and of Harrison as deputy, took place in 1816. And the fact that Harrison continued to act as deputy until November term 1818, was shewn as well by his returns on process, as by the testimony of witnesses. Two executions issued on the 7th of October 1818, in other cases, appeared to have been levied by Harrison, one on the 29th of that month, and the other on the 12th of November 1818. And the clerk of Amherst deposed that the deputy sheriffs generally attended a few days after the rising of the court to receive executions; that Harrison was always anxious to take them out, and that the general rule in delivering them out to the deputy sheriffs was, to deliver them in the order in which they stood recorded on the execution book.

The defendants, on their part, introduced evidence for the purpose of shewing that Jabez Camden, at the date of the forthcoming bond, was good and sufficient security for the amount of money mentioned in the said forthcoming bond, and that at the date of the writing presently mentioned, there was some property on which an execution in favour of Lynch might have been levied. (The evidence was very far from establishing clearly the facts which it was designed to establish; it is sufficient however to state here its object and tendency.) The said defendants introduced a writing (that just alluded to) in these words: "The sheriff of Am- 552 herst *will please permit the property on which he may levy my execution against Leroy Camden, to remain in his possession until monday next. J. Lynch jr. 10th Nov'r 1818." The handwriting of Lynch was proved, and the paper was proved to have been delivered by him to Leroy Camden to carry to the sheriff. It was further shewn that in June 1818, Leroy Camden had a boy named Harry, who would have sold for between 300 and 400 dollars. (That, it will be observed, is the name of

the boy mentioned in the forthcoming bond.)

After all the evidence had been heard, the plaintiff demurred to it. The defendants objected to joining in the demurrer, but their objections were overruled, and they thereupon joined in the same.

The counsel for the plaintiff then tendered to the jury the conditional verdict hereinafter mentioned, to be found by them. Whereupon the counsel for the defendants insisted on submitting the evidence to the jury, that they might weigh the case and ascertain the amount of damages. But the court was of opinion, from the proceedings in this case, that the plaintiff must recover the amount of his debt, or nothing, and that the said evidence could not be urged before the jury in mitigation of damages. To this opinion the defendants excepted.

Thereupon the jury found a conditional verdict (the same which the plaintiff's counsel had previously tendered) assessing the damages to 358 dollars 99 cents, with interest on 354 dollars 13 cents, part thereof, from the 23d of May 1818, if the court should be of opinion for the plaintiff on the demurrer to evidence.

On the 14th of September 1832, the demurrer to evidence being argued, the court pronounced its opinion thereupon against the defendants. And on the 2d of April 1833, final judgment was rendered for the plaintiff.

To that judgment, on the petition of the defendants, a supersedeas was awarded.

553 *Stanard for plaintiffs in error.

It was incumbent on the plaintiff, upon the plea of conditions performed, to shew, 1. that the act complained of was committed by one who, at the time, was the sheriff's lawful deputy; and 2. that it was so committed at a time when the sureties in the sheriff's bond were bound for his acts. The evidence offered to establish these facts must be subjected to those tests which, under the practice of this state and the decisions of this court, are held to be applicable to the evidence of that party who, by demurring, has withdrawn the question of fact from the consideration of that tribunal which is the most proper for deciding the facts. When subjected to these tests, the evidence must be held insufficient. The bond that is produced neither shews when the sheriff came into office, nor how long he was to continue in office, nor indeed that he was ever in office at all. A man may be regularly commissioned and give bond as sheriff, but if he be never sworn into office, the sureties in the bond will hardly be liable for his acts. The sheriff may be bound for his own acts, but the sureties are bound only for the acts of the officer. There must, it is clear, be something besides the bond to establish the fact of the qualification of the sheriff, and the time when it occurred. What is there in this case? An order reciting that he was commissioned by Linah Mims lieutenant

governor of the commonwealth; whereas this bond was payable to James P. Preston governor, and executed when he was in office. It may be said that this bond was for the second year of Garland's sheriffalty. If it were, still the necessity of shewing a qualification for the second year is not dispensed with. Commonwealth v. Fairfax & others, 4 Hen. & Munf. 208. But there is no evidence that this bond was for the second year. Besides (supposing it was) when Harrison was first appointed, the appointment could only have been during Garland's continuance in 554 office under his first *commission.

Harrison's term of office must therefore have expired before this bond was executed; and there is no evidence of reappointment. Munford v. Rice and others, 6 Munf. 81.

II. When a judgment is rendered against two or more, and an execution issues upon such judgment against all, which is levied upon the property of one, and the owner gives bond with adequate security for the forthcoming of the property at the day of sale the forthcoming bond, when forfeited, is in law a satisfaction of the original judgment, to this extent at least, that so long as the bond remains in force and unquashed, no proceedings can be had upon the judgment against any of the parties thereto. Taylor v. Dundass, 1 Wash. 92; Downman v. Downman's ex'or, 2 Wash. 189; United States v. Graves and others, 2 Brock. 385, 6. In the last case, chief justice Marshall clearly considers that there is no remedy unless equity could interfere; and it must be admitted that it would be very difficult to sustain equitable jurisdiction in such a case. When, then, the sheriff took Jabez Camden as security, he took a person who could clearly not be proceeded against both upon the forthcoming bond and upon the original judgment: if the bond should be forfeited and proceedings had upon that, there could be no execution against him on the original judgment; if on the other hand the bond should be quashed, so as to permit an execution on the original judgment, by the very act of quashing the bond, Jabez Camden would be discharged from liability as an obligor therein. It is apparent, then, that it was no breach of duty in the officer to take him as surety in the forthcoming bond, if, at the time, he was sufficient in point of estate; a matter to be determined upon the evidence.

III. The decision in Perkins and others v. Giles governor, 9 Leigh 397, shews that the court erred in the opinion which it gave as to the damages.

555 *C. and G. N. Johnson for defendant in error. On the demurrer to evidence, it will suffice to say that the conclusions of fact must be such as the jury might from a just and reasonable construction have made, and not arbitrary inferences. Stephens v. White, 2 Wash. 211.

II. The material question is, whether the sheriff was justified in taking Jabez Cam-

den as surety in the forthcoming bond. If the law be, that by levying the execution on the property of one, and taking from him a forthcoming bond, the other is discharged, then the sheriff should be held liable for not levying the execution on the property of the other, as well as of that one. But the law is not so. Where the first execution which issues on a judgment does not produce satisfaction, the statute provides for a new execution in every case except where a *capias ad satisfaciendum* against two is levied on one, and he is discharged by the act of the plaintiff. 1 R. C. 1819, p. 527, § 3, 4, p. 528, § 8, and p. 538, § 33. And the whole course of decision, as well in England as in this country, is, that the judgment is not to be considered satisfied, except in the case just mentioned, until the creditor has received his money or given a release. Where the body of the debtor is taken in execution, the remedy remains in force against every other person bound for the debt. *Hayling v. Mulhall*, 2 W. Bl. 1235. So likewise where the goods of one obligor are levied upon. *Dyke v. Mercer*, 2 Show. 394; *Clerk v. Withers*, 2 Ld. Raym. 1072; *Winston and others v. Whitlocke*, 5 Call 435. If a forthcoming bond be taken and forfeited, the forfeited bond is only an apparent satisfaction. *Taylor v. Dundass*, 1 Wash. 92; *Downman v. Downman's ex'or*, 2 Wash. 189; *Randolph's adm'x v. Randolph*, 3 Rand. 490. The latter case explains the two former, and shews that there is no actual satisfaction until payment is made of the money. It is true that in that case the judgment was only against one obligor,

whereas in this it was against two, 556 and the *property of one was taken.

But the difference is not material. The principle of the decision is, that the forfeited forthcoming bond is not a satisfaction of the debt, and that the creditor may still have recourse against others previously bound. The law works detriment to no man. *Nadin v. Battie &c.*, 5 East 147. Therefore, where the creditor has not been an actor, but the subject of the law's action, and has pursued the remedies of the law as far as he can, he will not be prevented from going against those previously bound. There is no case in which, under such circumstances, relief has been denied. Its denial would be manifestly unjust, and against the intention of the legislature. They have taken from the creditor the certain advantage which would result from a sale of the property levied on, and in place of the property have provided for him bond and security. But what benefit does the creditor derive, if, when he gets this security, all sureties previously bound are discharged? The forthcoming bond is a mere substitute for the property for which it is taken; and as the property would only discharge the judgment so far as money was obtained for it, so the forthcoming bond should only be a discharge so far as money is paid in satisfaction of it. In the case of *The United*

States v. Graves and others, 2 Brock. 385, 6, the mind of chief justice Marshall seems to have been turned to a remedy in equity. But the principle on which he rested was, that there ought to be a remedy. There can be no occasion to turn the creditor over to equity. For a surety is never discharged at law by the act of law.

III. What excuse is offered for the failure to levy, complained of in the second breach? It seems to have been supposed that the creditor had improperly interfered. But it is not proved that any thing more was done in relation to the note, than to write it and deliver it to the defendant.

The probability is that the defendant 557 *never used it. And the case is as if the note had never been written. But it did not, by any possible construction, authorize the sheriff not to levy.

IV. It seems to have been supposed that the plaintiff was negligent in not having the execution levied on a particular slave. But the plaintiff had nothing to do with any particular property. He had only, when one execution was returned, to issue another; and this has been done.

On any view, the plaintiff was entitled to a verdict. For there was unquestionable evidence of misconduct in office. The stronger the proof that Harry was liable and might have been taken under execution, the stronger the case made out for the plaintiff.

V. The assessment of damages was no doubt the province of the jury. But the court might instruct the jury when engaged in the assessment. The only question is whether the instruction was correct. If it had been shewn that the whole debt had not been lost, but only a part, then the jury should only have assessed the damages for the part lost. But here there is no such evidence. The plaintiff seeks to recover on the ground that the whole has been lost by the misconduct of the sheriff in taking insufficient security in the forthcoming bond; and if the allegation be made out, then the proper measure of damages must be the whole debt. The case of *Perkins and others v. Giles governor*, 9 Leigh 397, is no authority against us. In an action by an assignee against his assignor, the court would never hesitate to say that the criterion of damages is the amount of the debt lost: and that is all that is done here.

ALLEN, J. It has not been contended in argument that the sheriff would be liable, if, in the proper discharge of his duty, he took a delivery bond with security sufficient at the time, and the surety should thereafter become insolvent. The law imposes no such responsibility

558 *upon him. It was introduced for the convenience of the owner, and not in ease of the sheriff. It would have been unreasonable, under such circumstances, to require any thing more of the sheriff than to take security good at the time. The act authorizing the sheriff to

demand a bond of indemnity was for his benefit, to relieve him from his common law liability; and therefore the provision was inserted, that the claimant of the property, upon the execution of the indemnifying bond, should be barred of his action against the sheriff levying the execution, unless the obligors in the bond should become insolvent. In the first breach assigned in this case, it is not averred that the obligors were insolvent when the bond was executed, but that they became insolvent afterwards. This, though necessary to be averred in order to shew that the plaintiff suffered injury, would not of itself constitute any ground of complaint against the sheriff. There must have been some other act, which was improper, and subjected him to the action of the plaintiff; and the loss consequent on that act would respect the damages alone. The facts alleged shew that the sheriff took a codefendant alone as security; and this, it is maintained, was such an improper act as subjected him to the action of the creditor.

To the correct determination of this question it becomes necessary to enquire what effect a delivery bond given by one of several defendants, whose property has been levied on, has upon the condition of the other defendants, who do not join in the bond; and what is the nature of the undertaking of the surety in the forthcoming bond. Does a forthcoming bond forfeited constitute an actual satisfaction of the original judgment, so that no further proceedings can be founded on that judgment? If it does—if the remedy of the plaintiff, after a valid forthcoming bond taken and forfeited, is on the bond alone, and that is substituted for the judgment *which is thereby extinguished, one of two consequences must follow: either the sheriff incurs a liability if he omits any of the defendants in the execution, (for by so doing they are discharged and the creditor's rights impaired;) or if not, then he may receive as security a codefendant who is sufficient in point of estate; for, if not taken as security, he would be discharged, and the plaintiff sustains no injury by his being received as the security.

There is nothing in the act which makes it the duty of the sheriff to require every defendant in the original execution to join in the delivery bond. The law was passed for the benefit of the owner of the goods taken; to enable him, at his risk, to retain the possession and use of the goods, and to avoid the expense of their safekeeping until the day of sale. The words relate to the owner, and make it the duty of the sheriff to suffer the goods to remain with him, upon his tendering a bond with sufficient security to have them forthcoming at the day of sale. His right to retain the possession is not dependent on the other parties to the execution. The law respects his condition as owner, and for his convenience of

retaining possession of his property upon complying with the terms imposed. And the practice has been in conformity with this construction of the act. Several cases have occurred in this court, where the bond was given by one of several defendants; and in no instance has it been held that the bond was defective for that cause. If then a bond may properly be taken from one of several defendants, and the sheriff, upon the tender of such a bond with good security, is bound to receive it, does this bond, when forfeited, actually satisfy the original judgment, and exonerate the other defendants from all further responsibility? It is apparent that if the act is to receive this construction, a provision introduced for the benefit of the debtor may in 560 practice operate *most harshly on the rights of the creditor. A creditor having several persons bound to him may, without any default on his part, and whilst in pursuit of a legal recovery, be deprived of all remedy except against the one giving the delivery bond and his surety. And if the surety, though sufficient when taken, should, with the principal obligor, prove insolvent before actual payment, the debt would be lost though the other defendants remain solvent. I should be unwilling to come to a conclusion leading to such results, if it can be avoided. Nor do I think any of the cases referred to have established the proposition. They have merely decided that a forfeited forthcoming bond, whilst it remains in force, is a satisfaction of the judgment, so as to prevent a new execution. To the same extent, it may be said that a ca. sa. executed, or a fi. fa. levied on the property of one, is a satisfaction of the judgment. Whilst the body remains in custody, no new execution can issue against that defendant; but if he dies in custody, or escapes, the creditor is remitted to his original judgment. And where a fi. fa. is levied on a sufficiency of goods, the property of one of the defendants, a new execution cannot issue on that judgment until the levy is exhausted. Blumfield's case, 5 Co. Rep. 87; Taylor v. Dundass, 1 Wash. 94.

The first and leading case is Taylor v. Dundass. The bond there in question was a replevy bond. By subsequent cases, however, a replevy bond and a forfeited forthcoming bond seem as to this point to be placed on the same footing: both have the effect of a judgment, the first from the date, the last from the forfeiture. In that case an execution issued and was levied on the property of one defendant, who gave a twelve months replevy bond. Afterwards, but within the year, (as appears from the dates of the executions and order of court,) a second execution issued: and this was 561 quashed on motion, upon the ground that the proceedings under *the first execution were a bar to the second. Judge Pendleton in one place says, that a replevy bond is the same as if the estate had been sold to the amount of the debt, and though it is an indulgence to the defendant, the execution is considered as

levied and the judgment discharged. This language, standing alone, would cover the whole ground; but in a subsequent passage the judge qualifies it, by remarking that the replevy bond, whilst the execution remains unquashed, is as complete an execution of the judgment, as if the estate had been sold to the full amount of the judgment. So in *Downman v. Downman's ex'or*, 2 Wash. 189, judge Lyons observed, that a forthcoming bond, whilst in force, was a satisfaction of the judgment. Remarks of the same kind will be found in many of the cases since. In *Randolph v. Randolph*, 3 Rand. 490, judge Green observed, that the only effect of the decisions is that a replevin or forthcoming bond, even if defective, is a bar to any further proceedings on the judgment until quashed.

These authorities leave no doubt that as long as the bond remains in force, it arrests all proceedings on the original judgment. So long, it constitutes a technical satisfaction, and operates, as it respects the other defendants, like a *fi. fa.* executed on the property of one. But no case has yet decided under what circumstances and for what cause the bond may be quashed, so as to remit the plaintiff to his original judgment.

The law provides that the creditor, if the bond at any time be quashed as faulty, besides his remedy against the sheriff, may moreover have execution on his original judgment as if such bond had never been given. By this provision, literally construed, the right to quash would seem to be restricted to the case of defects apparent on the bond. That the creditor has not the right, at his own discretion, to quash a good bond, seems to me clear. The bond, at the least, is a substitute for

562 *the levy. When the execution is levied on the property of the principal, if the creditor interferes and releases it, he thereby discharges the surety. *Baird v. Rice*, 1 Call 18; *Bullitt's ex'ors v. Winstons*, 1 Munf. 269. To hold that he could, without good cause, quash the bond which has supplied the place of a levy, and so be remitted to his original judgment and all his remedies to enforce it, would be to authorize him to do indirectly, after the execution of the bond, what he could not do directly, before its execution, without releasing the other defendants. In *Hendricks &c. v. Dundass*, 2 Wash. 50, the creditor moved to quash the replevy bond, because the execution had been issued without authority. The motion was resisted by the other defendant: but it was not pretended in argument, nor is there any intimation in the opinion of the court, that the creditor had the absolute right to quash without cause. In *Jett v. Walker*, 1 Rand. 211, on a judgment against two a forthcoming bond had been taken, which was quashed on the motion of the plaintiff. A second execution was levied on the property of the bail, who moved to quash it, as having issued irregularly. His motion was overruled, and he appealed. The court held that the appeal

extended only to the judgment overruling the motion to quash the second execution, and without deciding whether the appellant would be entitled to a supersedeas to the first judgment, even it was erroneous, affirmed the judgment. By a note of the reporter it appears, that the counsel intimated an intention to apply for a supersedeas to the first judgment, but was informed by the president of the court that the judges had considered the subject, and determined to refuse the supersedeas, on the ground that the bond varied from the execution, and was of course properly quashed. These cases, though not decisive of the very point, tend strongly to prove that the creditor's right to quash is not unlimited. Nor has it been decided that

563 the creditor *has no right to quash except for apparent defects. The contrary may be implied from the case of *Hendricks &c. v. Dundass*, above cited. There the motion was made and sustained upon proof that the execution issued without authority. So, I suppose, it would not be doubted that if the sheriff fraudulently received as security a person notoriously insolvent, the court, upon this fact being shewn, would quash the bond; and this notwithstanding the sheriff had made himself liable; for he might be insolvent, and unable to indemnify the plaintiff. Such a bond would, in the words of the act of assembly, be faulty, the law requiring the sheriff to take sufficient security.

If the plaintiff may for the cause just mentioned, or for the reasons appearing in the case of *Hendricks &c. v. Dundass*, quash upon other grounds than that of apparent defects, may he not do so as well after an award of execution on the bond, as before? The court gives no judgment on the bond; the effect of a judgment is acquired when the bond is forfeited. The bond may be quashed whenever a motion is made for the award of execution, no matter how many terms have intervened since the forfeiture. It may be so quashed as well for defects apparent, as for objections shewn aliunde. Then why should the award of execution change the rights of the parties? It imparts no new character to the judgment; that was complete upon the forfeiture of the bond; and the proceeding to enforce it is for the benefit of all interested. The surety may have been sufficient when taken, but afterwards have become insolvent; or he may have been then insufficient, and the fact unknown to the officer or creditor, or so doubtful in his circumstances as to render it uncertain whether his insufficiency could be proved. By proceeding on the bond, the creditor avoids delay: if the debt is made, no further question arises; if the obligors prove insolvent and the money

564 cannot be made, that is conclusive *evidence of the insufficiency of the security. It seems to me, therefore, that after the award of execution, if the execution proves unavailing without any default of the creditor, that furnishes sufficient ground to quash the bond; and that

the court, upon such proof, should quash it, so as to remit the plaintiff to his original judgment. Any other construction places the creditor who has a joint judgment against his debtors, in a much worse position than the creditor who has no judgment, or a separate judgment against one. In *Dyke v. Mercer*, 2 Show. 394, two were bound in a bond jointly and severally, and judgment was obtained in a separate suit against one. A *fi. fa.* was issued, and a seizure to the value returned, but the property was not sold, nor the money paid. To a second action against the other obligor, this matter was pleaded in bar; but the court determined against the defendant, holding that nothing but actual satisfaction by his co-obligor was sufficient to discharge him. In *Winston & al. v. Whitlocke*, 5 Call 435, a forthcoming bond having been given by two, execution was awarded and a *fi. fa.* issued against one of them, under which property was taken; but the *fi. fa.* was not returned. Upon the authority of *Dyke v. Mercer*, it was held that these proceedings were no bar to a motion on the bond against the other obligor. Why should the mere form of proceeding affect so materially the right of the creditor? Whether he proceeds by a separate action or a joint action, the object is the same, to obtain actual satisfaction; and if in the one case he may proceed until that satisfaction is procured, there can be no good reason why a mere technical satisfaction should discharge the other defendants finally in the other case. The point has not been expressly decided in this court; but principles have been established incidentally, which cannot be reconciled with the proposition, that a forfeited forthcoming bond extinguishes the original claim, although it is shewn that the

565 *bond has proved unavailing. Thus in *Randolph v. Randolph*, 3 Rand. 490, judgment having been rendered against a surety in an obligation, he gave a forthcoming bond, which was forfeited. After many years he paid this bond, and then moved against his principal. The motion was resisted on the ground that the forthcoming bond, when forfeited, satisfied the original judgment; that the surety's right of action then accrued, and that it was now barred by the lapse of time. The court held, that though the forfeited forthcoming bond arrested all proceedings on the judgment whilst it remained in force, it did not amount to an actual payment or satisfaction of the debt, so as to bar an action against the other obligors. In *Smith &c. v. Triplett &c.*, 4 Leigh 590, the assignee of a note obtained judgment against the obligor, who gave a forthcoming bond, upon which execution was awarded; and the obligors proved insolvent. This was held not to be such a satisfaction as precluded the assignee from resorting to his assignor. There the bond was not defective on its face. By the original judgment, the instrument assigned was merged in a higher security; and if this security was satisfied,

either by the forfeited forthcoming bond or the proceedings under it, upon what ground could the assignor be held responsible?

There is but one serious objection to this construction of the law. Where there is an execution against two defendants, bearing towards each other the relation of principal and surety, and the execution is levied on property of the principal sufficient to pay the debt, the surety, if the property were sold, would be relieved. But if a forthcoming bond be executed, and the surety therein, though sufficient when taken, afterwards become insolvent, to hold that the creditor may be permitted to resort to the original judgment, would be to subject the original surety to a loss. To this it

may be answered that the surety was 566 guilty of the first default. *Contracts are made not with a view to their breach, but to their fulfilment. Having engaged to pay the debt, he was bound to comply with his undertaking. His failure to perform his obligation has driven the creditor to the judicial tribunals for redress. If, in the due and regular prosecution of his claim, injury is inflicted on the surety by the operation of law and the act of the principal, over which the creditor could exercise no control, the creditor should not suffer. And as between the two, equally innocent as respects the particular transaction, he should bear the burthen whose original default has resulted in the special injury.

If then the other defendants are still ultimately liable on the judgment, in the event of the insolvency of the obligors in the delivery bond, as I think they are, it becomes necessary to enquire for what the surety in the forthcoming bond is liable. The act provides that if the owner of the goods and chattels taken shall give sufficient security to the sheriff to have them forthcoming on the day of sale, it shall be lawful for the sheriff to take a bond payable to the creditor, reciting the service of the execution, and the amount due thereon, with condition to have the goods forthcoming &c. and then provides that if the owner fails to deliver the goods or to pay the money mentioned in the execution, the bond is to be returned to the office and have the effect of a judgment. The bond, until forfeited, is part of the execution, collateral to the payment of the debt, and a forfeiture may be saved by a delivery of the goods. It may therefore, in this view, be considered not as a security for the payment of the debt, but for an independent act, the delivery of the property alone. But all the provisions of the law must be adverted to for the purpose of ascertaining the true character of the surety's undertaking. The bond is a statutory bond, and its operation must be determined by reference to the law under which it was taken.

567 The law requires that *the bond shall recite the service of the execution, and the amount due thereon; obviously for the purpose of fixing the extent of the surety's liability. He cannot discharge

himself by paying the value of the property to be delivered, if that is less than the amount of the execution. The forfeiture is saved, either by a delivery of the property, or the payment of the money due on the execution. If the value of the property, therefore, exceeds the amount due, a breach of the condition is saved by paying that amount. And execution is to be awarded not for the value of the property, to be ascertained by a jury or in any other way, but for the amount of the execution as recited in the bond. All these provisions shew that the surety, though he may discharge himself by delivering the property before forfeiture, also undertakes for the debt in the event of a failure to deliver the property. His undertaking bears a double aspect, and the alternative is with him, not the creditor. If he chooses to deliver the property, he is discharged; having elected to do that which constitutes his undertaking collateral to the payment of the debt. Failing to deliver, he elects the other alternative which his undertaking embraced, the payment of the debt. In entering into the bond, therefore, he becomes (as it seems to me) a surety for the debt, with the power to relieve himself from that liability by doing another act within the period prescribed. If this be the true character of his undertaking, and if, as I have before attempted to shew, all the original defendants continue ultimately responsible until the actual payment, notwithstanding the intermediate execution and forfeiture of the forthcoming bond, then it follows that such a defendant is not sufficient security. He is already bound for the debt, and continues so bound until discharged by actual satisfaction of the judgment. He cannot therefore be considered as sufficient security, or security in any sense, for that for which he already stands bound by the judgment; and the sheriff is not warranted in receiving him.

I therefore think, that as the evidence demurred to in this case proves that the surety in the forthcoming bond was a defendant in the original judgment, that evidence supports the issue charging the sheriff with a breach of duty in taking him as security; that whether he was sufficient in point of estate or not, in point of law he was no security.

To sustain the issue on the part of the plaintiff, it was incumbent on him to prove that Garland was sheriff on the 23d of May 1818, that the bond sued on covered his transactions for that year, and that Harrison, who levied the execution, was his deputy. The plaintiff offered in evidence an order shewing the qualification of Garland as sheriff, under a commission from Linah Mims lieutenant governor, and also an order shewing the qualification of Harrison as his deputy. These orders are copied into the record without their dates, but I do not think the imperfection of the record in this respect material. The plaintiff also offered the official bond of Garland, executed + September court 1817. The condition re-

cites that Garland was appointed sheriff by commission from the governor; and under that commission the bond was taken. This, therefore, must have been the bond given for the second year. And it seems from the evidence, and the returns of his deputy Harrison on process, that under this second commission he continued in office until November 1818. There is no conflict in the evidence in reference to this point; and the orders, bond, and returns on the process clearly establish that Garland was the sheriff, and Harrison his acting deputy, during the period referred to.

The defendants in their fourth plea alleged that the debt was lost by the negligence of the creditor. In the view already taken of the rights and duties of the respective parties, as growing out of the forthcoming bond, I have attempted to shew that the creditor has not the absolute right to quash the bond, where it is not defective on its face, and has been regularly taken. If, however, the codefendant in the original judgment was not a legal security, the bond might have been quashed for this defect, and the creditor, besides his remedy against the sheriff, would have been at once remitted to his original judgment. He elected to pursue the bond. Of this the sheriff could not complain, unless the debt was afterwards lost by the negligence or misconduct of the creditor. The defendants have introduced evidence tending to prove that there was property of Leroy Camden, on which the sheriff might have levied, and that he was arrested by the improper interference of the creditor. The only interference consisted in the written memorandum given by Lynch to Leroy Camden on the 10th of November 1818, four days before the sheriff went out of office. It does not appear that this memorandum ever came to the sheriff's hands; and though, as against the demurrant, a jury might fairly have inferred that it did, as it was produced in evidence by the defendants, yet the memorandum did not warrant the sheriff in failing to levy; it merely authorized him to permit the property on which he might levy to remain in the possession of Leroy Camden until the succeeding monday. This, it seems to me, did not justify the sheriff in omitting entirely to levy. He had already incurred a liability by taking improper security in the forthcoming bond. For his own protection, it was his duty at least to levy the execution, if there was a sufficiency of property; and then, if loss ensued in consequence of this interference of the creditor, it must have been borne by him. The facts fairly deducible from this evidence do not, as it seems to me, make out a bar to the action. They tend to prove that part of the debt might possibly have been made, and therefore were proper for the consideration of the jury in assessing the damages, but do not defeat the plaintiff's action.

The second breach avers the delivery of the execution on the forthcoming bond

against Leroy Camden to the sheriff, and that the sheriff could have levied the execution on sufficient property of Leroy Camden to satisfy it, but failed and refused to levy the same. The execution referred to was returned "Not time to execute." The breach is imperfectly assigned, and it is somewhat doubtful whether it was intended to aver that the defendant had sufficient property upon which the sheriff might have levied, or that he received the execution in time to levy the same. If the former was intended the record presents the parties as relying on the same evidence; the sheriff, as proving that there was property sufficient to have satisfied the debt, if the creditor had been diligent; and the creditor, as establishing the same fact, to prove misconduct in the sheriff. Looking at the breach in connexion with the execution set out and the return, it seems to have been intended to put in issue the truth of the return, and to aver that the execution came to the sheriff's hands in time to levy it. So considering it, the evidence, it seems to me, does not prove the issue. The execution is dated the 5th of October 1818; but there is no proof shewing when it was delivered to the sheriff, or returned. It seems that other executions against the same defendant, dated afterwards, did come to the sheriff's hands, and were levied before the return day of the one in question; and the clerk proves that the sheriff was in the habit of calling at the office and taking out executions. I do not think this sufficient, in opposition to the return of a sworn officer, to prove the return false. The affirmative was with the plaintiff, and he demurs. He might and should have proved when the execution was delivered. The jury

would not have been justified in inferring from the evidence adduced that such delivery was in time, against the return; and the plaintiff cannot, by demurring, deprive the defendants of the benefit of it. According to the well established rule, he is to be considered as waiving all his evidence which conflicts with that of the defendants.

No evidence was given to sustain the issue on the third breach. The law being, as I conceive, for the plaintiff on the facts, as proving the issue made under the first breach, if the case stopped here, the plaintiff would be entitled to an affirmation of the judgment. But after the demurrer to evidence was joined, (the court having ruled the defendants to do so,) the plaintiff's counsel tendered a conditional verdict for the amount of the debt: the defendants objected, contending that the quantum of damages was a question to be decided by the jury, and insisted on submitting the evidence to the jury; but the court was of opinion that, from the pleadings, the plaintiff must recover the amount of his debt, or nothing, and that said evidence could not be urged before the jury in mitigation of damages; and thereupon the jury signed the verdict. To this decision the defendants excepted. This was an action on the

official bond, against the sheriff and his sureties; and the case of Perkins and others v. Giles governor, 9 Leigh 397, decides, that in such an action the recovery is confined to the damages sustained, and these may amount to the debt, or may amount to less. The sheriff having levied, and having released the goods by taking a defective bond, might, if the debt were lost in consequence of this discharge, be made liable for the whole. But even in an action on the case against him alone, the recovery would be limited to the amount of the injury sustained. In this case, the creditor having proceeded on the bond, it was competent to shew that the debt, or part of it, was made, or that the debt, or a portion of it, might have been collected if the

creditor had not interfered, or that loss has resulted from his culpable neglect. Such evidence would be proper for the consideration of the jury on the question of damages. The only points submitted to the decision of the court upon the demurrer were, that the facts shew a cause of action against the sheriff, and do not shew that the debt was lost through the negligence of the creditor. The plaintiff was therefore entitled to a recovery; but the extent of that recovery must depend on the evidence as to the injury sustained. This the jury may hear and consider in assessing the damages. It may be entitled to little weight; but of this the jury are the exclusive judges, and the plaintiff cannot, by demurring, deprive the defendants of the benefit of it. The opinion of the court took from the jury all discretion, and fixed the damages at the amount of the debt. In this, and in excluding the testimony offered from the consideration of the jury on the quantum of damages, it seems to me the court erred; and for this cause the judgment should be reversed, the verdict set aside, and a new writ of enquiry awarded.

The other judges concurred. And the president stated that he was authorized by judge Brooke to say, that if present he would also have concurred.

Judgment reversed.

573 *The Bank of the United States Incorporated by Pennsylvania, and Others v. The Merchants Bank of Baltimore.

February, 1843, Richmond.

Foreign Corporation—Attachment—Construction of Statute.*—Under the act in 1 R. C. 1819, p. 474, ch. 123, directing the method of proceeding in courts of equity against absent debtors, a creditor of a cor-

*Personal Actions—Venue—Natural Persons—Corporations.—In *Humphreys v. Newport News & M. V. Co.*, 33 W. Va. 137, 10 S. E. Rep. 40, the court said: "At common law a personal action can be maintained in this state against a nonresident natural person in any county where he can be personally served with process. *Mahany v. Kephart*, 15 W. Va. 620; *Vinal v. Core*, 18 W. Va. 19; *Beirne v. Rosser*, 26 Gratt. 538; 1 Rob. Pr. 316, 353. But it is said in

poration created by another state may maintain a suit in equity against such corporation, as a defendant out of this commonwealth, where there are persons within the same who have in their hands effects of, or are indebted to, such absent defendant; or may maintain a suit in equity against such corporation as an absent defendant, where it has lands or tenements within the commonwealth.

The Merchants bank of Baltimore being a creditor of the bank of the United States (incorporated by Pennsylvania), and experiencing great difficulty in the recovery of their debt, and the indebted corporation, though without this commonwealth, having effects here, a suit in equity was commenced in the superior court of chancery for the Richmond circuit, against the said corporation as debtors out of this commonwealth, and against others within the same, having in their hands effects of or otherwise indebted to the said absent debtors, and also against the said absent debtors as owners of lands and tenements within the commonwealth. Affidavit was duly made that the defendants sued as absent debtors were out of the commonwealth, and both the bill and endorsement on the subpoena shewed, in the usual manner, that the object of the suit was to obtain a decree for the sale of the lands and tenements belonging to the absent debtors, to satisfy the debt appearing to be due

from them, and to restrain the defendants in this commonwealth from paying, conveying away or secreting the debts by them owing to, or the effects in their hands of, the said absent debtors. The usual order of publication was made against the absent debtors, and the same being duly published and posted, and the cause matured for hearing also as to other defendants, the case came on to be heard the 24th of January 1842, on the bill and exhibits. On consideration whereof, the court, without deciding any other question at that time, was of opinion that the lands and tenements sought to be subjected ought to be under the direction of the court, in the hands of a receiver, so that the same might be finally disposed of in such manner as to the court might seem just; and the court therefore, until its further order, appointed Gustavus A. Myers receiver of the rents and profits of all the said lands and tenements, with the powers set forth in the order. Afterwards, on the motion of the plaintiffs, leave was given them to amend their bill and make new parties, and the cause was sent to the rules. The amended bill was accordingly filed, making defendants thereto, besides others, John Bacon, Alexander Symington and Thomas Robbins. On the 23d of June 1842, on the motion of the absent debtors and of the said Bacon, Symington and Robbins, they were permitted to file their answers, on giving security for costs; the order providing, as usual, that the attachment sued forth in the cause was not to be thereby discharged.

In this state of the case, to wit, on the 29th of June 1842, the defendants who had so filed their answers moved the court to discharge the attachment, upon the ground that the proceeding against the debtor corporation is not authorized by the act of the 11th of February 1819, in 1 R. C. p. 474, ch. 123. The said motion being argued by counsel, the circuit court, on consideration thereof, ordered that the same be overruled.

From which order an appeal was allowed.

575 *Taylor and G. A. Myers for appellants. The act of February 11, 1819, and the general laws from which it is taken, in substance if not literally, (act of 1744, 5 Hen. St. at large p. 220; 1777, 9 Hen. St. at large p. 396,) clearly relate throughout to natural persons, and not to bodies politic or corporate. The preamble recites, that "whereas creditors have experienced great difficulties in the recovery of debts due from persons residing without the jurisdiction of this commonwealth, but who have effects here sufficient to satisfy and pay such debts; for remedy whereof," &c. The first section then enacts, that "upon affidavit that such defendant or defendants are out of the country, or that upon enquiry at his, her or their usual place of abode, he, she or they could not be found, so as to be served with process;" in all such cases the court may make any

Bank v. Bank, 1 Rob. (Va.) 605, this cannot be predicated of a corporation, for, by the common law unaided by statute, a foreign corporation cannot be sued, because by that law process against it must be served on its head, within the jurisdiction where this artificial body exists." The principal case is cited in this connection in B. & O. R. R. Co. v. Gallahue, 12 Gratt. 660.

See foot-note to *Cowardin v. Universal Life Ins. Co.*, 32 Gratt. 446, and monographic note on "Corporations (Private)" appended to *Slaughter v. Com.*, 18 Gratt. 767.

Corporations—When Deemed to Be Persons.—See foot-note to *Western Union Tel. Co. v. Richmond*, 26 Gratt. 1. The principal case is cited in *Crafford v. Supervisors*, 87 Va. 115, 12 S. E. Rep. 147.

Same—"Persons" Used in Statute Includes Corporations.—In B. & O. R. R. Co. v. Gallahue, 12 Gratt. 663, it is said: "When the word person is used in a statute, corporations as well as natural persons are included for civil purposes. This was the rule at common law. 2 Inst. 697, 703, 736. They are to be deemed and taken as persons when the circumstances in which they are placed are identical with those of natural persons expressly included in such statutes. *Beaston v. Farmers Bank of Delaware*, 12 Peter's R. 103, 134-5; *U. S. Bank v. Merchants Bank of Baltimore*, 1 Rob. R. 573."

In *Stribbling v. The Bank of the Valley*, 5 Rand. 190, JUDGE CABELL said: "The term 'person,' used, in the law, is unquestionably sufficiently comprehensive to embrace corporations; and it must be held to embrace them, unless there be something in the law showing the legislative intention to restrict its application."

See *Miller v. Com.*, 27 Gratt. 110, and note, and monographic note on "Corporations (Private)" appended to *Slaughter v. Com.*, 18 Gratt. 767.

order, and require surety if it shall appear necessary, to restrain the defendants in this country from paying, conveying away or secreting the debts by them owing to, or the effects in their hands of, such absent defendant or defendants, &c. The fourth section still more clearly contemplates natural persons, since a foreign corporation surely cannot return and appear openly, and cannot have an "heir, executor or administrator."

It is to be remarked, that the first general law giving this process was passed in 1744, when no corporations, except quasi corporations, such as towns, counties or boroughs, existed in the colony of Virginia at any rate, if they did in any other of the colonies; so that it is impossible to conceive that the legislature contemplated them at that time. The subsequent laws, as observed above, use the same terms as are to be found in the law of 1744; and it cannot fairly be contended that those terms in the present law can be enlarged by interpretation, so as to embrace objects not contemplated by the legislature in the preceding laws, in the absence too of any expression properly applicable to such

576 objects. *If corporations had been intended to be embraced, would not the legislature, who must be presumed to be acquainted with the technical terms which would convey their meaning, have expressly included "bodies politic or corporate" in the law? When such artificial bodies are contemplated, those terms are used by them. For example, in the act (Supplement to Rev. Code, p. 382, ch. 313), "to amend an act more effectually to prevent the circulation of notes emitted by unchartered banks," an act of great importance and intended to check a great and growing evil, while the first section prohibits any person or persons from committing the acts specified therein, the second section explicitly prohibits "any body politic or corporate" from committing similar acts. Surely if, under the words "person or persons," the legislature conceived that artificial persons would be included, they would not have deemed it necessary to use another term in the second section.

This question has never been decided in Virginia, it is believed. But in New York, (where, under the words of the law, 1 New R. L. 157, ch. 49, § 23, it might with much more propriety be contended that corporations were included, than it can be under our statute,) the supreme court decided that the attachment against absent debtors would not lie against the estate of a foreign corporation; for that that law applied to natural persons only, and not to bodies corporate. *M'Queen v. The Middletown Manufacturing Company*, 16 Johns. Rep. 5. The 23d section of the New York law enacts that the real and personal estate of any debtor, who resides out of the state and is indebted within it, shall be liable to be attached and sold &c. It was contended in that case, in support of the attachment, that a corporation might

be a debtor, as well as a natural person; but the court decided as above stated. Now it is conceived that if the term "debtor," taken in connexion with the other provisions of that law, was not deemed sufficiently *comprehensive to embrace corporations, it can be with still less reason contended in this case, that the words "person or persons" are more so. Great inconvenience and embarrassment might be produced, if an opposite construction should prevail. Our banks must provide funds at different points, to enable them to draw, and to conduct their business with safety. At a period of suspension of specie payments recognized by the legislature, if a holder of their paper should apply to any of them to redeem their notes, upon a refusal they may be required to endorse on the notes the time such demand is made, and from that period they become an interest-bearing debt. Provided with such endorsement, the creditor proceeds to some point out of this commonwealth, where he is apprized that the bank has funds, and he attaches them. The most ruinous consequences might ensue, although the institution thus affected is actually protected by the laws of Virginia in the suspension out of which these consequences have arisen.

The case of *Bushel & another v. The Commonwealth Insurance Company*, 15 Serg. & Rawle 173, will be relied upon the other side. It appears from the report of that case, that the court was not unanimous. *Tilghman*, chief justice, was sick and gave no opinion, and the only opinions pronounced are those of *Rogers, J.*, and *Duncan, J.*,—the latter dissenting from the former. Of these two opinions we rely with great confidence on that of judge *Duncan*, whose reasoning, it is humbly conceived, is infinitely stronger, and certainly more consistent with the legitimate powers and duties of judicial tribunals, than that of his brother judge, who is driven first to construe the law of foreign attachments as a remedial law, when in truth it is an innovation on the common law and should be construed strictly, and then to declare that the law has undergone changes to suit the times, not by legislative enactments, but by 578 the "silent legislation of the people themselves"—a species of legislation certainly unknown to us, and not existing, that we are aware, in any community of laws upon earth.

If it be necessary to give this remedy against foreign corporations, the legislature, and not the courts alone, have the power to do so; and we humbly conceive that it is better to leave it thus, than (in the language of judge *Duncan*) for the courts to "make laws as we go along, put them on the judicial anvil, and with the judicial hammer give them a different shape, and fashion them according to our own notions of right and wrong."

Robinson for appellees. Such construction ought to be put upon a statute as may

best answer the intention which the makers had in view; for qui hæret in litera, hæret in cortice. Bac. Abr. tit. Statute, Let. I. § 5. A thing which is within the intention of the makers is as much within the statute as if it were within the letter. Ibid. Whenever this intention can be discovered, it ought to be followed, although such construction seem contrary to the letter. Ibid.

In the case of *The United States v. Amedy*, 11 Wheat. 393, the prisoner was indicted under an act of congress making it felony to destroy a vessel with intent "to prejudice any person or persons that hath underwritten." The underwriters in that case being a corporation, it was insisted that a corporation was not a person within the meaning of the act. But the supreme court of the United States overruled the objection. Mr. justice Story, in delivering the opinion of the court, (p. 412,) said, "If there had been any settled course of decisions on this subject in criminal cases, we should certainly, in a prosecution of this nature, yield to such a construction of the act. But there is no such course of decisions. The mischief intended to be reached by the statute is the same, whether

it respects private or corporate persons. *That corporations are in law, for civil purposes, deemed persons, is unquestionable. And the citation from 2 Inst. 736, establishes that they are so deemed within the purview of penal statutes. Lord Coke, there, in commenting on the statute of 31 Eliz. ch. 7, respecting the erection of cottages, where the word used is 'no person shall,' &c. says this extends as well to persons politic and incorporate, as to natural persons whatsoever."

The authorities cited and opinion delivered by the supreme court of New York, in *The People v. Utica Insurance Company*, 15 Johns. 382, are to the same effect.

It was formerly argued in this court that the statute against usury (1 R. C. 373), did not apply to corporations. By the first section of that statute, the legislature had declared that no person should take for the loan of money above the specified rate, and that all contracts for payment of any money so lent, on which higher interest was reserved, should be void. By the second section, any person taken above the legal rate was made subject to a forfeiture of double the money lent. And by the third section, a borrower was authorized to exhibit a bill in chancery against the lender, and compel him to discover upon oath the amount lent. Though the language thus used, strictly construed, was applicable only to natural persons, and the statute was one of a penal character, this court held nevertheless, (three judges concurring,) that a contract with a corporation on which it reserved more than the interest specified was void. *Stribbling v. The Bank of the Valley*, 5 Rand. 141, 2, 148, 9, 189. Judge Cabell said, (p. 190). "The term 'person' used in the law is unquestionably sufficiently comprehensive to embrace corpora-

tions, and it must be held to embrace them unless there be something in the law shewing the legislative intention to restrict its application." The other two judges not

putting the case on so broad a ground, 580 he agreed with them that even if *it were true that corporations could not be punished under the second section, the contract must be vacated under the first section. For, said he, "the great object was to protect the fleeced borrower, and that object requires that the provision as to vacating the contract should apply to artificial as well as natural persons."

In *The Bank of the United States v. Deveaux*, 5 Cranch 61, the supreme court held, that under the clause of the constitution giving the federal courts jurisdiction of "controversies between citizens of different states," those courts could take jurisdiction of a controversy between a corporation and a citizen.

So far, this question has been considered upon those authorities which, it might be inferred, would take the view the most favourable that could be taken for the other side; the decisions being all of them upon penal statutes, except in one instance, and that a case of constitutional power.

It is, however, much more plain that corporations are embraced in the statute now under consideration, than in the cases which have been cited. While in those cases the statutes were generally penal statutes, and to be construed strictly, thus, it is manifest, is a remedial statute and to be construed liberally. It is laid down that a statute made for the suppression of a fraud, or to give a more speedy remedy for a right, ought to be construed liberally, because such construction is for the furtherance of justice. Bac. Abr. tit. Statute, Let. I. § 8. If this be so, surely a statute which gives a remedy where there was none before, and gives it in a case in which a remedy is necessary for the furtherance of justice, must be construed liberally. Such is the nature of the statute under consideration. It is clearly remedial. And such a construction, we are told, ought to be put upon a remedial statute as will tend to suppress the mischief intended to be remedied. Bac. Abr. tit.

Statute, Let. I. § 8.

581 *What was the mischief that this statute intended to remedy? It was, that debtors residing out of this commonwealth had effects here sufficient to satisfy such debts, and yet their creditors remained unpaid. The mischief is the same, whether the debt be due from a corporation or from a natural person; and the remedy must be coextensive with the mischief. If, for the prevention of fraud and the furtherance of justice, the remedy be necessary and proper in the one case, it is equally necessary and proper in the other.

Although then the expression in the preamble, "persons residing without the jurisdiction of this commonwealth," had been adhered to in the act itself, it would nevertheless have been proper to consider

corporations as embraced within the act. The argument that they are not persons would have been entitled to no more weight than it received in *Beaston v. The Farmers Bank of Delaware*, 12 Peters 134, 5. In the language of the court in that case, "corporations are to be deemed and considered as persons, when the circumstances in which they are placed are identical with those of natural persons expressly included in such statutes."

But when we come to the enacting clause, we find the language much more comprehensive. The suit is not confined in terms to persons, but may be "against any defendant or defendants who are out of this country, and others within the same, having in their hands effects of or otherwise indebted to such absent defendant or defendants, or against any such absent defendant or defendants having lands or tenements within the commonwealth." And there is no difficulty in holding a corporation created by another state to be a defendant out of this commonwealth. Nay more, it is, in the language of the preamble, a defendant residing without this commonwealth. For, as is said by the court in *The Bank of Augusta v. Earle*, 31 Peters 588, "a corporation can have no 582 legal existence out of the boundaries of the sovereignty by which it is created. It exists only in contemplation of law and by force of the law; and where that law ceases to operate and is no longer obligatory, the corporation can have no existence. It must dwell in the place of its creation, and cannot migrate to another sovereignty. But although it must live and have its being in that state only, yet it does not by any means follow that its existence there will not be recognized in other places; and its existence in one state creates no insuperable objection to its power of contracting in another."

When, by our laws, we permit a corporation created by another state to make within the scope of its powers a contract here, and to sue for and recover debts and effects here, it would be strange indeed if no suit could afterwards be maintained here against the corporation, to subject such debts and effects to the satisfaction of a debt justly due from it.

The words of several clauses of the statute have been commented on by the counsel on the other side. Similar comments were made in the case of *Beaston v. The Farmers Bank of Delaware*, and proved of no avail. True it is, that in the present case affidavit could not be made, that upon enquiry at the defendants' usual place of abode they could not be found. But neither could that be done in the case of a natural person who never had his abode in the commonwealth. Against such a person, as against a corporation, the affidavit would be, that the defendant or defendants are out of the commonwealth. In the language of the court in 12 Peters 135, the fact that the corporation "cannot be brought within all the predicaments stated in the statute proves

nothing, if it can be brought within any one or more of them." It was argued in that case, that a corporation could not be a deceased debtor with an insufficiency of assets in the hands of executors or administrators; that its effects could not 583 be attached as those of an absent, concealed, or absconding debtor (p. 124). But the court held the argument insufficient; and its judgment is a condemnation of that now urged under the fourth section of our statute. If a corporation created by another state cannot "appear openly within this commonwealth," so as to be served with a copy of the decree, the consequence simply is, that the bar arising from the lapse of twelve months after such appearance, without petitioning for a rehearing, will never exist against a corporation; but such corporation, not appearing in a suit against it, will only be barred after the lapse of seven years from the time of the decree.

The argument, that when the law first passed giving this remedy, no corporations existed here except those for municipal government, militates against the purpose for which it is used. For, while it accounts for the absence in the act of such words as "bodies politic or corporate," it does not shew in the least that the law-makers would have been unwilling to comprehend corporations. Such words as bodies politic or corporate, it is said, are now used when the legislature means to comprehend them; and an instance is given of their use in a statute. It is sufficient to say, that the statute referred to is of a penal character and of modern date.

The view taken of this question has been more extended than would have been deemed necessary but for the decision of the supreme court of New York in the case of *M'Queen v. The Middletown Manufacturing Company*, 16 Johns. 5. In that case the conclusion of the court upon the whole act of New York was, that the legislature intended to authorize proceedings under it against natural persons only. Since that decision, a motion has been made in the supreme court of Pennsylvania to dissolve an attachment, on the ground that a foreign corporation is not within the act of that state of 1705, nor liable to attachment by the custom of London. And after a very full investigation of the subject, 584 the court has come to the conclusion (Rogers and Gibson, now C. J., concurring) that foreign corporations are liable to foreign attachments. 15 Serg. & Rawle 173.

It is argued that inconvenience and embarrassment might result from holding that a remedy exists under our statute against a corporation created by another state. And the reason assigned is, that effects in another state of one of our banks might be attached in that state, at a time when the bank is protected by our laws. This will still be so, no matter what the decision in the present case. No decision of this court can, for example, prevent a pro-

ceeding in Pennsylvania by foreign attachment against a corporation created by this or any other state. No such decision can prevent such a proceeding now in New York. For, since the decision in 16 Johns. 5, the legislature of New York has passed a statute giving a remedy in that state against a foreign corporation by attachment. 2 R. S. 459, § 15, and p. 375 of 2d ed. § 15, cited in *Bennett v. Hartford Fire Ins. Co.*, 19 Wend. 46. Such a statute, passed by the legislature of so commercial a state, is the best possible refutation of all the arguments advanced to show that good policy forbids the existence of such a remedy.

ALLEN, J. The preamble of the act directing the method of proceeding against absent debtors recites, that creditors have experienced great difficulties in the recovery of debts due from persons residing without the jurisdiction of the commonwealth. Under this law, the plaintiffs in the court below sued out their foreign attachment against the bank of the United States; and the question is presented, whether the attachment lies against this corporation of another state?

The remedy given by this statute is an innovation upon the common law, and, as has been frequently observed by the judges, liable to great abuse. The legislature,

foreseeing that an ex parte proceeding 585 of this kind might be abused, have been careful to regulate it, and to provide sufficient security to indemnify the absent defendant for any damage improperly sustained. This court, in *Kelso v. Blackburn*, 3 Leigh 306, held that the mode pointed out must be pursued, and the requisitions of the statute strictly conformed to. But though the court is watchful in exacting a compliance with the terms of the law, this does not change its character. The statute is remedial. It gives a remedy where none existed before. This is admitted by Judge Carr, who always looked upon the proceeding with jealousy. He remarks in *Kelso v. Blackburn*, that the law was founded on the necessity of the case, lest there should be an absolute failure of justice. If the statute was necessary to suppress a mischief, and is remedial, the cases to which it extends must be ascertained by those rules of construction which are applied to the interpretation of all remedial statutes. Such statutes are to receive a liberal construction: they are to be so construed as may best answer the intention of the maker; and where a statute introduces a new remedy, the interpretation should be such as will tend to suppress the mischief and be in furtherance of justice. In cases arising under this act, it has received a liberal construction and been extended beyond the letter. The preamble mentions the difficulties experienced in the recovery of debts due. This would seem to confine the remedy to the case of a debt then payable, and for the recovery of which an action could then be maintained if the

defendant were within the commonwealth. But in *Williams &c. v. Bowie &c.*, 6 Munf. 176, it was decided that the attachment would lie to secure a note executed by the absentee and endorsed by the attaching creditor, although, at the time of suing out the attachment, the note had not been paid and was not then due.

The first section requires an affidavit of nonresidence, or of ineffectual enquiry 586 at the usual place of abode. *Taking this in connexion with the fourth section where the act speaks of the defendant's returning and appearing openly, it might be argued from the literal import of the terms, that the remedy was confined to those defendants who had at one time been residents and subject to the jurisdiction of the commonwealth. But in *Peter v. Butler*, 1 Leigh 285, it was determined, that a claim arising on a contract of bailment made out of Virginia, against a nonresident, is a claim for debt for which the foreign attachment lies; thus applying the remedy where the defendant had never been subject to the jurisdiction of the commonwealth, where the contract was made without the state, and where the plaintiff's demand was not liquidated, but sounded in damages.

It has been suggested that the law can be applied to those cases only, where the defendant would, if within the jurisdiction of the commonwealth, be liable to be sued; and that this cannot be predicated of a foreign corporation, for it can have no legal existence without the bounds of the sovereignty which created it. The fact might be conceded, and yet the consequence does not necessarily follow. There is nothing in the act restricting it to defendants who could be sued if within the commonwealth. The law extends to all nonresidents. Whilst they continue without the state, they never could be subject to the jurisdiction of the commonwealth; and the law was passed to enable the creditors to reach their effects, because they would not submit themselves to the jurisdiction of the state. And can it make any difference in the operation of the act, whether the jurisdiction of the commonwealth is prevented from attaching by the defendant's remaining out of the state, or because he can never come within it? If the defendant is a nonresident, (to whatever cause owing) so as to be without the jurisdiction of the commonwealth, and has effects subject to its 587 jurisdiction, *the case is made out to which the law was intended to apply.

If this were an act to force an appearance, —to compel the defendant, by attaching his effects, to appear to an ordinary action, it might be contended with much force, that the act could apply to such defendants only as would be liable to suit if within the jurisdiction of the state. The law might be considered as ancillary to the ordinary proceeding; a mere substitution of one form of process for another; and being but an incident to the principal subject, ought not to be construed as extending to cases where

without it the court could not take jurisdiction.

This was the difficulty in the cases referred to, decided in Pennsylvania and New York. In the former state they have no chancery court. The case of *Bushel & Co. v. The Commonwealth Ins. Co.*, 15 Serg. & Rawle 173, was a proceeding at law. It appears from the report of the case, that by their statute the defendant was authorized to appear upon putting in bail to the action. Natural justice demands that in all such laws a provision should be made to enable the absentee, on certain conditions, to appear and controvert the justice of the claim set up against him. This law did contain such a provision; but it was one of which the absent defendant, being a corporation, could not take advantage. A recognizance of special bail could not be acknowledged for it, as the condition to surrender the body was impossible. It was therefore insisted that the law could not be so construed as to embrace corporations. But even in that case the objection was overruled and the jurisdiction sustained.

The supreme court of New York in *M'Queen v. The Middletown Manu. Co.*, 16 Johns. Rep. 4, gave a different construction to their statute against absconding or absent debtors, and held that the attachment authorized by that act did not lie 588 against a corporation. The 23d "section of their act used the phrase "every debtor who resides without the state." These words, if they had stood alone, would have comprehended corporations. But the court, taking the 23d in connexion with other sections of the act, held that natural persons only were included. For this construction reliance was mainly placed on the 21st section, which provided that the debtor might supersede the attachment, upon giving security to appear and plead to any action of law or in equity brought against him in the state within six months. This supposed that the defendant would, if within the state, be subject to an ordinary suit. In requiring security to be given to appear and plead to any such action, the makers, it is to be presumed, meant to confine the remedy to such defendants as could place themselves in that predicament,—subject themselves to the jurisdiction of the courts. In the case of a foreign corporation, there was no person upon whom process could be served, and therefore no mode of instituting an action against it. For, in the language of the supreme court of the United States in *The Bank of Augusta v. Earle*, 13 Peters 588, "a corporation exists only in contemplation of law and by force of the law; and where that law ceases to operate and is no longer obligatory, the corporation can have no existence. It must dwell in the place of its creation, and cannot migrate to another sovereignty." Though there had been no conflict in the opinions of the two courts referred to, and both had decided under their laws that the attachment did not lie, the decisions would

not have affected the construction of our statute. The law in each case contemplated a legal proceeding in the ordinary tribunals and in the accustomed mode.

Nothing of the kind is found in our act. The whole jurisdiction is confided to a court of equity. The proceeding is a bill for relief. The defendant may appear: this a corporation can do by attorney. The 589 defendant "can discharge the attached effects by giving security to perform the decree: such security may be given for a corporation by a third party, or it can deposite the amount in court. And whether the defendant appears and answers or not, the court hears the case upon the proofs and pronounces a final decree. In *Beaston v. The Farmers Bank of Delaware*, 12 Peters 134, 5, the court say that corporations are to be deemed and considered as persons, when the circumstances in which they are placed are identical with those of natural persons included in the statute. The circumstances in which they are placed by our act are identical with those of the natural person who continues without the state. The same opportunity, and to the same extent, is afforded to each for defending the suit; and after the seven years have expired, the decree is conclusive as to both, without the service of a copy, or any thing more being done. None of the reasons which created a doubt under the laws of New York and Pennsylvania apply: no action at law, no ulterior proceeding in the accustomed mode is provided for or contemplated.

Upon principle, and in view of the construction given to the act in the cases occurring under it, the jurisdiction, I think, may be maintained. But if this were more doubtful than it seems to me it is, there are other grounds upon which the jurisdiction may be supported.

For civil purposes, corporations are in law deemed persons. *The United States v. Amedy*, 11 Wheat. 393. This proposition has not been controverted. In the case of *Beaston v. The Farmers Bank of Delaware*, above cited, the question arose whether the act of congress giving priority in certain cases to the United States extended to corporations? The words of the act are, "When any revenue officer or other person becoming indebted &c." The court decided that corporations were included. So in *Stribbling v. The Bank of the Valley*, 5 Rand. 132, the word person in the law 590 against usury was held to "embrace corporations. The only doubt has been whether that word would be so construed as to embrace them within the purview of penal statutes: and in the case of *The United States v. Amedy*, the court, upon the authority of lord Coke in 2 Inst. 736, decided, that under the act of congress making it felony to destroy a vessel with intent to prejudice any person or persons that hath underwritten, corporations were comprehended by the words person or persons. The word being sufficiently comprehensive to embrace corporations, "it

must be held to embrace them" (in the language of judge Cabell in *Stribbling v. The Bank of the Valley*) "unless there be something in the law shewing the legislative intention to restrict its application." Were it necessary, this construction might be supported by a reference to the enacting clause. The language there is, "a suit in chancery against a defendant or defendants out of the state;" terms sufficiently broad to include every party, whether natural or artificial, capable of being sued. A corporation is as much within the mischief as a natural person. It is capable of contracting, of holding effects. There is nothing in the law restricting the remedy to natural persons; and the terms being sufficiently extensive to include corporations, the jurisdiction, it seems to me, is clear.

I am for affirming the order.

STANARD, J., dissented, and stated that Brooke, J., who had had the benefit of the argument and had examined the case, authorized him to say, that if he could have been present at the decision, he should also have dissented.

But BALDWIN, J., and CABELL, P., concurring with Allen, J., the order was affirmed.

591 *Herrington v. Harkins's Adm'rs.*

February, 1843, Richmond.

(Absent CABELL, P., and BROOKE, J.)

Statute of Limitations—How Taken Advantage of.—

Where an action of debt is brought on a judgment after ten years from the date thereof, and the defendant wishes to avail himself of the statute of limitations, it is necessary that he should do so by plea. A demurrer to the declaration is not the proper mode to take advantage of the statute.

Same—Construction of Statute—Action of Debt.—The statute 1 R. C. 1819, p. 489, ch. 128, § 5, declaring that where execution hath issued and no return is made thereon, the party in whose favour the same was issued may obtain other executions for ten years from the date of the judgment and not after, does not bar such party from maintaining an action of debt on the judgment after ten years.

Continuance—Good Cause for—First Term.—Where an issue is made up in a cause at the first term after

*For monographic note on Limitation of Actions, see end of case.

†**Statute of Limitations—How Taken Advantage of.**—See the principal case cited in a note in 6 Va. Law Reg. 568, appended to *Hubble v. Poff*, 98 Va. 646, 37 S. E. Rep. 277. The principal case is also cited in 3 Va. Law Reg. 64. See foot-note to *Tazewell v. Whittle*, 18 Gratt. 329, and monographic note on "Demurrers" appended to *Com. v. Jackson*, 2 Va. Cas. 501.

‡**Same—Construction of Statute—Action of Debt.**—The principal case is cited in *Smith v. Charlton*, 7 Gratt. 450.

There is no limitation by statute, to an action of debt, or *scire facias* on a judgment, except only in the case of a judgment on which no execution has been taken out. *Randolph v. Randolph*, 8 Rand. 490. See *Fleming v. Dunlop*, 4 Leigh 328.

the suit is brought, and the defendant, when the cause is called, moves for a continuance, he must, according to the act 1 R. C. 1819, p. 508, ch. 128, § 78, shew good cause for such continuance; otherwise the court, although it be the first term, will try the cause at that term.

Same—Same.—What is not good cause for a continuance.

Accord and Satisfaction—Plea Insufficient.—In debt on a judgment the defendant pleads, that by an agreement in writing between the parties, the judgment was discharged and satisfied by a new contract, for the payment of a sum in cash, which was then paid, and for the payment of the balance by deferred instalments, whereby the said judgment was remitted and released, and accord and satisfaction thereof made. The plaintiff demurred to this plea, and the demurrer was sustained.

Appellate Court—Rejected Plea—Bill of Exceptions.—

§**Accord and Satisfaction—Joint Trespassers—Release of One—Effect.**—The principal case is cited in *Bloss v. Plymale*, 3 W. Va. 409.

Novation—Specialty—Discharge of Instruments.—In *Moore v. Johnson*, 84 W. Va. 679, 13 S. E. Rep. 321, the court said: "The old common law was that a specialty could not be discharged by a parol undertaking (5 Rob. Pr. 740; *Wilson v. Spencer*, 11 Leigh 273; note a, 1 Tuck. Bl. Comm. 389; 1 Chit. Pl. 594); and, as pertinent to this matter of novation, three cases in Virginia hold that, to make one instrument an extinguishment of another, the new must be of higher dignity than the old, and an express agreement that the note shall extinguish the specialty would be a *nudum pactum*, and if the note is not paid the bond will still live, notwithstanding the agreement that it should be discharged (*McGuire v. Gadsby*, 3 Call 234; *Herrington v. Harkins*, 1 Rob. 501; *Parker v. Cousins*, 3 Gratt. 373; *Bank v. Good*, 31 W. Va. 466)." The principal case is cited in *Bank v. Good*, 31 W. Va. 466; *Bantz v. Bassett*, 12 W. Va. 323, 324, 347.

¶**Appellate Court—Rejected Plea—Bill of Exceptions.**—See foot-notes to *Dickinson v. Dickinson*, 25 Gratt. 322; *Bowyer v. Hewitt*, 2 Gratt. 193.

The principal case is cited in *Lawrence v. Com.*, 86 Va. 579, 10 S. E. Rep. 840; *Fry v. Leslie*, 87 Va. 275, 12 S. E. Rep. 671; *Williams v. Knights*, 7 W. Va. 333. See also, *King v. Burdett*, 12 W. Va. 688.

Same—Same—Same—Order Book—Principal Case Distinguished.—If a rejected plea is by order of the court made a part of the record, and the order book shows, that its rejection was excepted to, the supreme court of appeals will review the action of the court in rejecting such plea, though no formal bill of exceptions was taken to the rejection of such plea. *Sweeney v. Baker*, 18 W. Va. 160, citing and distinguishing the principal case, *White v. Toncray*, 9 Leigh 347, and *Morrisett's Case*, 6 Gratt. 673, in the following language on page 212: "These cases all differ from the case before us in this, that in all of them the record did not show, that the rejection of the pleas were excepted to by the defendants. In each of them not only was no bill of exceptions filed, but no entry was made on the order book, that the defendants objected, or excepted to the action of the court in rejecting their pleas. But in the case before us the order book expressly states, when these pleas were rejected, the defendants' exception to the ruling of the court in rejecting them."

The decision in *White v. Toncray*, 9 Leigh 347, that where pleas are rejected an appellate court will take it to have been rightly done unless the defendant has excepted, approved and acted on.

On the 6th of April 1835, James W. Clemens administrator and Elizabeth Harkins administratrix of William Harkins deceased, commenced an action of debt in the circuit court of Norfolk borough against John Herrington. The declaration demanded 1250 dollars with interest thereon from the 20th day of August 1817, and 8 dollars 75 cents costs of suit. The first count set forth *that William Harkins in his lifetime, to wit, on the 20th of August 1817, at the August term of the court of the county of Ohio in the state of Virginia, recovered against the defendant the sum of 1250 dollars with interest, and 8 dollars 75 cents, as demanded; that afterwards in the lifetime of the said William Harkins, to wit, on the 21st of August 1817, a writ of *capias ad satisfaciendum* was issued upon the said judgment, which writ was never executed or returned; and that the said judgment still remains in full force and effect, not reversed, satisfied or otherwise vacated. The second count was similar, with the additional allegation that the said William Harkins, in his lifetime, and the plaintiffs since his death, have not obtained any other execution or satisfaction of or upon the said judgment.

The defendant demurred generally to the declaration, and the plaintiffs joining in the demurrer, the same was argued and overruled. The defendant then pleaded payment, upon which an issue was joined.

On the 15th of June 1835, subpoenas were issued for the defendant's witnesses, returnable to the 18th of that month; one for Ann Jeffrey and John Vangover, directed to the sergeant of Norfolk borough, the other for William Carter, directed to the sergeant of Petersburg, both of which subpoenas were returned executed. When the cause was called, the defendant moved for a continuance upon his own affidavit that these three persons were all important witnesses for him, and that he could not safely go to trial without them, and upon the statement of his counsel that William Carter, one of the said witnesses, was absent. The motion for a continuance was opposed by the plaintiffs, on the ground that they had incurred great trouble &c. in procuring from the county of Ohio two witnesses, who were then present, and upon the further ground of the insufficiency of the said affidavit. At the suggestion and request of the plaintiffs' counsel, the court directed that the defendant, *who resided in town, should be sent for; and upon his coming in shortly afterwards, the court, being then informed that the witness Carter had arrived in town, permitted the defendant, assisted by one of the officers of the court, to go and endeavour to obtain the immediate attendance of Carter, and also the attendance of the other wit-

nesses named in the affidavit. The court was kept open until night, waiting for the defendant and his witnesses; but some of the witnesses having failed to come, because (in the language of the bill of exceptions) "the defendant would not or could not find the said witnesses," the court adjourned until the next day, with the understanding that the case would be called and tried on that day. On the next day the case being accordingly called, the defendant appeared in court, and by his counsel offered, in addition to the plea of payment upon which issue was previously joined, five special pleas in writing, and again urged the court (not upon oath, but through his counsel) to continue the case, for the following reasons: 1. because the suit had been but very recently brought, and his counsel therefore did not expect it would be tried; 2. because the defendant desires and expects to prove (but without saying by whom) that he the defendant was in the town of Petersburg at the time of the rendition of the judgment in the declaration mentioned, when in fact, as the defendant alleges, the individual against whom the said judgment was rendered was in court, and actually present at the rendition thereof; and 3. because his counsel, in consequence of their engagements, had not had sufficient time to prepare his defence. But the witness Carter (on account of whose alleged absence the motion had been urged) and the witness Vangover having both appeared in court, and Ann Jeffrey, who lives in Norfolk, having, as well as the defendant himself, been present in court the previous afternoon when notice was given that the case would be tried, and the court being satisfied *that if the defendant had used due diligence he could have produced her, the motion was overruled. To this decision the defendant excepted. In the bill of exceptions it was stated, that the court believed, from the evasive and equivocating conduct and deportment of the defendant, that in making the said application he was induced by no honest purpose, but by the desire to delay the trial, and probably, as the consequence of it, to produce the final loss of the plaintiffs' demand, by the death of their witnesses or otherwise.

In the transcript of the record, the five pleas in writing were copied. They were as follows: 1. That the defendant is not the same John Herrington mentioned in the record of the county court of Ohio. 2. That the judgment has been paid off and fully discharged by the special bail of the said John Herrington. 3. That the said William Harkins in his lifetime, to wit, on the 8th of May 1818, for and in consideration of the sum of 666 dollars and two thirds of a dollar, did acquit, release and discharge the said special bail, who was bail for the said John Herrington in the proceedings of Ohio court mentioned, and thereby the said judgment was, by operation of law, fully and entirely satisfied and of no farther force. 4. That the plaintiffs are barred by

the statute of limitations entitled "an act for limitation of actions, for preventing frivolous and vexatious suits, concerning jeofails and certain proceedings in civil cases," from having and maintaining their action against him, because he says that 17 years and 6 months had elapsed from the rendition of the said judgment to the institution of this suit. 5. That the judgment of the county court of Ohio was, by an agreement between the said William Harkins and the said John Herrington in writing, in the possession of the said William Harkins, discharged and satisfied by a new contract, for the payment of 400 dollars in cash, which was then and there paid, and the balance of the said amount was to be paid by deferred instalments; whereby the said judgment was remitted and released, and accord and satisfaction thereof made.

In that part of the transcript of the record wherein the pleas were introduced, it was stated that the defendant, with the leave of the court, filed five pleas in writing, in hæc verba. After copying the pleas, it was stated that to the first of the said pleas the plaintiffs replied generally, and put themselves upon the country, and the defendant likewise; that the plaintiffs objecting to the filing of the second and third, the court rejected the same; that to the fourth the plaintiffs filed a special replication; and that to the fifth they demurred.

The replication to the fourth plea was in general terms, that the plaintiffs were not barred by the statute of limitations mentioned in the plea from having and maintaining their said action. It concluded to the country, and issue was joined on it.

In the demurrer to the fifth plea the defendant joined, and the demurrer, being argued, was sustained by the court.

Thereupon, to wit, on the 19th of June 1835, a jury was sworn to try the issues joined on the plea of payment and on the first and fourth pleas. The jury found a verdict for the plaintiffs, and judgment was rendered on the same.

To this judgment, on the petition of the defendant, a supersedeas was awarded.

Braxton for plaintiff in error. The court erred in overruling the motion for a continuance. It was not only a new issue in a case for the first time on the docket, but the suit had been brought only 73 days before it was called for trial. Nevertheless it was tried when the state of the pleadings was necessarily embarrassed, when the counsel of the defendant, in consequence of other professional engagements, was

not prepared for the trial, and when one of the defendant's witnesses was absent. The defendant had sued out a subpoena and had it regularly served on Ann Jeffrey in due time. He had done all that was in his power for securing the attendance of the witness; and if she did live in Norfolk borough, it by no means follows that the party could have procured her attendance at the trial.

The demurrer to the declaration was im-

properly overruled; for, besides other objections, the claim on the face of the declaration appears to be barred by the statute of limitations. *Fleming's ex'or v. Dunlop &c.*, 4 Leigh 338. The second plea was also improperly rejected, and the demurrer to the fifth improperly sustained.

G. N. Johnson for defendants in error. The various and inconsistent defences put forward by the defendant tend strongly to shew of themselves that the only object of the party was delay.

The statute of limitations cannot be taken advantage of by demurrer to the declaration. It can only be availed of by plea; and where the plea is not special, but the general issue, the record must shew that the statute was relied upon as a defence under it. Here the defendant pleaded the statute specially; the issue on that plea was found for the plaintiffs, and no objection was taken by the defendant to that finding. Besides, the declaration does not shew when the suit was instituted, and so it does not appear what length of time had elapsed between the judgment and the bringing of the action; the writ not being made a part of the record by oyer.

But if it be necessary to consider the effect of the statute, the opinion in *Randolph's adm'x v. Randolph*, 3 Rand. 493, is in point. Judge Green there lays down, that there is no limitation by statute to an action of debt or scire facias upon a judgment, except only in the case of a judgment on which no execution

has been taken out, and in cases against executors or administrators upon a judgment against the decedent.

The court had the right, in the exercise of a sound discretion, to reject the second as well as the third plea. *Reed v. Hanna's ex'or*, 3 Rand. 56. The matter was already put in issue by the plea of payment before filed. Besides, the rule that matter amounting to the general issue shall not be received in the form of a special plea, if objected to, is applicable; for the plea of payment is regarded as a general issue in this state. *Henderson &c. v. Southall &c.*, 4 Call. 371. Certainly a special plea of payment by a particular person (as the bail) is idle and unnecessary. In *The King v. Johnson*, 6 East 597, the objection was, that the plea was an argumentative plea of not guilty; and here the plea is an argumentative plea of payment.

The demurrer to the 5th plea was properly sustained. 1 Bac. Abr. title Accord. letter A.; 1 Com. Dig. title Accord. A. 1, pl. 8, A. 2, pl. 4, 5, B. 1, pl. 2, 5, B. 2, pl. 2, B. 4, pl. 1, 3; *Fitch v. Sutton*, 5 East 230; *Harrison v. Close &c.*, 2 Johns. Rep. 448. In this case the agreement stated was no satisfaction of the judgment. It was in truth an agreement without consideration and void, so far as regarded the excess of the amount recovered by the judgment, over the amount paid in cash.

The attorney general on the same side. The grounds of continuance set out in the bill of exceptions were merely stated by the

counsel, and not sworn to by the defendant. The grounds themselves were moreover wholly insufficient, even if they had been verified by affidavit. They were altogether too vague and uncertain.

The objection to the declaration, that it shews the judgment barred by the statute of limitations, can at most apply but to one count; for the first does not contain "any statement that no new execution had been sued out. But the question as to the effect of the statute cannot arise at all upon demurrer to the declaration. It is not necessary, therefore, to go into an argument to shew that an action of debt upon the judgment is not barred.

The second and fifth pleas were properly overruled. For the second does not aver that there was any special bail, nor who he was, nor when or where he paid. And the fifth pleads a mere parole agreement unexecuted, in bar of the action on the judgment.

Lyons on the same side. As the witnesses whose materiality was sworn to were all brought into court before the trial, the affidavit of the defendant may be thrown out of the case. It is obvious from the fact that the first special plea is wholly inconsistent with the second, and with the general plea of payment, that the motion for a continuance was a mere scheme to procure delay.

The demurrer to the declaration cannot raise the question whether the judgment is barred by the statute of limitations. *Blanchard on Lim.* 141. As there were issues made up on a plea of payment, a plea of the statute of limitations, and a plea denying the identity of the defendant, the proper mode of presenting any of the questions involved in those issues to the review of this court was, by moving the court at the trial to instruct the jury, or, after the trial, to grant a new trial, and excepting to the refusal of the court to give the instruction or award the new trial.

The fifth plea was clearly bad. *Peploe v. Galliers*, 4 J. B. Moore 163; 16 Eng. Com. Law Rep. 371; *Kaye v. Wagborne*, 1 Taunt. 428; *Drake v. Mitchell*, 3 East 251; *Scholey &c. v. Mearns*, 7 East 148. Accord and satisfaction cannot be pleaded to an action on a record. 1 Saund. on Plead. & Ev. 27.

599 *Braxton in reply. The want of an affidavit to the statements of the defendant's counsel was no ground for refusing the continuance. Such an affidavit is never required in practice. If the motion was disposed of on the first day, the refusal of the continuance was clearly erroneous, as there was then before the court the defendant's own affidavit of the materiality of the witnesses who had been summoned and were not in attendance: if the motion was kept open until the second day, the reasons of the court for then overruling it were wholly insufficient; for even if the defendant's witnesses were then in Norfolk, (which does not appear to be established by any thing in the record) that fact would

not shew that the defendant could, by any exertion of his, have brought them to the court. [Stanard, J. In such case, is it not the usual practice to bring in the witness by attachment, instead of granting a continuance on account of his absence?] I believe that such practice is not usual, where the action is newly brought, and the case is for the first time called for trial. Even if no one of the circumstances in this case were of itself sufficient to entitle the defendant to a continuance, yet the whole of them taken together constitute ground of the strongest description.

The authorities do not sustain the general proposition, that the defence of the statute of limitations is not available without pleading the statute. In assumption, it is true, the defendant must plead it specially. *Gould v. Johnson*, 2 Ld. Raym. 838; *Lee v. Rogers*, 1 Levinz 110; *Hodaden v. Harridge*, 2 Wms. Saund. 63, note 6. But in debt it is otherwise: the defence of the statute may be availed of under the general issue of nil debet. *Ballant. on Lim.* 215; *Draper v. Glassop*, 1 Ld. Raym. 153. [Stanard, J. The defendant is required to avail himself of the statute by plea rather than demurrer, that the plaintiff may have an opportunity of bringing himself, if he can, within the exceptions.]

600 *In *Randolph's adm'x v. Randolph*, 3 Rand. 493, the execution had been returned, and judge Green's remark, relied upon by the other side, was not applicable to the case then before the court. In *Fleming's ex'or v. Dunlop &c.*, 4 Leigh 338, the proceeding was by scire facias, and an execution sued out on the judgment had not been returned. The remark of Tucker, P., that where execution has issued, though no return be made thereon, the action of debt is not barred, like the remark of judge Green just adverted to, had no application to the case before him. Upon the just construction of the statute, both the scire facias and the action of debt are barred after the lapse of ten years from the date of the judgment, where no execution has been returned.

ALLEN, J. The only question of interest in this case is whether the statute of limitations was a bar to the recovery. The defendant, improperly as it appears to me, attempted to rely on the statute of limitations by a general demurrer. This was overruled. But the defence was presented by an informal plea, to which there was an equally informal replication, concluding to the country, when in fact the pleadings presented a mere question of law. There was a verdict for the plaintiffs, and judgment. This judgment I consider as a decision of the court upon the law; and if correct, it ought not to be disturbed because the issue tried by the jury may have been informal.

In *Randolph's adm'x v. Randolph*, 3 Rand. 490, judge Green remarked, that there is no limitation by statute to an action of debt or scire facias upon a judgment, except only in the case of a judgment on which no

execution has been taken out, and in case of executors &c. The correctness of this observation, as to a scire facias where an execution had been taken out and not returned, came under the consideration of this court in Fleming's ex'or v. Dunlop &c., 4 Leigh 338. There an execution had been sued out within the year, and another at a subsequent period, but neither returned; and to a scire facias sued out more than ten years after the judgment, the statute was held to be a bar. But judge Tucker concurred with judge Green in the opinion that debt would not be barred.

At common law there was no limitation to the action of debt; nothing but the presumption of payment or satisfaction, arising from a delay to proceed upon the judgment for 20 years. This being the law, the statute provided that judgments, where execution hath not issued, may be revived by scire facias or an action of debt brought thereon within ten years next after the date of such judgment, and not after. No other reference is made to the action of debt. At common law, if no execution was issued within the year, a presumption of satisfaction or release was raised, and the plaintiff was driven to his action of the judgment. To this the statute of Westminster the 2d superadded a scire facias, to give the plaintiff the benefit of the original judgment. And the first provision in the 5th section of our statute limits the remedy to ten years.

Where an execution had issued but was not returned, the execution could not be kept alive for want of continuances on the roll, and the party was driven to his scire facias or action. 4 Leigh 343. The second clause of the 5th section was designed to relieve the plaintiff from this inconvenience, and does so by authorizing him to obtain other executions within ten years without a scire facias. But unless he procures a return on the execution within the ten years, the act is a bar to obtaining any other execution on the judgment. But nothing is said as to the action of debt. Where the legislature intended to limit the recovery by action, as in the case first provided for, where no execution ever issued, they have done so by express words. Their attention was directed to the subject; and as they have *dropped the action of debt in the second clause, by which they designed to limit the time of proceeding on the same judgment, it would be a forced construction to hold that it was embraced by any equitable interpretation of the statute.

The 6th section, which contains a saving in favour of persons labouring under disabilities, conforms to the 5th, and shews the extent to which the legislature intended to proceed, and that the omission of the action of debt in the second provision of the 5th section was not owing to inadvertence. The first provision of the 6th section relates to the first provision of the 5th. As by that, where no execution had

issued, the remedy by scire facias or action of debt was limited to ten years, by the proviso in the 6th a further time is allowed in similar cases, after the disability is removed, for reviving by scire facias or action. Here the action of debt is again specified. The second provision of the 6th section, corresponding with the second provision of the 5th, by which, where an execution had issued and not been returned, the party was allowed to obtain other executions, allows a further time to obtain executions on the identical judgment after the disability is removed, but is silent as to the action of debt.

It seems to me, therefore, that as it appears an execution was sued out within the year and not returned, though a scire facias to obtain another execution on the same judgment would have been barred, the bar does not apply to the action of debt.

As to the other questions presented by the record, it seems to me the court did right in overruling the motion for a continuance, and in sustaining the demurrer to the fifth plea. As to the second and third pleas, there is no exception to the decision of the court rejecting them. In White v. Toncray, 9 Leigh 347, it was determined, that if pleas be tendered by the defendant and rejected by the court, and he take

no exception *to the rejection of them, he shall be presumed in the appellate court to have acquiesced. In this case, it is true, the record sets out that the pleas were filed: but this, in view of the subsequent motion to reject, and the action of the court, I consider as a mere note of the clerk, and as shewing nothing more than that the pleas were tendered.

I think the judgment should be affirmed.

The other judges concurring, the judgment was affirmed.

LIMITATION OF ACTIONS.

- I. Scope of Title.
- II. Operation and Effect.
 1. Statute of Repose.
 2. Mode of Testing Application.
 3. Effect of Statute on Presumption of Payment.
 4. Distinguished from Presumption of Payment.
 5. Retrospective Effect.
 6. Constitutionality of Statutes of Limitation.
 7. Statutory Provisions.
 8. Possession of Land Not Adverse.
 9. Generally.
- III. What Law Governs.
- IV. Waiver and Estoppel.
- V. When Statute Begins to Run.
 1. General Rule.
 2. Dependent on Future Event.
 3. Fraud, Mistake and Deceit.
 4. Fraudulent and Voluntary Transfers.
 5. Recovery of Land.
 6. Suits between Partners.
 7. Legacies.
 8. Remainders and Reversions.
 9. Agency.
 10. Action for Seduction.
 11. Damage by Railroads.

12. Sureties.
13. Assessments.
14. Trusts.
15. Other Instances.
- VI. By and against Whom Statute Pleded.**
 1. General Rules.
 2. Specific Instances.
 - a. Beneficiaries.
 - b. Joint Defendants.
 - c. Sheriffs.
 - d. Assignees.
 - e. Public Corporations.
 - f. Foreign Corporations.
 - g. Personal Representatives, Fiduciaries, Heirs, etc.
 - h. Lessees.
 - i. Escheators.
 - j. Husband and Wife.
 - k. Trustees.
 - l. Creditors.
 - m. Purchasers.
 - n. State.
- VII. Suspension and Interruption of Statute.**
 1. In General.
 2. War and Stay Law.
 3. Infancy.
 4. Coverture.
 5. Mistake.
 6. Ignorance.
 7. Obstruction of Prosecution.
 8. By Provisions in Will.
 9. By Agreement of Parties.
 10. Tacking Disabilities.
 11. Fraud.
 12. Order of Reference in Creditors' Suits.
 13. Departure from State.
 14. Happening of Subsequent Event.
 15. Merging Cause of Action.
 16. Void Legal Proceedings.
 17. Statutory Provisions.
 18. Legal Proceedings.
 - a. Pending Suits in General.
 - b. Suit in Another State.
 - c. Set-Offs.
 - d. Executions.
 - e. Injunctions.
 - f. Amendments.
 - g. Limitation Ceases on Commencement of Action.
 - h. Dismissal, Nonsuit or Failure of Action.
- VIII. Acknowledgment, New Promise and Part Payment.**
 1. Acknowledgment and New Promise.
 - a. General Principles and Rules.
 - b. What Constitutes.
 - c. Certainty and Sufficiency Required.
 - d. Construction and Operation.
 - e. Who May Make.
 2. Part Payment.
- IX. In Equity.**
 1. Where Equity Has Exclusive Jurisdiction.
 2. Where Jurisdiction Is Concurrent—Rule of Analogy.
- X. In Criminal Cases.**
- XI. Pleading and Practice.**
 1. The Plea.
 2. Must Be Pleded.
 3. How Pleded.
 - a. Plea.
 - b. Demurrer.
 - c. Answer.
 - d. Amendment.

- e. Exception to Commissioner's Report.
- f. Before Commissioner.
- g. On Trial.
- h. Replication.
4. When Pleded in General.
5. Replication.
6. Declaration.
7. Instruction.
8. Execution.
9. Verdict.
10. Bill of Review and Discovery.
- XII. Evidence.**
 1. Admissibility, Sufficiency and Weight.
 2. Presumption and Burden of Proof.
- XIII. Appeals.**
 1. From Interlocutory Decrees.
 2. Raising Question on Appeal.
 3. Motion to Dismiss.
 4. Appeal Bond.
 5. Presentation of Petition.
 - a. In Virginia.
 - b. In West Virginia.
- XIV. The Statute in Particular Instances.**
 1. Accounts.
 2. Bankruptcy.
 3. Bonds.
 4. Conversion.
 5. Death by Wrongful Act.
 6. Decrees.
 7. Judgments.
 8. Malicious Prosecutions.
 9. Motions.
 10. Notes.
 11. Parol Contracts.
 12. Partnership Accounts.
 13. Trusts.
 14. Voluntary Conveyances.
 15. Other Instances.

Cross References to Monographic Notes.

- Adversary Possession, appended to *Nowlin v. Reynolds*, 25 Gratt. 137.
 Estoppel, appended to *Bower v. McCormick*, 23 Gratt. 310.
 Laches, appended to *Peers v. Barnett*, 12 Gratt. 410.

I. SCOPE OF TITLE.

This article does not include cases of limitations arising from laches, presumption of payment, or adverse possession. The subject has also been included in many of the monographic notes of this series, and attention is directed to the notes on the specific subjects for a more complete collection of cases.

II. OPERATION AND EFFECT.

1. **STATUTE OF REPOSE.**—Statutes of limitation are to be enforced by the courts like any other statute. They are statutes of repose, and are dictated by a wise policy founded upon the presumption against him, who has unreasonably delayed the assertion of his demand, and in favor of him who has long exercised the dominion of owner. *Virginia, etc., Co. v. Hoover*, 82 Va. 449, 4 S. E. Rep. 689; *Taylor v. Burnside*, 1 Gratt. 187; *Flanagan v. Grimmet*, 10 Gratt. 421; *Smith v. Chapman*, 10 Gratt. 445; *Anderson v. Harvey*, 10 Gratt. 386.

2. **MODE OF TESTING APPLICATION.**—The proper mode of testing the application of the statute of limitations is to enquire, not whether the plain tiff might have brought at a given time a premature or groundless action, as where it has been suspended or discharged, but whether his cause of

action had accrued—whether he had the right to sue, and was bound to do so, in order to prevent or suspend the running of the statute. *Horner v. Speed*, 2 P. & H. 616.

3. EFFECT OF STATUTE ON PRESUMPTION OF PAYMENT.

Remedy Barred.—In a suit to enforce a debt the statute of limitations bars the remedy but does not extinguish the debt, and therefore if it be secured by a deed of trust, though no action may be brought for its recovery, the lien of the deed is not affected by any lapse of time short of the period sufficient to raise the presumption of payment. *Criss v. Criss*, 28 W. Va. 388, citing *Hanna v. Wilson*, 8 Gratt. 243; *Pitzer v. Burns*, 7 W. Va. 63; *Camden v. Alkire*, 24 W. Va. 675; *Ross v. Norvell*, 1 Wash. 14; *Coles v. Withers*, 33 Gratt. 187; *Smith v. Washington, etc., R. Co.*, 33 Gratt. 617.

The right to enforce a deed of trust is barred by the presumption of payment, which arises after the lapse of twenty years, and this bar is not affected by the provision for a statute of limitations for trust deeds by Acts 1897-8, p. 316. *Turnbull v. Mann*, 99 Va. 41, 37 S. E. Rep. 288.

In West Virginia the period of twenty years is still the time within which the lien of a trust deed or mortgage may be enforced, notwithstanding the fact that by statute the limitation of the right of entry on land has been made less than twenty years. *Camden v. Alkire*, 24 W. Va. 674.

The fact that a debt secured by a deed of trust is barred by the statute of limitations, does not, as a general rule, extinguish the security or prevent the enforcement of the lien by suit. *Camden v. Alkire*, 24 W. Va. 674.

The reduction of the limitation to an action of ejectment does not reduce the time in which presumption of payment arises. *Criss v. Criss*, 28 W. Va. 388.

4. DISTINGUISHED FROM PRESUMPTION OF PAYMENT.—There is a recognized distinction between the statute of limitations, and the presumption of payment from lapse of time, the condition of the parties, and their relations towards each other. In the former case the bar is absolute; in the latter it is a rule of evidence, and may be rebutted. *Clendenning v. Thompson*, 91 Va. 513, 23 S. E. Rep. 233.

5. RETROSPECTIVE EFFECT.

In General.—A statute changing the period of limitations will not be applied to antecedent transactions, unless its letter or necessary intent demand a retroactive construction. *Walker v. Burgess*, 44 W. Va. 399, 30 S. E. Rep. 99; *Stewart v. Vandervort*, 34 W. Va. 524, 12 S. E. Rep. 736. And though the statutes of limitation do not destroy the right, but affect only the remedy, the West Virginia court has applied this rule to such statutes in numerous cases. *State v. Mines*, 38 W. Va. 125, 18 S. E. Rep. 470; *Maslin v. Hiett*, 37 W. Va. 15, 16 S. E. Rep. 437; *Fowler v. Lewis*, 36 W. Va. 112, 14 S. E. Rep. 447. Thus the following clause contained in ch. 4, Acts 1895, "but if such transfer or charge is admitted to record within eight months after it is made, then such suit to be available must be brought within four months after such transfer or charge was admitted to record," does not apply to transfers or charges in existence prior to the passage of such enactment, which was on February 10, 1895. *Casto v. Greer*, 44 W. Va. 332, 30 S. E. Rep. 100.

Construction.—Statutes of limitation are never to be construed retrospectively, unless such construc-

tion is required by express command, or by necessary and unavoidable implication. *Maslin v. Hiett*, 37 W. Va. 15, 16 S. E. Rep. 437.

Limitation of Actions on Indemnifying Bonds.—The proviso in the act of Feb. 28, 1838 (Sup. Rev. Code 272, sec. 1), limiting actions on indemnifying bonds to seven years, does not apply to an action on a bond executed prior to the passage of the act. *Deval v. Malone*, 14 Gratt. 24.

Extension of Time on Implied Contracts.—The general limitation act, ch. 102, Acts 1863, extending the period of the statute of limitations in certain cases, is constitutional when applied to an implied contract, and where the act applies, a party may go back more than five years before the suit is brought, in an account for rents and profits. *Sturm v. Fleming*, 31 W. Va. 701, 8 S. E. Rep. 363.

Express Contracts.—Acts of 1872-73, ch. 112, providing for the elimination of the time when rights were obstructed by war, and the Acts of 1873-4, ch. 28, providing also for elimination of the time during which persons cannot make the "Sutors' Test Oath," prescribed by sec. 27, ch. 106, of the Code of 1860, although they are retrospective in their operation, are constitutional when applied to actions on express contracts although the action was barred by the statute of limitations when those acts were passed. *Huffman v. Alderson*, 9 W. Va. 616.

Judgments.—The fifth section of the act of limitations of 1793 does not apply to judgments which existed before the act took effect. *Day v. Pickett*, 4 Munf. 104.

The ten years' statute of limitations, which in sec. 11, 12, ch. 189, of the Code 1860, is made applicable to judgments, applies to judgments rendered before the 1st day of April, 1860, at which date the Code took effect. *Northwestern Bank v. Hays*, 37 W. Va. 475, 16 S. E. Rep. 561.

Section 8, ch. 141, and sections 11 and 12, ch. 128, of the W. Va. Code 1881, prescribing limitations as to the time in which execution may issue upon a judgment, apply alike to judgments obtained before and to judgments obtained since the Code went into effect. *Spang v. Robinson*, 24 W. Va. 327. See generally, monographic note on "Judgments" appended to *Smith v. Charlton*, 7 Gratt. 425.

Open Account.—In *Brooke v. Shelly*, 4 H. & M. 308, the act of 1793, which makes it the duty of the court to expunge, in an action upon an open account against an executor or administrator, all items appearing to have been due five years prior to the death of the testator or intestate, was construed to apply to open accounts existing before the first of October, 1793, when the act took effect.

Vendor's Lien or Oweity of Partition.—Prior to the Code of 1867, there was no statutory limit to the enforcement of a vendor's lien, or the lien for oweity of partition, but they continued to exist until waived, released, satisfied, or until payment was presumed. If the statute, sec. 2935, Code of 1867, applies to a lien for oweity of partition, it has no application to a case where the creation of the lien arose prior to the enactment of the statute. *Jameson v. Rixey*, 94 Va. 342, 26 S. E. Rep. 861.

Action for Recovery of Land.—The act of the legislature of West Virginia passed February 6, 1873, in so far as it attempts, in actions for the recovery of land, to exclude from the time fixed as the bar in such action by the statute of limitations, the period from the 28th day of February, 1865, to the date of the passage of the act, is unconstitutional and inopera-

tive as to actions which had become barred before the passage of the act. *Hall v. Webb*, 21 W. Va. 818. See monographic note on "Ejectment" appended to *Tapscott v. Cobbs*, 11 Gratt. 172.

6. CONSTITUTIONALITY OF STATUTES OF LIMITATION.

Reviving Remedy.—A distinction is made between the case of a remedy revived by an act of the legislature, which is lost by reason of a statute of limitations, and the case of a remedy cut off or destroyed by the same authority. The former does not violate the obligation of a contract; the latter does. The former is a privilege which may be conferred by the same power by which it was divested; the latter affects the vested rights of a party. *Caperton v. Martin*, 4 W. Va. 138, 6 Am. Rep. 270; *Caperton v. Bowyer*, 4 W. Va. 176. See for discussion and collection of authority, monographic note on "Constitutional Law" appended to *Com. v. Adcock*, 8 Gratt. 661.

Same—Recovery of Property.—The effect of the statutory bar in actions on express contracts, and in actions to recover possession of property, is essentially different, according to the uniform decisions of the courts. When an action in the first class is barred by the statute the remedy only is regarded as taken away and the right remains. But in the last class, and especially in the actions of ejectment and detinue, the rule is very different. It is well settled in such cases that the bar of the statute not only takes away the remedy, but it has the effect of transferring and vesting an absolute title in the possessor of the property. *Hall v. Webb*, 21 W. Va. 324. This subject is elaborated, with many authorities in the monographic note on "Constitutional Law" appended to *Com. v. Adcock*, 8 Gratt. 661.

Constitutionality of Acts Suspending Statute.—The several acts of the government of Virginia during the war suspending the statute of limitations, were valid to prevent the running of said statute to March 3, 1866. *Conn. Insurance Co. v. Duerson*, 28 Gratt. 630; *Johnston v. Gill*, 27 Gratt. 587.

The West Virginia act of Feb. 27, 1866, providing that the period of time from April 17, 1861, to the passage of the act, should not be computed in counting the time under any statute of limitations in certain counties, was held to be constitutional in *Caperton v. Martin*, 4 W. Va. 138, 6 Am. Rep. 270; *Caperton v. Bowyer*, 4 W. Va. 176.

Title Vested by Statute.—Where title to property is vested under the statute of limitations, no act can, by extending the statute or reviving the remedy, impair such title. It would be unconstitutional because of depriving one of property without due process of law; but where the demand is on contract, or any class of actions where the statute merely gives a defence, and does not vest property, there is no vested right to such defence, and the legislature may by repeal of the statute or otherwise revive the action, and deprive one of such defence. *McEldowney v. Wyatt*, 44 W. Va. 711, 30 S. E. Rep. 220.

7. STATUTORY PROVISIONS.—The general limitation act, ch. 102, Acts 1883, does not repeal by implication ch. 28, Acts 1872-73, providing for a special class of cases, and the said statute is still in force. *Sturm v. Fleming*, 31 W. Va. 701, 8 S. E. Rep. 223.

The saving in the act of 1819, 1 Rev. Code, ch. 104, sec. 13, in relation to wills, in favor of persons out of the state, is not repealed by the act of March 2, 1826,

in relation to the limitation of actions. *Schultz v. Schultz*, 10 Gratt. 358.

The proviso in an act for limitations of suits as to rights existing when the Code takes effect, is restricted to actions and rights barred by that chapter (Code of 1849, ch. 149, sec. 19), and does not extend to the law limiting and regulating appeals. *Yarborough v. Deshazo*, 7 Gratt. 374.

8. POSSESSION OF LAND NOT ADVERSE.—Where the plaintiff has always remained in possession of land, claiming it, the statute of limitations does not run against his claim. *Williams v. Lewis*, 5 Leigh 686; *Roberts v. King*, 10 Gratt. 184. See generally, monographic note on "Adversary Possession" appended to *Nowlin v. Reynolds*, 25 Gratt. 137.

Where one buys land that is under a recorded deed of trust given by the owner from whom the purchase is made, the possession of such purchaser is not adverse to the right of the grantor in the trust deed, and the statute of limitations will not run against the deed of trust debt. *Pickens v. Love*, 44 W. Va. 726, 29 S. E. Rep. 1018.

A suit brought to set aside a tax deed, because the lands were redeemed, and because the party to whom the deed was made sustained such relation to the land that he could not acquire a title thereto, and it does not appear that any adverse possession was claimed, is not barred by the statute of limitations. *Battin v. Woods*, 27 W. Va. 58.

9. GENERALLY.

Dismissal of Suit.—Where a claim is barred by limitations, even though the court has jurisdiction of such a case, the suit should be dismissed. *Johnston v. Va. Coal & Iron Co.*, 96 Va. 156, 31 S. E. Rep. 85.

Security for Debt.—Where a creditor holds a pledge or collateral security for his debt, he will be entitled to retain the same in his possession against the pledgor or debtor, notwithstanding the statute of limitations is, or might be, successfully pleaded against the debt for the security of which the pledge was made. *Roots v. Salt Co.*, 27 W. Va. 483.

Vendor's Lien.—The statute of limitations has no application to bar a lien for purchase money reserved in a conveyance of land. Though action on a note, given for such purchase money, be barred, so as to defeat its collection out of other property of the debtor, the lien against the particular land conveyed is not barred. *Evans v. Johnson*, 39 W. Va. 299, 19 S. E. Rep. 623; *Hopkins v. Cockerell*, 2 Gratt. 88; *Hull v. Hull*, 35 W. Va. 155, 18 S. E. Rep. 49.

Petition Claiming Taxes in Proceeding to Sell Land.

—Where a city files a petition in a proceeding by a commissioner of school lands to obtain a decree for the sale of a lot, which has been forfeited by the failure of the owner to enter the same upon the land books, claiming an amount to be due it for taxes on said lot, it will not be deemed thereby to have brought a suit for said amount of taxes, and the statute of limitations will not be applied to the taxes due thereon. *Tebbetts v. A Forfeited Lot*, 33 W. Va. 705, 11 S. E. Rep. 23.

Unascertained Owner of Ground Rent.—Where ground rent is reserved in land conveyed by trustees, by authority of an act of assembly, which rent is to be paid to the owner of the land when he is ascertained, the statute of limitations does not run against the claim of the proprietor against the purchaser to recover such rents. *Mulliday v. Machir*, 4 Gratt. 1.

III. WHAT LAW GOVERNS.

Lex Fori.—The statute of limitations of another state, where a contract was made, cannot be pleaded

as a bar to an action in this state, as the *lex fori*, and not the *lex loci contractus*, governs in all cases as to the time, mode and extent of the remedy. *Urton v. Hunter*, 2 W. Va. 88; *Johnson v. Anderson*, 76 Va. 766.

In an action brought in Virginia on a judgment obtained in North Carolina, the act of limitations of the latter state cannot be pleaded in bar, but the law of the former state must prevail, as the act of limitations affects the remedy and not the right. *Jones v. Hook*, 2 Rand. 808, 14 Am. Dec. 788.

A contract to locate a treasury warrant on lands in Kentucky is made in August, 1783, and it appeared that the breach, if any, occurred before Kentucky became a state. It was held that the act of limitations of Virginia began to run from the time of the breach and was therefore a bar to an action on the contract brought in 1816. *McAlexander v. Montgomery*, 4 Leigh 61.

A debt is contracted at Petersburg, Va., for goods sold there; the debtor resides at the time and continues to reside in North Carolina; the creditor brings suit in a court of this state against the debtor, who pleads the statute of limitations in bar. It was held that by sec. 14, 1 Rev. Code, ch. 128, he was precluded from making such defence. *Wilkinson v. Holloway*, 7 Leigh 277 (1836).

IV. WAIVER AND ESTOPPEL.

Exhaust of Legal Remedies First No Waiver.—Where the liability of a sheriff and his sureties, for the wrongful release of property under levy, has been fixed, it cannot be affected by any delay short of the statutory limitation, and the fact that the party injured first exhausts his remedy against his debtor does not constitute a waiver. *Sage v. Dickinson*, 38 Gratt. 361.

Agreement Not to Sue for Given Time.—A mutual agreement between a debtor and creditor, that suit shall not be brought upon an account until the debtor shall have gone to Europe and returned, is a good bar to the plea of the statute of limitations during his absence from this country. *Holladay v. Littlepage*, 2 Munf. 316.

Notice of Trust No Estoppel.—Where a debtor conveys land in trust for the payment of his debts, and then for the benefit of his wife and children, and a creditor sues to enforce the trust and has the land sold to him under the decree, in an equity suit by the children of the debtor against this creditor to recover the land, it was held that he was not precluded from setting up the statute of limitations, because he acquired the land with notice of the trust in favor of the plaintiffs. *Drumright v. Hite*, 2 Va. Dec. 465 (1897).

Mandamus against Supervisors—Allowance of Claim by Them.—Powers and duties of a board of supervisors are not judicial in their character, but executive, and their allowance of a claim against the county is not an adjudication of the merits of the claim, so as to estop them, on application for a mandamus to compel its payment, from pleading the statute of limitations. *Board of Supervisors v. Catlett*, 86 Va. 158, 9 S. E. Rep. 999.

Commissioner Directed to Ascertain Rents for Erroneous Period.—A direction by the court to a commissioner to ascertain rents and profits for a period of time greater than five years prior to the commencement of the suit, does not preclude the defendant from relying upon the statute of limitations before the commissioner. *Ogle v. Adams*, 12 W. Va. 213.

Suit by Administrator—Effect of Decision against

Him When Wife Living.—A plaintiff suing for slaves as administrator of his wife is not barred by a decision against him in her lifetime in a suit to which he was not a party, the ground of the decision having been that under the act of limitations the opposite party had obtained a legal title to the slaves by five years' possession commencing during the coverture, during which also the right of the wife accrued and the husband having never had possession in his character as husband. *Blakey v. Newby*, 6 Munf. 64.

V. WHEN STATUTE BEGINS TO RUN.

1. GENERAL RULE.—It may be stated as a general rule that the statute of limitations does not begin to run until the right of action accrues. *Cann v. Cann*, 40 W. Va. 138, 20 S. E. Rep. 910; *Cann v. Cann*, 45 W. Va. 568, 31 S. E. Rep. 922; *Andrews v. Roanoke B. & L. Assoc.*, 98 Va. 445, 36 S. E. Rep. 531.

Thus the act passed March 8, 1823, for the limitation of actions against persons acting in a fiduciary character, only begins to run from the time when the liability sought to be enforced arises. *Cookus v. Peyton*, 1 Gratt. 481.

So in an action of debt by a sheriff against his deputy on his bond, conditioned for the faithful performance of his duties, the right of action does not accrue to the sheriff when the deputy made default in collecting, and the statute does not run against the action until the sheriff has paid some part of the debt occasioned by the default. *Adkins v. Fry*, 38 W. Va. 549, 18 S. E. Rep. 737; *Adkins v. Stephens*, 38 W. Va. 557, 18 S. E. Rep. 740.

2. DEPENDENT ON FUTURE EVENT.

Insurance Policy—Time to Pay.—A policy of insurance provides that proof of loss shall be furnished to the company within thirty days from the date of the loss, and that all claims under it shall be barred, unless prosecuted within six months from the same date, and it also provides that the loss shall be paid in sixty days after its approval. The six months' limitation begins to run at the close of the sixty days allowed the company for payment, and not from the actual loss. *Murdock v. Franklin Ins. Co.*, 33 W. Va. 407, 10 S. E. Rep. 777.

Provision in Will.—A testator by will requested that a debt which he owed should be paid out of his estate, after the happening of a future event. The right of action did not accrue until the occurrence of that event, and the statute of limitations did not begin to run until then. *Perkins v. Selfried*, 97 Va. 444, 34 S. E. Rep. 64.

Collection of Bond.—Where a father promised to let his son-in-law have the amount of a particular bond when collected, the claim of the son-in-law did not accrue until such collection, and hence the statute of limitations did not begin to run against him until that time. *Scott v. Osborne*, 2 Munf. 411.

Payment Out of Particular Fund.—An action of debt was brought on a note, payable one day after date, which stipulated that it was to be paid "out of the proceeds of the furnace." When more than sufficient funds had been realized by the sale of the furnace to pay the note more than five years previous to the institution of the action, it was held that it was barred by limitation. *Sayers v. Sayers*, 90 Va. 755, 19 S. E. Rep. 844.

Demand Necessary.—If a demand be necessary before suit, the period of limitation under statutes of limitation does not start until demand. But demand must be made within a reasonable time, which is the term fixed by the statute of limitation, if not made before. Where no demand is shown, it

will be presumed that it was made within that period, and the statute will then run. *Thompson v. Whitaker Iron Co.*, 41 W. Va. 574, 23 S. E. Rep. 795.

Withdrawal from Loan Association.—A withdrawing member from a building and loan association cannot sue to recover the withdrawal value of his stock until a sufficient sum is accumulated by the society to meet his demand, for until that event has happened he has no right of action. *Andrews v. Building Assoc. & Inv. Co.*, 98 Va. 445, 36 S. E. Rep. 531.

Promise to Pay at Death.—If an employer promises to make compensation for services at the time of his death, by will or otherwise, the statute of limitations does not begin to run until the death of such person. *Cann v. Cann*, 45 W. Va. 563, 31 S. E. Rep. 223.

Decree Appealed.—Where the decree against an administrator was appealed from, the plaintiffs had no right to have satisfaction until the decree was affirmed, and the act of limitations did not begin to run until then. *Sheldon v. Armstead*, 7 Gratt. 264.

3. FRAUD, MISTAKE AND DECEIT.

Discovery.—Where property has been delivered under a common or mutual mistake of fact, the statute of limitations does not begin to run until the mistake has been discovered. *Cranford v. Smith*, 93 Va. 623, 23 S. E. Rep. 235.

Cases of fraud, trust and mistake are not within the statute of limitations. *Hunter v. Spotswood*, 1 Wash. 145. At all events in cases of mistake and fraud, the statute does not begin to run until its discovery. *Massie v. Heiskell*, 80 Va. 789; *Rowe v. Bentley*, 29 Gratt. 760.

In cases of concealed fraud or mistake, the act of limitations does not run except from the discovery of the fraud or mistake. *Harshberger v. Alger*, 31 Gratt. 52.

To a bill in equity by a creditor for relief against a fraudulent conveyance of his debtor, the act of limitations, if well pleaded in bar, would run only from the time when fraud is discovered. *Shields v. Anderson*, 3 Leigh 729.

Same—Contrary Doctrine.—Where a cause of action arises out of a fraud, the statute of limitations runs from its perpetration, and not from its discovery. *Thompson v. Whitaker Iron Co.*, 41 W. Va. 574, 23 S. E. Rep. 795; *Callis v. Waddy*, 2 Munf. 511; *Rice v. White*, 4 Leigh 474; *Cook v. Darby*, 4 Munf. 444; *Fant v. Fant*, 17 Gratt. 14. But this rule does not apply to fraudulent transfers. *Thompson v. Whitaker Iron Co.*, 41 W. Va. 574, 23 S. E. Rep. 795.

It was said by BRANNON, J., in *Thompson v. Whitaker Iron Co.*, 41 W. Va. 574, 23 S. E. Rep. 799, that "The statute starts from the act of fraud done, open or concealed,—that is, whether the act be of such a character that it conceals itself or not; but fraudulent tricks or acts of the defendant to conceal and obstruct the prosecution of an action are another matter, for that is an express exception in the statute. That very exception denies the right to say that time does not run from the act of fraud, because it only allows the time of actual obstruction to be excluded. It assumes that the statute has begun to run, and excludes certain time for certain causes,—simply makes a subtraction from the total time. From reading, I think there has been a confusion of mind on this matter, and that it largely explains the conflict of opinion."

In an action for deceit in the sale of a chattel, there is a plea of the statute of limitations, a gen-

eral replication thereto, and issue thereon joined. It was held that the cause of action accrued at the time of the practicing of the deceit, and that the limitation began to run immediately. *Rice v. White*, 4 Leigh 474.

If the obligee of a bond transferred it to an assignee with knowledge that there was usury in the transfer, he was guilty of deceit, and the statute of limitations began to run from the time of the transfer. *Fant v. Fant*, 17 Gratt. 11.

4. FRAUDULENT AND VOLUNTARY TRANSFERS.

From Execution of Transfer.—A suit to avoid an assignment for a consideration not deemed valuable in law is barred after the lapse of five years, and the statute begins to run from the date of the execution of the deed (sec. 16, ch. 146, Code 1878), and not, as is the general rule in respect to such statutes, from the time the right of action accrued. *Bickle v. Chrisman*, 76 Va. 678.

Under sec. 14, ch. 104, Va. Code 1891, the period of five years, limiting a suit to avoid a voluntary conveyance, begins to run from the making of the conveyance. *Reynolds v. Gawthrop*, 37 W. Va. 3, 16 S. E. Rep. 364.

The limitation provided in sec. 14, ch. 104, Code of 1898, for avoiding a conveyance on consideration not deemed valuable in law, commences to run at the time the deed was made if at all. *Hunter v. Hunter*, 10 W. Va. 321. See monographic note on "Fraudulent and Voluntary Conveyances" appended to *Cochran v. Paris*, 11 Gratt. 348.

From Recordation.—Where the plaintiff attempts to avoid a conveyance made by his creditor on the ground of its being voluntary, the statute of limitations runs from the date of recordation, and not from the plaintiff's knowledge that it was made without consideration, unless his ignorance of such fact proceed from the fraud of the grantor. *Vashon v. Barrett*, 99 Va. 344, 38 S. E. Rep. 200.

5. RECOVERY OF LAND.

Estates with Plurality of Tenants.—The statute of limitations does not run in favor of one co-tenant against the others until there has been actual ouster of possession, or some act equivalent to a denial of their rights in the property. *Fry v. Payne*, 82 Va. 759, 1 S. E. Rep. 197. See monographic note on "Adversary Possession" appended to *Nowlin v. Reynolds*, 25 Gratt. 137.

From the time that co-tenants have knowledge or notice of ouster by another co-tenant, the possession of the latter will be adverse, and the statute of limitations will commence to run. *Caperton v. Gregory*, 11 Gratt. 505; *Cooley v. Porter*, 22 W. Va. 124.

After the death of a father one of his sons took possession of his land, claiming that it had been given to him by will for life, with remainder to his two sons. This possession by the son and those claiming under him began in 1823, and having existed continuously until suit was brought by the other co-parcener in 1848, such possession was adverse and the statute of limitations commenced to run from the time of such taking possession. *Caperton v. Gregory*, 11 Gratt. 505. See monographic note on "Joint Tenants and Tenants in Common."

Two Grants of Same Land.—Where a grantee enters upon land which is subsequently granted to another person, the statute of limitations begins to run in favor of the party taking possession, from the time of the issuance of the subsequent grant, and if he remains in actual possession long enough to bar the

entry under the statute, he will acquire a valid title to the land. *Adams v. Alkire*, 20 W. Va. 480.

Land Occupied Granted by State.—The statute of limitations commences to run in favor of an occupant of land against the grantee of the state from the date of the grant of the land so occupied. *Hall v. Webb*, 21 W. Va. 318.

Notice to Surrender.—Equity follows the law in holding that time does not run against one who is in possession in the exercise or assertion of a right, and hence a vendee who enters upon land and holds it with the consent and acquiescence of the vendor will not be barred by the lapse of time, until he is put in default by notice to surrender the premises or pay the price. *Abbott v. L'Hommedieu*, 10 W. Va. 677.

Disavowal of Title.—Where a sale of land under a decree is made and confirmed, the purchase money paid, but no deed is made, and possession is not taken, the statute of limitations does not begin to run against the purchaser until his title is disavowed, and notice of an adverse claim is brought home to him. *Whitlock v. Johnson*, 87 Va. 323, 12 S. E. Rep. 614. See *Creekmur v. Creekmur*, 75 Va. 436.

Dower—Widow's Rights.—As a widow is entitled by sec. 2274 of the Code of 1887, to hold the mansion and curtilage, until dower is assigned to her, the statute of limitations will not begin to run until her possession ends or she publishes her claim and possession to be adverse, by actual and open disseizin. *Hannon v. Hounihan*, 85 Va. 429, 12 S. E. Rep. 157.

SUITS BETWEEN PARTNERS.—See monographic note on "Partnership."

Settlement of Accounts.—Where the dealings between merchant and merchant, or merchant and factor, have ceased and the accounts between them have been so adjusted that the party in whose favor the balance appears might bring an action at law thereon, then from the time of such adjustment the statute of limitations will commence to run as against such balances. *Roots v. Salt Co.*, 27 W. Va. 468.

In a suit between partners for a settlement of the business, the statute begins to run from the time there is a settlement, or account stated of the partnership business between the partners made several years after the dissolution of the firm, which was then delivered and understood to include and adjust all the assets and liabilities, although it may subsequently appear that they were mistaken. *Boggs v. Johnson*, 26 W. Va. 821.

Suit to Settle Partnership—Outstanding Claims.—In a case of a bill by a partner against his co-partners for a settlement of partnership accounts, the statute of limitations will not begin while there are debts due to and by the partnership. *Jordan v. Miller*, 75 Va. 442.

7. LEGACIES.—See monographic note on "Legacies and Devises."

Dependent on Future Event.—Where a legacy is limited upon a future event, the statute of limitations will not begin to run against the right to claim it, until the happening of such event. *Effinger v. Hall*, 81 Va. 94.

Held by Executor.—The statute of limitations does not run against a legatee's claim for a specific legacy, while it is held by the executor, although he has long before assented to the legacy. *Nelson v. Cornwell*, 11 Gratt. 724.

Estate Not Administered upon.—Where a legatee dies shortly after the testatrix and before a qualification upon her estate in this country, and there

having been no administration on the estate of the legatee for twelve years, the act of limitations does not bar the claim for the legacy during this period. *Lyon v. Magagnos*, 7 Gratt. 377.

8. REMAINDERS AND REVERSIONS.

Termination of Life Estate.—The statute of limitations does not commence to run against a remainderman or reversioner, until termination of the life estate. *Ball v. Johnson*, 8 Gratt. 281; *Merritt v. Hughes*, 36 W. Va. 362, 15 S. E. Rep. 58; *Merritt v. Smith*, 6 Leigh 486; *Hope v. Norfolk*, etc., R. Co., 79 Va. 288; *Effinger v. Hall*, 81 Va. 100; *Davis v. Tebb*, 81 Va. 606; *Hannon v. Hounihan*, 85 Va. 439, 12 S. E. Rep. 157; *Cent. Land Co. v. Laidley*, 32 W. Va. 142, 9 S. E. Rep. 64.

A life tenant of a slave sells her interest and dies, and the purchaser continues to hold the slave. He does not hold under but adversely to the remainderman, and the statute begins to run on the death of the life tenant. *Layne v. Norris*, 16 Gratt. 296.

Where a mother is given a life estate in certain slaves with a remainder to her children, the right of the latter to the slaves does not accrue until the death of the mother, and consequently the statute of limitations does not begin to run against them until her death. *Duncan v. Wright*, 11 Leigh 562.

Same—Conveyance in Fee Void as to Wife.—Where an attempted conveyance in fee simple by a husband and wife was void as to the wife, and therefore the grantees were only entitled to an estate for the life of the husband, the right of action of the wife, or any one claiming under her against the grantees, did not accrue until after the husband's death, and the statute of limitations did not run against them until that time. *Central Land Co. v. Laidley*, 32 W. Va. 144, 9 S. E. Rep. 61; *Merritt v. Hughes*, 36 W. Va. 366, 15 S. E. Rep. 56; *Arnold v. Bunnell*, 42 W. Va. 473, 26 S. E. Rep. 359.

9. AGENCY.—See monographic note on "Agency" appended to *Silliman v. Fredericksburg*, etc., R. Co., 27 Gratt. 119.

In General Agency Statute Runs from Close.—In case of a general or continuous agency, as distinguished from a special agency, the statute of limitations runs between the parties to it from its close. *Rowan v. Chenoweth*, 49 W. Va. 267, 38 S. E. Rep. 44.

Same—Compensation for Advances or Services Prior to Termination—Repudiation by Principal—General Statement.—As a general proposition, where there is an undertaking or agency which requires a continuation of services, the statute of limitations does not begin to run against advances lawfully made by the agent in the prosecution of the undertaking or agency, or against compensation for the services of the agent, until the termination of the undertaking or agency. The law looks upon the employment as an entire contract, and regards the claim for disbursements and compensation as an entire demand to which the right does not accrue until the completion of the service, or the termination of the employment or agency. But, although the employment or agency is a continuing one, yet if the agent had the right to require payment for advances or compensation for services prior to the termination of the agency, or if the advances were repudiated by the principal as unauthorized, or not required to be made by the nature of the employment or agency, the statute begins to run from the time the agent had the right to demand payment for his services, or for advances, or, if the advances were repudiated as unauthorized, from the time of such repudiation. The statute begins to run

whenever the right of action accrues, and such right accrues whenever the agent has the right to demand payment of his principal, and, if refused, to apply to the proper tribunals for relief. So that, although the agency be a continuing one, if the agent has the right prior to the termination of the agency to demand payment of his compensation or for advances, the statute begins to run from the time he had the right to make such demand. *Riverview Land Co. v. Dance*, 98 Va. 289, 85 S. E. Rep. 720.

Sheriff and Deputy.—A deputy sheriff is the agent of the sheriff, and the statute of limitations applies between them as between principal and agent. *Rowan v. Chenoweth*, 49 W. Va. 287, 38 S. E. Rep. 544.

Agent to Collect.—Where an heir appoints an agent to collect his share of the estate and turn it over to him there is no trust, and the limitation begins to run against his claim for the share so collected from the date of the collection, whether demand is made or not. *Hasher v. Hasher*, 96 Va. 584, 32 S. E. Rep. 41.

10. ACTION FOR SEDUCTION.—Where a daughter lived away from her father's house at the time of her seduction, but returned and was confined and nursed there, the statute of limitations will only begin to run from that time. *Clem v. Holmes*, 38 Gratt. 722. See also, *Fry v. Leslie*, 87 Va. 269, 12 S. E. Rep. 671; *Riddle v. McGinnis*, 22 W. Va. 275; *Allebaugh v. Coakley*, 75 Va. 628.

Section 1, ch. 108, Code W. Va., does not alter the rule as to the commencement of an action by a father for the seduction of his daughter. *Riddle v. McGinnis*, 22 W. Va. 253.

11. DAMAGE BY RAILROADS.

From Time of Injury.—A railroad company in the construction of its road negligently floods an adjoining lot by the erection of an embankment. The statute of limitations begins to run in such case against the right of the owner to recover, not from the time the embankment was built, but from the time of actual injury to the lot by the invasion of the water. *Henry v. Ohio River R. Co.*, 40 W. Va. 284, 21 S. E. Rep. 863.

So where a railroad bridge changes the current of a stream, and injures land lying lower down the stream by washing it as freshets come, the injury is intermittent, and the statute of limitations runs from the actual damage by washing, not from the erection of the bridge. *Eells v. Chesapeake, etc., R. Co.*, 49 W. Va. 65, 38 S. E. Rep. 479.

12. SURETIES.

From Payment of Obligation.—The statute of limitations begins to run against the right of a surety to claim payment of his principal for reimbursement for the payment of a joint obligation from the time of actual payment of the obligation. *Harper v. McVeigh*, 82 Va. 751, 1 S. E. Rep. 193. See monographic note on "Suretyship."

From Decree against Executor.—Where an executor purchases a slave from his testator's estate, and fails to settle his accounts, in a suit brought against him for a settlement the sale is set aside and he is required to account for the hire of the slave, and in 1860 there is a decree against him. In an action against his surety founded upon this decree, it was held that the statute of limitations in favor of the surety, did not begin to run until the decree of 1860, notwithstanding the surety was not a party to the suit in equity. *Franklin v. Depriest*, 13 Gratt. 287.

Action by Sheriff against Deputy and Sureties—Statutes.—Section 46, ch. 49, Code of 1873, provides

that a sheriff may proceed against his deputy and his sureties, whenever he becomes liable on account of the default of his deputy, whether a judgment has been recovered against him or not. Section 47 of the same chapter authorizes the sheriff to proceed against the deputy and his sureties only when there has been a recovery against him, and the payment in whole or in part to the creditor. It was held under these statutes that where a deputy sheriff made default prior to 1849, and a judgment was obtained against the sheriff in 1874, which was paid by him in 1878, and in 1879 he proceeded against the deputy and his sureties for the amount so paid, that the claim was not barred although the default of the deputy occurred more than ten years before. *Allebaugh v. Coakley*, 75 Va. 628.

13. ASSESSMENTS.

From Date of Assessments.—It was held in *Lewis v. Glenn*, 84 Va. 947, 6 S. E. Rep. 806, under sec. 3, ch. 57, Code 1873, that the statute of limitations only began to run against unpaid assessments from the time that such assessments were made.

Thus where the officers of a corporation, which has assigned all of its property, including the unpaid portion of its capital stock, neglect to levy an assessment for such stock, and the levy is made by a court in a proceeding instituted by the trustee, the statute of limitations begins to run from the date of such levy made by the court. *Vanderwerken v. Glenn*, 85 Va. 9, 6 S. E. Rep. 806.

14. TRUSTS.

From Conclusion of Trust.—Where a trustee retains money in his hands the statute of limitations does not begin to run against the demand of the *cestui que trust* until the trust is concluded. *Lomax v. Pendleton*, 3 Call 538, Wythe 4.

Repudiation of Trust—Notice.—It is well settled, that while in cases of direct or express trusts, as between the trustee and *cestui que trust*, the statute of limitations has no application during the continuance and recognition of the trust, yet if the trustee repudiates the trust by clear and unequivocal acts or words, and claims thereafter to hold and control the estate as his own not subject to any trust, and such repudiation and claim are brought to the notice or knowledge of the *cestui que trust* in such manner that he is called upon to assert his equitable rights, the statute will begin to run from the time that such knowledge is brought home to the *cestui que trust*. *Jones v. Lemon*, 26 W. Va. 629.

When the subject is land, of which the trustee has the legal title, and the *cestui que trust* is a member of his family living upon the land, if the trustee, asserting title in himself, conveys a part of the land by deed in his own name, to a third person whom he places in possession of the part so sold and takes the purchase money to himself, and the deed is put upon record, and there is no evidence that the trustee ever thereafter recognized the trust, but on the contrary claimed the residue of the land as his own, these acts and transactions will be regarded as a repudiation of the trust, and the statute of limitations will begin to run against the *cestui que trust* from that time. *Jones v. Lemon*, 26 W. Va. 629.

15. OTHER INSTANCES.

Claim against Decedent's Estate.—The statute of limitations does not begin to run against a claim asserted for a decedent's estate, till a qualification of an executor or administrator of the decedent. *Hansford v. Elliott*, 9 Leigh 79.

Devastavit by Executor.—In an action by a creditor or legatee against an executor for a devastavit, the right accrues ordinarily, and the limitation commences to run when the wrongful act is committed. *Leake v. Leake*, 75 Va. 792.

Where Administrator Is Distributee.—Where the characters of an administrator and distributee unite in the same person, who holds possession of personal property in the former character for more than five years, his right as distributee will not be barred by the statute of limitations. *Vaiden v. Bell*, 8 Rand. 448. See monographic note on "Executors and Administrators" appended to *Rosser v. Depriest*, 5 Gratt. 6.

No Qualification on Estate for Five Years—Presumption.—When a cause of action accrues to the estate of a decedent at the time of his death, and not before, and no one qualifies as administrator until more than five years thereafter, the law conclusively presumes that an administrator qualified on the last day of the five years, and the statute of limitations begins to run in favor of the estate of the decedent from that time, whether there is in fact any administrator of the estate or not. *Western Lunatic Asylum v. Miller*, 29 W. Va. 326, 1 S. E. Rep. 740.

Contest between Widow and Purchaser—Statute Runs from Appointment of Executor.—Where the widow claims the slaves of the husband as her own property and holds possession of them for more than five years, and then the administration of her husband's estate is committed to the sheriff, in a contest between the widow and the purchaser, it was held that the statute of limitations did not begin to run until the administrator was appointed. *Clark v. Hardiman*, 3 Leigh 347.

Debt of Wife Collected by Husband.—Where a husband collected demands due the wife as her separate estate, the statute of limitations began to run against the wife's right of action to recover the amount so collected from the time when she obtained knowledge of the fact of the collection. *Riggan v. Riggan*, 93 Va. 78, 24 S. E. Rep. 920. See monographic note on "Husband and Wife" appended to *Cleland v. Watson*, 10 Gratt. 159.

Void Deed as to Wife—From Entry of Decree.—Where a deed by a husband and wife was a nullity as to the wife, in an action by the grantee to recover back the purchase money, it was held that his cause of action did not arise until the decree set aside the deed in favor of the wife, and that the statute of limitations did not begin to run against his claim until that time. *Garber v. Armentrout*, 33 Gratt. 235.

Note Payable on Demand.—The statute of limitations runs from the date and delivery of a note payable on demand, and not from the time of demand. *Laidley v. Smith*, 32 W. Va. 387, 9 S. E. Rep. 209, 25 Am. St. Rep. 825.

Death by Wrongful Act.—An action for damages for death by wrongful act, under sec. 5, ch. 103, W. Va. Code 1899, may be maintained within two years after the death of the person, although such death does not occur until more than a year has elapsed from the time of such injury. The statute makes no reference to the bar of the statute of limitations prior to the death of the injured person, and while the negligent injury is the real cause of action, it is not consummated until it results in death, and then the cause of action accrues to the administrator, and not until then. *Hoover v. Chesapeake, etc.*, R. Co., 46 W. Va. 268, 33 S. E. Rep. 224.

See monographic note on "Death by Wrongful Act" appended to *De Ende v. Wilkinson*, 2 Pat. & H. 603.

Sealed Agreement to Execute Notes.—Where there is a sealed agreement between the plaintiff and defendant that the latter shall execute notes at a specified time in payment of land, the statute begins to run against the agreement at that time, although there is a covenant on the part of the former to convey the property at the same time and he fails to do so. *Davis v. McMullen*, 86 Va. 256, 9 S. E. Rep. 1095.

Covenant by Railroad to Build Crossing or Fence—From Date of Damage.—The statute of limitations will not bar an action against a railroad company upon a covenant in the grant of the right of way to build and maintain a crossing or fence, the action being merely for such failure; but if actual damage results from the failure to build such crossing or fence, the statute will begin to run from the date of such damage, in an action for compensatory damages. *Douglass v. Ohio, etc., R. Co.* (W. Va.), 41 S. E. Rep. 911.

Recovery by Vendor—From Time Title Passes.—No time bars the right, either under the statute of limitations or presumption of payment, of a vendor to recover purchase money for land, if he has not parted with the legal title. *Evans v. Johnson*, 30 W. Va. 299, 19 S. E. Rep. 633.

Claim for Improvements by Tenant in Common—From Time Partition Is Asked.—Where a tenant in common improved the property at his own expense, without the assent of his co-tenants, the statute of limitations does not begin to run against the equity for compensation until a partition is asked. *Ballou v. Ballou*, 94 Va. 350, 26 S. E. Rep. 840. As between joint tenants, see *Fry v. Payne*, 82 Va. 759. See monographic note on "Joint Tenants and Tenants in Common."

Judgments Transferred from Virginia to West Virginia—From April 1, 1869.—The statute of limitations, as to judgments rendered in the courts of Virginia in favor of that state, and by the act of general assembly transferred to the state of West Virginia, did not commence to run against the latter state for any purpose by the virtue of her laws as to said judgments until the 1st of April, 1869. See W. Va. Code 1868, ch. 35, § 20; *Calwell v. Prindle*, 19 W. Va. 604.

Appropriation by Supervisors for Bounties—From Presentation of Claim and Refusal to Pay.—Where a county by an order of its board of supervisors appropriates money to pay bounties to soldiers, and after such money becomes payable a soldier entitled to such bounty presents his claim to the board for payment, and it refuses to pay him, the statute of limitations begins to run against such claim from the time it was presented and payment thereof was refused, and becomes barred at the expiration of five years from that time. *Shaw v. County Court*, 30 W. Va. 488, 4 S. E. Rep. 439.

Liability of Assignor of Bond—Suit against Obligor.—A suit was brought against the obligor in a bond by the assignee, and it was referred to arbitration. It being proved that the bond had been discharged by payments to the assignor, and by set-offs against him, the arbitrators found for the defendant. Then the assignee sued the assignor, and in this suit upon the plea by the latter that the action against him did not accrue within five years, it was found that the debt originally due from the obligor had been discharged by payments and set-offs against the assignor, yet the assignee did

not know until after judgment in his suit against the obligor that nothing was due, and it was also found that five years had not elapsed since the judgment. It was held that the action did not accrue against the assignor until the judgment was rendered. *Scates v. Wilson*, 9 Leigh 473.

VI. BY AND AGAINST WHOM STATUTE PLEADED.

1. GENERAL RULES.

Personal Privilege.—As a general rule the plea of the statute of limitations is a personal defence to be made only by the party against whom the demand is asserted, and can only be waived by him if he desires to do so. *Clayton v. Henley*, 32 Gratt. 65; *Smith v. Hutchinson*, 78 Va. 683; *McCartney v. Tyrer*, 94 Va. 198, 26 S. E. Rep. 419; *Welton v. Boggs*, 45 W. Va. 620, 32 S. E. Rep. 233; *Clarke v. Hogeman*, 13 W. Va. 730; *Baltimore, etc., R. Co. v. Vanderwerker*, 44 W. Va. 223, 28 S. E. Rep. 829.

Same—Privies in Estate.—Privies in estate, such as heirs, devisees, vendees, or mortgagees of property, may use it to defend their property. *McClagherty v. Croft*, 43 W. Va. 270, 27 S. E. Rep. 246; *Werdenbaugh v. Reid*, 20 W. Va. 588; *Shipley v. Pew*, 23 W. Va. 487.

Same—Effect as to Strangers.—A mere stranger to a claim, as a creditor, although he may be injuriously affected by the failure of the debtor to plead the statute, cannot either set it up himself, or compel his debtor to do so, as the privilege is personal. *Welton v. Boggs*, 45 W. Va. 620, 32 S. E. Rep. 233.

Party in Interest.—It is competent for any party interested in a fund to take advantage of the statute of limitations, notwithstanding the executor of the deceased party refused to do so. *Jackson v. Hull*, 31 W. Va. 601; *Woodyard v. Polsley*, 14 W. Va. 221; *McCartney v. Tyrer*, 94 Va. 203, 26 S. E. Rep. 421; *Smith v. Pattie*, 81 Va. 666; *McClagherty v. Croft*, 43 W. Va. 270, 27 S. E. Rep. 246; *Werdenbaugh v. Reid*, 20 W. Va. 588; *Shipley v. Pew*, 23 W. Va. 487. See subsec. 1. "Creditors," *infra*.

2. SPECIFIC INSTANCES.

a. BENEFICIARIES.—Beneficiaries who have possession of the trust property cannot set up the statute of limitations to defeat the right of the other beneficiaries to share in the trust property. *Turner v. Campbell*, 3 Gratt. 77.

b. JOINT DEFENDANTS.—It is undoubtedly a general rule that the defence of the statute is a personal privilege, and must be pleaded by the party who would take advantage of it, but when the interest of the defendants is joint, and the plea of the statute by one is not purely personal as to him, it enures to the benefit of all. *Ashby v. Bell*, 30 Va. 811.

c. SHERIFFS.—The act of limitations will not bar a motion against a sheriff for clerk's tickets put into his hands to collect. *Lee v. Peachy*, 3 Call 230. See monographic note on "Sheriffs and Constables."

d. ASSIGNEES.—One of two assignees claiming the same judgment cannot plead the statute of limitations as against each other. *Clarke v. Hogeman*, 13 W. Va. 718.

Where the assignee sues upon a note, he may plead the statute of limitations against a set-off based upon a demand against the assignor. *Walker v. Burgess*, 44 W. Va. 390, 30 S. E. Rep. 99.

e. PUBLIC CORPORATIONS.—Statutes of limitation run against public corporations, whether they are municipal or mere agencies of the state. Such corporations are more or less branches of the government, and necessarily are clothed with the attributes and incidents of sovereignty; yet when they have

power to sue and to be sued, to have a common seal, to take and hold property, and transact business, they are governed by the same laws and regulations, and subject to the same limitations, as natural persons, unless exempt by positive law. *Western Lunatic Asylum v. Miller*, 29 W. Va. 326, 1 S. E. Rep. 740; *McClanahan v. West. Lunatic Asylum*, 88 Va. 466, 13 S. E. Rep. 977.

The statute of limitations applies as well to a municipal corporation as to individuals. *Forsyth v. City of Wheeling*, 19 W. Va. 318; *Wheeling v. Campbell*, 12 W. Va. 36.

It was held in *Teass v. City of St. Albans*, 38 W. Va. 1, 17 S. E. Rep. 400, that in the absence of express statutory provision to the contrary, the statute of limitations runs against a municipal corporation.

f. FOREIGN CORPORATIONS.—An insurance company chartered by another state, but doing business in this state in compliance with the statute of 1855-6, is to be considered, for the purpose of being sued, as domiciled in this state, and is entitled to rely on the statute of limitations just as if it were a company which had been chartered by the legislature of this state. *Conn., etc., Insurance Co. v. Duerson*, 28 Gratt. 630.

3. PERSONAL REPRESENTATIVES, FIDUCIARIES, HEIRS, etc.

Personal Representative.—It is the duty of a personal representative to rely upon the statute of limitations in behalf of legatees and distributees, and also to protect creditors. *Woodyard v. Polsley*, 14 W. Va. 211.

Same—Construction of Statute.—It is provided by sec. 7, ch. 123, Code Va. 1873, that an administrator shall have no credit for paying a claim against the estate when he knows that a recovery of the same could be prevented. This statute does not require that the statute of limitations be interposed to a claim which is apparently barred, when the administrator knows it is inapplicable to such claim. *Radford v. Fowlkes*, 85 Va. 830, 8 S. E. Rep. 817.

Same—Administrator Sole Heir and Distributee.—Where there are debts against an intestate which are barred by the statute of limitations, the administrator cannot repel the bar in any way, although he be also sole heir and distributee, but it is his duty to plead the statute against the debts. If he refuses to do so, a judgment creditor of his by reason of his interest in the fund, is entitled to file the plea. *Smith v. Pattie*, 81 Va. 664.

Executors De Son Tort.—Executors in their own wrong are liable to account for the property of the decedent to his distributees or legatees, like other executors, and cannot rely on the statute of limitations to protect them from such accountability. *Hansford v. Elliott*, 9 Leigh 79.

Fiduciaries—Sureties.—As to fiduciaries there is no limitation except what results from staleness of demand or presumption of payment, it is otherwise as to their sureties. Code of 1873, ch. 146, § 9; *McCormick v. Wright*, 79 Va. 524.

Heirs.—A judgment against a personal representative of a decedent is not even *prima facie* evidence of the debts against the heirs of such decedent. And in a suit brought by the plaintiff in such judgment against the heirs to subject the real assets descended, such judgment against the personal representative will not prevent the heirs from relying upon the statute of limitations as a bar to the original cause of action in such suit. *Saddler v. Kennedy*, 26 W. Va. 636.

When an administrator presents a personal de-

mand against his decedent's estate he must show that such demand is not barred by the statute of limitations. *Cann v. Cann*, 40 W. Va. 188, 20 S. E. Rep. 910.

h. LESSEES.—An action of assumpsit founded on the covenants contained in a lease, is not barred in five years, against a lessee who has not signed the lease. *West Virginia, etc., R. Co. v. McIntire*, 44 W. Va. 210, 28 S. E. Rep. 696. See monographic note on "Landlord and Tenant."

Possession Adverse.—In order for the statute of limitations to be a good defence for a tenant against those demanding possession, he must not claim under their title, but his possession must be adverse to them. *Robnett v. Preston*, 4 Gratt. 141.

i. ESCHEATORS.—An escheator who is defendant to a petition under 1 Rev. Code, ch. 83, sec. 14, by a creditor of a purchaser whose lands have been escheated, has the same right to plead the statute of limitations in bar of the petition that a representative of the debtor would have to plead the statute in bar of an action. *Watson v. Lyle*, 4 Leigh 286.

j. HUSBAND AND WIFE.—In *Merritt v. Hughes*, 36 W. Va. 366, 15 S. E. Rep. 60, it was said that the case of *Caperton v. Gregory*, 11 Gratt. 506, was authority for the proposition that the statute of limitations ran against a wife owning lands and against her husband during coverture. See monographic note on "Husband and Wife" appended to *Cleland v. Watson*, 10 Gratt. 159.

k. TRUSTEES.—A trustee cannot take advantage of the act of limitations against the claim of the *cestui que trust* or of persons claiming under him. *Redwood v. Riddick*, 4 Munf. 223.

Same—Constructive.—A mere constructive trustee may protect his possession by the plea of the statute of limitations. *Sheppards v. Turpin*, 3 Gratt. 374.

1. CREDITORS.

Against Claim of Another Creditor.—While the right to plead the statute of limitations as a defence is generally personal to the debtor, yet where equity has taken possession of his estate for the purpose of distributing it among the creditors, any one of them interested in the fund may interpose the defence to the claim of another creditor. *McCartney v. Tyrer*, 94 Va. 198, 26 S. E. Rep. 419; *Tazewell v. Whittle*, 13 Gratt. 345; *Woodyard v. Polsley*, 14 W. Va. 211; *Werdenbaugh v. Reid*, 20 W. Va. 588.

It was said in *Elliot v. Trahern*, 35 W. Va. 684, 14 S. E. Rep. 223, that it was settled law in West Virginia that in marshaling assets, unless it be in a proceeding to subject the real estate of a decedent to the payment of his debts, the statute of limitations could not be set up by one creditor of an estate against another creditor to give his claim precedence.

Same—Debtor Not Relying on It.—It is a settled law that one creditor may set up the statute of limitations in a creditors' suit against the demand of another, although the debtor himself did not rely upon it. *Callaway v. Saunders*, 99 Va. 350, 38 S. E. Rep. 182.

Creditors of Partnership.—Where there is a contest between the creditors of a partnership in a suit brought for the purpose of settling the partnership, one creditor should be allowed to plead the bar of the statute of limitations against the claims of the other creditors in any proper way, as by exceptions to the report of a commissioner made in the cause. *Conrad v. Buck*, 21 W. Va. 396.

Creditors of Deceased.—The creditors of a deceased may appear before a commissioner appointed in a

creditors' suit to ascertain the debts, etc., and contest the claims of each other on the ground that they are barred by the statute of limitations, and it is the duty of the commissioner to report whether the claims are barred or not. *Woodyard v. Polsley*, 14 W. Va. 211.

In Suit against Sheriff for Default of Deputy.—Where a recovery by a creditor against the administratrix of a sheriff for the defaults of his deputy was barred by the act of limitations, it is for the deputy and his sureties to show that fact in the motion against them. *Cox v. Thomas*, 9 Gratt. 323. See monographic note on "Sheriffs and Constables."

Judgment Creditors.—Where a suit was brought by a judgment creditor to subject the lands of a debtor to the satisfaction of his judgment, and the plaintiff alleges the fact that there is another judgment against the same defendant, older in point of time, but which has not been kept alive by issuing execution as is required by statute, but the defendant being alive and not pleading the statute as to the older judgment, the plaintiff in the suit has no right to file or to rely on the plea. *Welton v. Boggs*, 45 W. Va. 630, 32 S. E. Rep. 232.

Same—Against Each Other—Open Question.—The question as to whether one judgment lienor can plead the statute of limitations against other lienors of a common living debtor is apparently an undecided question in West Virginia. It was brought up but not finally passed upon in several cases, so may be considered as an open question. *McClagherty v. Croft*, 43 W. Va. 270, 27 S. E. Rep. 246; *Woodyard v. Polsley*, 14 W. Va. 211; *Lee v. Feamster*, 21 W. Va. 111; *Conrad v. Buck*, 21 W. Va. 411.

m. PURCHASERS.—If one creditor may plead the statute against another, as where they are contesting the claims of each other against the estate of a deceased debtor, *a fortiori*, a purchaser, who stands in no less favorable position, may rely upon the bar of the statute to protect his land from the claims of creditors of his deceased vendor. *Werdenbaugh v. Reid*, 20 W. Va. 588.

Pendente Lite Purchasers.—The statute of limitations does not run in favor of a *pendente lite* purchaser, and, being in possession of land so purchased, he will not be regarded as holding it adverse to the parties to the suit during the litigation. *Lynch v. Andrews*, 25 W. Va. 751.

When Contract Is Repudiated.—Where the owner of land repudiated a contract for its conveyance because of the failure of the purchaser to comply with the terms of the contract, he must restore the amount of the purchase money which has been paid him under the contract. Where he fails to refund this payment he keeps the contract open and cannot be permitted to rely upon the statute of limitations to protect himself from a decree for the repayment thereof. *Bowles v. Woodson*, 6 Gratt. 78.

Where Conveyance Attacked as Fraudulent.—Where the conveyance of land by a debtor in his lifetime is assailed by his creditors after his death on the ground of being fraudulent, the vendee may plead that the debts are barred by the statute of limitations. *Werdenbaugh v. Reid*, 20 W. Va. 588.

n. STATE.

Virginia Rule.—The English maxim, *nullum tempus occurrit regi*, has been adopted in Virginia in relation to the commonwealth, on which principle it has been held, that the acts of limitation do not extend to the commonwealth in civil suits, not founded on any penal act expressly limiting the

commencement of the action. *Nimmo v. Com.*, 4 H. & M. 57, 4 Am. Dec. 488; *Hale v. Branscum*, 10 Gratt. 418; *Staats v. Board*, 10 Gratt. 400; *Hurst v. Dulany*, 84 Va. 701, 5 S. E. Rep. 802; *Levasser v. Washburn*, 11 Gratt. 572; *Com. v. Ford*, 30 Gratt. 688; *Hall v. Webb*, 21 W. Va. 322; *Kemp v. Com.*, 1 H. & M. 85; *Shanks v. Lancaster*, 5 Gratt. 110; *Gore v. Lawson*, 8 Leigh 458; *Saunders v. Com.*, 10 Gratt. 404; *Koerner v. Rankin*, 11 Gratt. 420.

Subject to Statutory Change.—The statute of limitations never runs against the commonwealth, unless there be an express provision in the statute to that effect, and there is no such provision in our statute. *Reusens v. Lawson*, 91 Va. 236, 21 S. E. Rep. 27. See *Shanks v. Lancaster*, 5 Gratt. 110; *Koerner v. Rankin*, 11 Gratt. 420.

Dedication of Land to Public.—Where land has been dedicated to the public, no title by adverse possession can be acquired to it, as time does not run against the state, nor bar the right of the public. *Buntin v. Danville*, 28 Va. 200, 24 S. E. Rep. 330; *Taylor's Case*, 29 Gratt. 780; *Norfolk v. Chamberlaine*, 29 Gratt. 534; *Yates v. Warrenton*, 84 Va. 337, 4 S. E. Rep. 818.

Exception.—But the maxim, *nullum tempus occurrit regi*, never applied to the proprietors of the Northern Neck of Virginia. *Birch v. Alexander*, 1 Wash. 34.

Claim of Revolutionary Officers.—The act of limitations does not apply to the claim of an officer of the state navy of Virginia during the war of the revolution, who became supernumerary before, and so continued until the end of the war, and who was entitled to half pay for life under the act of May 1779. *Com. v. Lilly*, 1 Leigh 535.

Former West Virginia Rule.—It was formerly the rule in West Virginia, as it is in Virginia and at common law, that the statutes of limitation were inoperative to bar the right of the state. In *Hall v. Webb*, 21 W. Va. 318, it was said that it was an universal principle of law that time did not run against the state unless so declared in the statute which prescribes the limitations; and as the West Virginia statute did not in terms or otherwise refer to the state, there could be no adverse possession, where the title to land remained in the state.

Same—Possession of Land Forfeited for Taxes.—Where land has been granted and an adverse possession commenced to run against the true owner, and subsequently the land is forfeited to the state for delinquent taxes, after the forfeiture, such possession is not adversary against the state, until the land is regranted or sold by the state. *Hall v. Webb*, 21 W. Va. 318.

Same—Ungranted State Lands—Beginning of Limitation.—The statute begins to run in favor of one in possession of ungranted lands of the state as soon as a grant issues to any one for such land. *Hall v. Webb*, 21 W. Va. 322; *Adams v. Alkire*, 20 W. Va. 480. See also, Virginia case of *Shanks v. Lancaster*, 5 Gratt. 110.

The statute of limitations does not begin to run in favor of an occupant of land, where the title thereto is vested in the state. *Hall v. Webb*, 21 W. Va. 318.

Present Rule in West Virginia.—But it is now provided by statute that the statute applies alike to state and individuals. Code 1899, ch. 35, sec. 20; *State v. Sponangle*, 45 W. Va. 415, 32 S. E. Rep. 233.

Thus the statute of limitations runs against the state and municipal corporations, as against individuals in all similar cases. *Ralston v. Town of Weston*, 46 W. Va. 544, 33 S. E. Rep. 827.

Same—Public Uses.—The maxim, *nullum tempus occurrit regi*, applies to all the sovereign rights of the people of the state dedicated to public uses, and of which they cannot be deprived otherwise than according to their express will and appointment. *Ralston v. Town of Weston*, 46 W. Va. 544, 33 S. E. Rep. 326. The point decided was that an individual could not destroy a public easement by setting up a claim under the statute of limitations, as the people could not be deprived of their sovereign rights in this way.

Same—Public Easements in Highways.—It was held in the cases of *Wheeling v. Campbell*, 13 W. Va. 86, *Forsyth v. Wheeling*, 19 W. Va. 318, and *Teass v. St. Albans*, 33 W. Va. 1, 17 S. E. Rep. 400, that the public easement in the public highways of the state was subject to the bar of the statute of limitations. But in the later case of *Ralston v. Town of Weston*, 46 W. Va. 544, 33 S. E. Rep. 326, these cases are expressly overruled, and such easements held not subject to the statute.

Same—Common-Law Rule Abolished.—Section 20, ch. 35, of the W. Va. Code of 1899, abolished the common-law rule that time does not run against the state, and made the state's rights subject to every statute of limitation, the same as individual rights. *State v. Mines*, 38 W. Va. 125, 18 S. E. Rep. 470; *State v. Brookover*, 38 W. Va. 141, 18 S. E. Rep. 476. See Code 1899, ch. 35, sec. 20.

Same—Same—Judgments—Repeal.—Section 19, ch. 55, of the Acts of 1875, providing that the statute of limitations should not apply to proceedings on "judgments on behalf of the state, or any claim due the state," did not wholly repeal sec. 20, ch. 35, of the W. Va. Code 1899, but only limited its operation by taking out of it judgments and money claims of the state; and when this section was subsequently repealed by the Act of March 17, 1881, ch. 13, such judgment and claims were again made subject to statutes of limitation. *State v. Mines*, 38 W. Va. 125, 18 S. E. Rep. 470; *State v. Brookover*, 38 W. Va. 141, 18 S. E. Rep. 476.

State a Party in Another State.—If a sovereign state enters the courts of a foreign state, she does so with no other rights and immunities than those which pertain to private corporations or individuals, and is not exempted from the operation of the statute of limitations of the *lex fori*. *Western Lunatic Asylum v. Miller*, 29 W. Va. 326, 1 S. E. Rep. 740.

A state charitable institution, suing in the courts of a foreign state, is subject to the statute of limitations of the forum, even if at its domicile it be regarded as a part of the state government. *Western Lunatic Asylum v. Miller*, 29 W. Va. 326, 1 S. E. Rep. 740; *McClanahan v. Western Lunatic Asylum*, 38 Va. 466, 13 S. E. Rep. 977.

VII. SUSPENSION AND INTERRUPTION OF STATUTE.

1. IN GENERAL.—The only way in which the operation of the statute can be avoided in any case, is by one or the other of the following circumstances: *First*, by a subsequent written acknowledgment or promise to pay money, signed by the party to be charged or his agent; *second*, by the existence of certain disabilities on the part of the plaintiff; *third*, by attempts on the part of the plaintiff to avoid the action, as by departing from the state, or by any other indirect way obstructing the plaintiff in bringing his action; and *fourth*, by the failure of a suit commenced in time. *Morris v. Lyon*, 84 Va. 381, 4 S. E. Rep. 784.

2. WAR AND STAY LAW.

Object of Stay Law.—By the 7th section of the act of March 2, 1866, entitled "An act to stay the collection of debts for a limited period," it was enacted that "the period during which this act shall remain in force shall be excluded from the computation of time within which, by the operation of any statute or rule of law, it may be necessary to commence any proceeding to preserve, or prevent the loss of any right or remedy." This act remained in force until January 1, 1869. The object of the act was the relief of the debtor class in the then condition of the country by staying the immediate enforcement of debts for a limited period, without prejudice to the rights of creditors. This was the evident purpose of the legislature. *Norvell v. Little*, 79 Va. 141. See *Johnston v. Wilson*, 29 Gratt. 379.

Length of War and Stay-Law Period.—By virtue of several different acts of the legislature the operation of the statutes of limitation was suspended between April 17th, 1861, to January 1st, 1869. *Davis v. Tebbbs*, 81 Va. 600; *Hope v. Railroad Co.*, 79 Va. 283; *Updike v. Lane*, 78 Va. 182; *Alexander v. Byrd*, 85 Va. 600, 8 S. E. Rep. 577; *Brewis v. Lawson*, 76 Va. 36; *Norvell v. Little*, 79 Va. 141; *Morrison v. Householder*, 79 Va. 637; *Kerlin v. Kerlin*, 85 Va. 475, 7 S. E. Rep. 849; *Danville Bank v. Waddill*, 27 Gratt. 448; *Conn. etc., Insurance Co. v. Duerson*, 28 Gratt. 680; *Bank of Virginia v. Handley*, 14 W. Va. 823; *Gore v. McLaughlin*, 8 W. Va. 489; *Hale v. Pack*, 10 W. Va. 145; *M'Allister v. Bodkin*, 76 Va. 809; *Justis v. English*, 80 Gratt. 565; *Pitzer v. Burns*, 7 W. Va. 63; *Hurst v. Hite*, 80 W. Va. 183; *Shields v. Farmers' Bank of Virginia*, 5 W. Va. 259; *Caperton v. Martin*, 4 W. Va. 138, 6 Am. Rep. 270; *Maalin v. Hiett*, 37 W. Va. 15, 16 S. E. Rep. 487; *Bolling v. Teel*, 76 Va. 487; *Coles v. Ballard*, 78 Va. 189; *Johnston v. Wilson*, 29 Gratt. 379; *Shipley v. Pew*, 23 W. Va. 487; *Baltimore, etc., R. Co. v. Falkner*, 4 W. Va. 180 (action of assumpsit); *Virginia, etc., Co. v. Hoover*, 82 Va. 449, 4 S. E. Rep. 689 (action of ejectment); *Johnston v. Gill*, 27 Gratt. 567 (suit to set aside voluntary conveyance).

Writs of Ft. Fa.—It is provided by sec. 3577 of the Code of 1887, that in computing time as to writs of *f. fa.*, that the period between the 1st of January, 1869, and the 29th of March, 1871, shall be omitted. *James v. Life*, 92 Va. 702, 24 S. E. Rep. 275.

Law Not Applicable to Appeals.—Section 7 of the Act of March 2, 1866, known as the stay law and the act amending it, do not apply to appeals, writs of error, or supersedeas, and therefore an appeal from a final decree made on the 1st of November, 1867, cannot be allowed on the 20th of June, 1871. *Rogers v. Strother*, 27 Gratt. 417.

Military Orders Staying Executions.—Military orders extending the time for a stay of execution on judgments, related only to the stay of execution and the forced sales of property, and did not operate to suspend the running of the statute of limitations. *Johnston v. Wilson*, 29 Gratt. 379.

Time Excepted by Rev. Code.—By 1 Rev. Code, ch. 76, § 11, three different periods are excepted from the statute of limitations, from April 12, 1774, to Oct. 20th, 1873, amounting to five years and one hundred and seventy-four days. *Clay v. Ransome*, 1 Munf. 454.

3. INFANCY.—The suspension of the statute by the disability of infancy is practically without exception. *Brown v. Lambert*, 23 Gratt. 266. See monographic note on "Infants" appended to *Caperton v. Gregory*, 11 Gratt. 505.

Joint Tenants—Common-Law Rule—Statute.—The doctrine that the infancy of one joint tenant pre-

vents the application of the act of limitations to other joint tenants is based on the common-law rule that they must sue and be sued jointly. But that doctrine can have no application in Virginia, where by statute it is provided that undivided interests may be sued for and recovered. See ch. 125, Va. Code 1887; *Redford v. Clarke*, 100 Va. —, 40 S. E. Rep. 630, 7 Va. Law Reg. 351; *Marshall v. Palmer*, 91 Va. 344, 21 S. E. Rep. 673; *Nye v. Lovitt*, 92 Va. 710, 21 S. E. Rep. 345.

But the infancy of one joint tenant does not prevent the application of the act of limitations to other joint tenants not under disability. *Redford v. Clarke*, 100 Va. —, 40 S. E. Rep. 630. See monographic note on "Joint Tenants and Tenants in Common."

Infant Legatee.—Where a deceased bequeathed a slave to his infant son, the act of limitations could never begin to run against his claim and title to the slave, until he had attained to full age. *Lynch v. Thomas*, 3 Leigh 682.

Claims under Marriage Settlement.—Where by a marriage settlement, the children are entitled to an absolute estate in certain slaves on the death of their mother and father, and the latter in their lifetime are deprived of the slaves, and depart this life leaving the children under age, the act of limitations does not begin to run against them until they have maintained their majority. *Baird v. Bland*, 3 Munf. 570.

Limitations after Removal of Disability—Sue to Avoid Will.—Where an infant reaches full age in 1856, he cannot file a bill in 1859, to set aside the probate of a will made in 1840, the disability of infancy having been removed more than one year. Va. Code 1849, ch. 125, § 35; *McClintic v. Ocheltree*, 4 W. Va. 249.

Same—To Recover Land.—The provision of the statute of limitations which allows infants to make entry or bring action within ten years after the removal of the disability of infancy, notwithstanding the fifteen years' limitation may have expired, does not curtail the time of the infant for the assertion of his rights in this case from fifteen years to ten years. But the operation of the statute is exactly the reverse. In such cases the time for the assertion of the rights of those under the disability of infancy is enlarged by giving them fifteen years in any event, or ten years, after the removal of the disability, in which to bring the action, and it is immaterial which period shall first expire. *Birch v. Linton*, 78 Va. 584.

Same—To Surcharge Administrator's Account.—A testator dies, leaving his estate to his children, one of whom dies shortly afterwards, leaving several children. The estate is administered on, but no accounts thereof are settled. A great many years afterwards, but within five years after arrival at age, the youngest grandchild, together with his brothers and sisters, brings a suit to surcharge the administrator's account, and for a full settlement of the estate. The statute of limitations does not bar the suit. *Toler v. Toler*, 2 P. & H. 71.

4. COVERTURE.—Before the enactment of the "Married Women's Acts," the statutes of limitation had no application, as a general rule, to women under the disability of coverture. *Justis v. English*, 80 Gratt. 565. See monographic note on "Husband and Wife" appended to *Cleland v. Watson*, 10 Gratt. 159.

Claim of Wife against Husband.—The claim of a wife against her husband is not barred by the statute of limitations during coverture, if at all, until twenty

years from the original inception, or written renewal thereof. *Righter v. Riley*, 43 W. Va. 633, 26 S. E. Rep. 357.

Wife Nominal Party in Bill.—Where a wife is merely joined in a bill with her husband as a matter of conformity, the coverture of the wife is no excuse for delay in suing. *Blackwell v. Bragg*, 78 Va. 520.

Widow as Administratrix—After Removal Holds Slaves under Father's Will.—A widow is appointed administratrix of her husband and claims certain slaves under her father's will. She is afterwards removed and continues to hold the slaves. After having them in her possession for more than five years, the statute of limitations will protect her against any claims by the administrator *d. b. n.* and the next of kin of her husband. The fact of one of the latter being a married woman during the whole period, will not prevent the running of the statute against her. *Livesay v. Helms*, 14 Gratt. 440.

Recovery of Property Purporting to Have Been Conveyed by Wife.—A wife owning land in fee, not separate estate, makes a deed purporting to convey the land in fee, but her husband does not join in the deed. The possession of the grantee is adverse to both as the deed is void, and twenty years' possession will by sec. 4, ch. 104, of the Code of 1891, bar the right of the wife to recover although she remains married during the whole of the 20 years, and suit may be brought during coverture to recover the land, although ten years of such possession have elapsed. *Merritt v. Hughes*, 36 W. Va. 356, 15 S. E. Rep. 56.

Where a deed by a married woman attempting to convey land in fee simple is void, the possession of the grantee thereby being adverse, if after the lapse of ten years the coverture ceases, under sec. 3, ch. 104, Code of 1891, suit must be brought within five years thereafter. *Merritt v. Hughes*, 36 W. Va. 356, 15 S. E. Rep. 56.

5. MISTAKE.

Mutual Mistake with No Fault of Injured Party.—No lapse of time or delay in bringing suit, however long, will defeat the remedy in cases of mutual mistake, if the injured party was in the meantime ignorant of the mistake without fault on his part. *Craufurd v. Smith*, 93 Va. 623, 23 S. E. Rep. 335.

Discovery of Will—Money Paid Distributee.—Where the will of a supposed intestate was discovered twenty years after the distribution of his estate, the statute of limitations to recover from a distributee, who was not a legatee, the amount paid to him, did not begin to run until the discovery of the mistake. *Craufurd v. Smith*, 93 Va. 623, 23 S. E. Rep. 335.

House Built on Another's Land.—Where the plaintiff contributed money to build a house on the land of another, relying on the idea that she was to have an interest in the property, and her claim for the money so loaned was barred by the statute of limitations, no right of action accrued against the estate of the owner on his death, because of failure of consideration, or of the mistaken belief that she was entitled to such interest. *Walker v. Tyler*, 94 Va. 533, 27 S. E. Rep. 434.

Deficiency in Land Sold.—The right of a purchaser to recover the value of a deficiency in land sold, is not affected by the statute of limitations, when he is ignorant of the mistake, and suit is brought soon after its discovery. *Hull v. Watts*, 95 Va. 10, 27 S. E. Rep. 629.

6. IGNORANCE.

No Effect at Law—Otherwise in Equity.—While ignorance of law will not prevent the operation of the statute of limitations, the rule is different in equity,

a court of conscience. In such court, moral as well as legal grounds may be considered, and a satisfactory moral excuse may be entertained, although it results from ignorance of law. *Cranmer v. McSwords*, 24 W. Va. 564.

On Part of Creditor.—Mere ignorance on the part of a creditor is not sufficient to suspend the operation of the statute of limitations. *Foster v. Rison*, 17 Gratt. 321; *Bickle v. Chrisman*, 76 Va. 687.

To Be Effective Must Proceed from Fraud.—Where one partner for himself and another settles the partnership accounts with the acting partner, and receives payments of money for himself and the other, the fact that the other one was ignorant of the existence of the debt due from the partner who collected the money, until within five years before the institution of a suit, is not sufficient to repel the bar of the statute. To have that effect such ignorance must proceed from the fraud of the partner collecting the money. *Foster v. Rison*, 17 Gratt. 321. See *Bickle v. Chrisman*, 76 Va. 687.

Suit to Set Aside Voluntary Conveyance—Assignment of Title Bonds.—The rule that a suit to set aside a voluntary conveyance must be brought within five years from the day of the conveyance, and not from the time of the accrual of the cause of action, is not affected by the fact that the assignment of the title bonds in this case was without the knowledge of the creditor. *Bickle v. Chrisman*, 76 Va. 678.

Sale of Land Bound for Bond.—The assignor of a bond retained it and agreed to remain bound as assignor thereof, and to collect it. The land by which the bond was secured was sold to pay the debt, and was bought by the assignor. In the absence of knowledge on the part of the assignee that the land was sold, the statute of limitations did not begin to run from the day of the sale. *Lightfoot v. Green*, 91 Va. 509, 23 S. E. Rep. 242.

7. OBSTRUCTION OF PROSECUTION.

General Rule.—Where a person by any direct way or means obstructs the prosecution of a right, the time during which such obstruction continues shall not be computed in the limitation period prescribed in the Code, ch. 104. *Reynolds v. Gawthrop*, 37 W. Va. 3, 16 S. E. Rep. 364; *Morris Lyon*, 84 Va. 331, 4 S. E. Rep. 734; *Vanbibber v. Beirne*, 6 W. Va. 108.

Debtor Confined during War.—Where shortly after a judgment was rendered against the debtor, he was taken and detained in close confinement during the war, until after the expiration of five years from the date of the judgment, he will not be prevented from appealing by reason of limitations. *Wyatt v. Morris*, 2 W. Va. 575.

8. BY PROVISIONS IN WILL.

Devise of Real Estate for Payment of Debts.—A devise of real estate for the payment of debts will not affect the operation of the statute of limitations upon such debts, whether they be barred at the testator's death or not, unless the contrary intention on his part plainly appears. The devise is not of itself sufficient evidence of the intent, but it must appear from some phrase or provision independent of the devise, which indicates the purpose of the testator. *Johnston v. Wilson*, 29 Gratt. 379. See monographic note on "Wills."

Where a debt of the testator, for the payment of which real estate devised to a son was charged, was not barred at his death, the charge prevented the statute from running. *Baylor v. DeJarnette*, 18 Gratt. 152.

Personal Estate—Payment of Debts Ordered.—But a direction in a will of a testator that his debts shall

be paid, does not prevent the bar of the statute as to the personal estate. *Braxton v. Wood*, 4 Gratt. 26.

9. BY AGREEMENT OF PARTIES.

Covenant Not to Deliver Note.—Shortly after the making and delivery of a promissory note the parties thereto enter into a covenant in which it is agreed, that in consideration of the fact that the promisor has become the bail of the promisee, the note should be delivered to the former to be held, and only redelivered to the latter, when the former's liability as bail was ended. The effect of the covenant was to suspend the operation of the statute of limitations from the time the covenant was executed until the liability of the promisor as bail had ceased. *Bowles v. Elmore*, 7 Gratt. 385.

Stipulation in Insurance Policy.—It is valid for a fire insurance policy to contain a stipulation which limits the period within which suit can be brought thereon, to a shorter time than the period prescribed in the statute. *Virginia, etc., Ins. Co. v. Wells*, 83 Va. 736, 3 S. E. Rep. 349. See *Virginia, etc., Ins. Co. v. Aiken*, 83 Va. 424.

Insurance companies can grant an extension of time for a suit against them, in addition to that allowed by the policy, and after such extension has been given, the company cannot withdraw it, nor add conditions to it, without the consent of the party to whom it is given. *Cochran v. London Assurance Corp.*, 93 Va. 558, 25 S. E. Rep. 597.

10. TACKING DISABILITIES.—Where a disability existing at the time the cause of action accrued is removed, another disability cannot be tacked to it, to avoid the bar of the statute of limitations. *Fitzhugh v. Anderson*, 3 H. & M. 399, 3 Am. Dec. 625; *Hudsons v. Hudson*, 6 Munf. 352; *Parsons v. McCracken*, 9 Leigh 495.

Thus the disability of coverture, arising after a cause of action accrues, cannot be tacked to that of infancy, existing previously, so as to prevent the statute of limitations from commencing to run on the expiration of the disability of infancy. *Parsons v. McCracken*, 9 Leigh 495; *Blackwell v. Bragg*, 78 Va. 529.

It seems if a party claim the benefit of the saving for infants and *femes covert* in an act of limitations, no other disability is available than the one which existed when the right of action accrued. *Parsons v. McCracken*, 9 Leigh 495.

But where two or more disabilities exist in the same person when the right of action accrues, the rule is otherwise, and he is not obliged to act until the last is removed. *Blackwell v. Bragg*, 78 Va. 529; *Parsons v. McCracken*, 9 Leigh 495.

11. FRAUD.

Fraudulent Concealment of Facts.—If it appear by the proper pleadings supported by proof that the facts on which the cause of action is founded, were exclusively in the knowledge of the defendant, that he fraudulently concealed those facts, and that by such ways and means he deceived and obstructed the plaintiff from bringing his action within the time limited, the statute of limitations is answered. *Vanbibber v. Belrne*, 6 W. Va. 168. See monographic note on "Fraud" appended to *Montgomery v. Rose*, 1 Pat. & H. 5.

Concealment of Voluntary Deed from Creditors.—If a voluntary deed be made for lands, and its existence purposely concealed by the parties, and it is withheld from recordation for nine years, with intent to prevent the creditors of the grantor from knowing of its existence, and the creditors, being ignorant of it, are thereby lulled into a belief of

security, and by reason thereof do not sue to avoid it, until after five years from the date of the deed, the time during which the creditors are thus obstructed is not to be computed as a part of the time limiting a suit to annul such deed. *Reynolds v. Gawthrop*, 37 W. Va. 3, 16 S. E. Rep. 364.

Fraudulent Possession of Slave.—If a slave be taken from the possession of his owner by fraud or violence, unaccompanied by any *bona fide* claim of property, no length of time will bar the action from the true owner. *Kitty v. Fitzhugh*, 4 Rand. 600.

To a bill by an heir to recover a slave, her increase and their profits, the statute of limitations was pleaded at the time of the purchase; the defendant had no notice of the plaintiff's title, and the plaintiff replied that the defendant's vendor had removed the slaves to a distance for the purpose of concealing them, and that they could not be found after a diligent search. Under all the circumstances, it was held that the statute was no bar to the bill. *Farrar v. Jackson*, Wythe 1.

12. ORDER OF REFERENCE IN CREDITORS' SUITS.

General Rule Stated.—It is laid down as a general proposition, which is supported by numerous authorities, that from the time of the entry of an order of reference in a creditors' suit, the statute of limitations will cease to run against all lien creditors, whether their claims be against a living debtor, or the estate of a dead debtor. The rule seems to arise from the theory that the court by ordering the account takes upon itself the distribution of the assets, and will enjoin the prosecution of independent suits having the same object. And many of these cases hold that it is unnecessary for the lien creditors to be parties to the suit, as the court which first acquires jurisdiction should from necessity have the power to compel all creditors to prosecute their claims in that suit, and from considerations of economy of costs and convenience to parties to prevent the institution of separate suits. *Laidley v. Kline*, 23 W. Va. 565; *Marling v. Robrecht*, 18 W. Va. 440; *Neely v. Jones*, 16 W. Va. 625; *Arnold v. Casner*, 22 W. Va. 444; *Woodyard v. Polesley*, 14 W. Va. 211; *Repass v. Moore*, 96 Va. 147, 30 S. E. Rep. 458; *Covington v. Griffin*, 98 Va. 124, 34 S. E. Rep. 974; *Houck v. Dunham*, 93 Va. 211, 23 S. E. Rep. 238; *Paxton v. Rich*, 85 Va. 378, 7 S. E. Rep. 531; *Bank v. Allen*, 76 Va. 300; *Piedmont, etc., Ins. Co. v. Maury*, 75 Va. 508; *Harvey v. Steptoe*, 17 Gratt. 289; *Kent v. Cloyd*, 30 Gratt. 555; *Stephenson v. Taverners*, 9 Gratt. 390; *Ewing v. Ferguson*, 33 Gratt. 548; *Norvell v. Little*, 79 Va. 141; *Bank v. Hays*, 37 W. Va. 475, 16 S. E. Rep. 561; *Craufurd v. Smith*, 98 Va. 630, 23 S. E. Rep. 335; *Bell v. Wood*, 94 Va. 677, 27 S. E. Rep. 504; *Rowan v. Chenoweth*, 49 W. Va. 287, 38 S. E. Rep. 544.

Modification of General Rule.—In the late case of *Callaway v. Saunders*, 99 Va. 350, 38 S. E. Rep. 182, the general rule, as above stated, was materially modified. JUDGE BUCHANAN, delivering the unanimous decision of the court, said: "It is generally broadly stated that an order for an account of liens in a creditor's suit suspends the running of the statute against all lien creditors. But it is believed that there is no case which holds that the order for an account will prevent the running of the statute against the demand of a creditor who did not assert his demand in the suit. On the contrary the authorities show that the rule is only applied to such creditors as come in under the decree, or otherwise become parties to the suit, and that as to all others the statute continues to run." See this

position approved in editorial note appended to the case in 7 Va. Law Reg. 42. See also, *Paxton v. Rich*, 35 Va. 381, 7 S. E. Rep. 581, and *Barton's Ch. Pr.* (2d Ed.) 188 (note).

Effect on Pending Suits.—It is well settled that the entry of the decree for an account in one creditor's suit operates to suspend all other pending suits, and this order may be made in the first cause ready for hearing, although it was not the first suit brought. And where a creditor, with knowledge that there has been a decree for an account in another creditor's suit, brings a separate suit for his own debt, he will be compelled to pay the costs. *Laidley v. Kline*, 33 W. Va. 555; *Kent v. Cloyd*, 30 Gratt. 555; *Stephenson v. Taverners*, 9 Gratt. 398; *Harvey v. Steptoe*, 17 Gratt. 299; *Woodyard v. Polsley*, 14 W. Va. 211. See generally, monographic note on "Creditors' Bills" submitted to Suckley v. Rotchford, 19 Gratt. 60.

Invalid Consent to Decree by Guardian of Infants—Consent of Parties Sui Juris.—Where the consent of a guardian of infants to the making of an order of reference to ascertain the liens against the lands of such infants for the debts of their father, is invalid, such order will not stop the statute of limitations as to debts against the father of the infants. But as to the parties who are *sui juris*, their consent to such order will stop the statute as to liens against them, from the date of such reference. *Fowler v. Lewis*, 36 W. Va. 112, 14 S. E. Rep. 447.

12. DEPARTURE FROM STATE.

Resident When Action Accrued.—For a departure from the state to suspend the operation of the statute of limitations, it is necessary by sec. 2933, Va. Code 1887, before it was amended, that at the time of the accrual of the right of action the defendant be a resident of the state, and that he shall depart therefrom after such time. *Griffin v. Woolford*, 100 Va. —, 41 S. E. Rep. 949.

Residence Depends on Intention.—The removal of a debtor from the state with the intention of changing his residence, will bar the statute while he remains without the state. But the question of residence is one of intention, and the old one will not be regarded as lost as long as the *animus revertendi* remains. *Maslin v. Hiett*, 37 W. Va. 15, 16 S. E. Rep. 457.

Removal after Contracting Debt.—Where a debtor, who resides in the state, removes after contracting the debt to another state, the removal is itself an obstruction to the prosecution of a suit by the creditor to recover the debt, and the statute of limitations will not run against the debt while the debtor resides out of the state. *Ficklin v. Carrington*, 31 Gratt. 219; *Abell v. Insurance Co.*, 18 W. Va. 415.

In *Markle v. Burch*, 11 Gratt. 26, a simple contract debt was made in 1819, when the debtor lived in Virginia, and shortly afterwards he moved out of the state, remaining absent until his death in 1836, and in 1840, a proceeding by a foreign attachment was instituted to recover the debt. The proceeding was barred by the statute of limitations.

Departure after Accrual of Right of Action.—A departure from and residence out of the state after the accrual of the right of action, are of their own force an obstruction to the prosecution of such right of action, excusing it from the statute of limitations. *Fisher v. Hartley*, 48 W. Va. 389, 37 S. E. Rep. 578.

Departure Prior to Right of Action.—If before both the origin of the cause of action and the accrual of the right of action, a resident of the state moved

out of it, his departure and residence abroad will not save the action from the statute of limitations. *Fisher v. Hartley*, 48 W. Va. 389, 37 S. E. Rep. 578.

Section 18, ch. 104, of the W. Va. Code of 1887, in regard to the suspension of the statute of limitations by the departure of a debtor from the state, does not apply when the defendant, although once a resident of this state, removed therefrom before any right of action accrued against him, and before a transaction occurred out of which the plaintiff's cause of action arose. *Walsh v. Schilling*, 33 W. Va. 108, 10 S. E. Rep. 54.

Departure before Personal Judgment.—If a defendant, once a resident of the state, departs and resides out of it before a personal judgment is rendered against him, the time of his residence abroad will not excuse the judgment from the statute of limitations, though he was a resident when the cause of action on which the judgment rests arose or accrued. *Fisher v. Hartley*, 48 W. Va. 389, 37 S. E. Rep. 578.

Carpenter Leaving Family and Working in Several States.—A judgment debtor at the date of the judgment resided in the state, and was a carpenter by trade, and for several years after the judgment went from place to place in different states working at his trade, leaving his family all the time in the place where the judgment was obtained. His wife testified that only three months before her deposition he wrote that he was coming home, and that his family were expecting him home had he not died. It was held that these facts established no such obstruction as was contemplated by § 2933 of the Va. Code of 1887, as the judgment debtor had not left the state with the purpose of changing his residence. *Brown v. Butler*, 37 Va. 621, 18 S. E. Rep. 71.

Removal after Giving Note.—Where the maker of a note after giving it, removes from the state and remains away, he has obstructed the plaintiff's right to sue within Acts 1883, ch. 102, § 18, providing that where one leaves the state after a cause of action has accrued against him, the time of his absence shall not be computed, though suit is finally brought and service made by publication. *Heflbower v. Detrick*, 27 W. Va. 16.

Contract Made Out of State—Temporary Absence of Plaintiff.—A contract is made out of West Virginia, to be performed within the state, with the plaintiff, who is a resident of the state, by the defendant, who had been a permanent resident of the state, but who was then temporarily absent from it. The time during which the defendant remains out of the state, is not to be computed as any part of the time within which the creditor is required by the statute of limitations to prosecute his suit on such contract. *Abell v. Penn., etc., Ins. Co.*, 18 W. Va. 400.

No Agent of Insurance Company in State.—Where a fire insurance company is allowed to do business in a state on condition of having an agent there, on which service of process may be had, when there ceases to be an agent in the state, it is a departure of the company from the state, within the meaning of the limitation law. *Abell v. Penn., etc., Ins. Co.*, 18 W. Va. 400.

Construction of Statute.—The broad proposition that the removal of the debtor operates *proprio vigore* an obstruction within the meaning of the statute (sec. 2933, Va. Code 1887) to the prosecution of the plaintiff's right, during the period of the debtor's absence, was modified in *Wilson v. Kuntz*,

7 Cranch (U. S.) 202, where a substantially similar statute of this state was the subject of construction. The court, speaking through CHIEF JUSTICE MARSHALL, held that it was essential in order to bring a case within the exception contained in the statute, that the plaintiff should have been actually obstructed or defeated in bringing or maintaining his action by the removal of the defendant. *Brown v. Butler*, 87 Va. 621, 13 S. E. Rep. 71.

The same statute was construed in *Embrey v. Jemison*, 131 U. S. 336, 9 Sup. Ct. Rep. 776, which case went up from the Eastern district of Virginia. This section provides that where a cause of action shall accrue against a person who had before resided in this state, if such person shall, by departing from the same, obstruct the prosecution of such action, the time such obstruction may have continued shall not be computed in determining the time within which the action ought to have been prosecuted. It was held that this section did not apply where the defendant had removed from the state before he made the contract sued on.

Where there is no evidence that the defendant was ever a resident of this state, nor that she in departing therefrom intended to obstruct or did obstruct the prosecution of any suit against her, the effect of the statute of limitations was not avoided by sec. 2933 of the Code, which provides that where a person by leaving the state or by any other indirect way obstructs the prosecution of a right, the time of such obstruction shall not be computed in considering the effect of the statute of limitations. *Lovett v. Perry*, 98 Va. 604, 37 S. E. Rep. 33.

Same—Residence in State.—If a person residing in another state, makes his home in this state, and thereafter departs from, and continues to reside out of the state, he will be considered as a person, "who before the action accrued, resided in this state," and who by his departure and residence out of it, has obstructed the payee in the prosecution of his right of action on such note, during such absence from this state. *Hefebower v. Detrick*, 27 W. Va. 16.

Same—Preliminary Suits.—Section 20, ch. 146, of the Code of 1873, which suspends the operation of the statute if the defendant leaves the state, or by other indirect ways or means, obstructs the prosecution of the action, does not apply to a case when the obstruction was to suits which were necessary preliminaries to the suit in which the statute was pleaded. *Bickie v. Chrisman*, 76 Va. 678.

14. HAPPENING OF SUBSEQUENT EVENT.

Rule Stated.—When a right of action accrues to a party who is capable of suing, the statute of limitations begins to run, unless this is prevented by the case coming within some exception to the statute, and after the running of the statute has commenced, it cannot be stopped by the happening of any subsequent event or disability, such as death, want of personal representation, coverture, infancy, or any other disability. *Handy v. Smith*, 30 W. Va. 195, 3 S. E. Rep. 604; *Harshberger v. Alger*, 31 Gratt. 52; *Pace v. Ficklin*, 76 Va. 292; *Rowan v. Chenoweth*, 49 W. Va. 287, 38 S. E. Rep. 544; *Mynes v. Mynes*, 47 W. Va. 681, 35 S. E. Rep. 935; *Caperton v. Gregory*, 11 Gratt. 505; *Jones v. Lemon*, 26 W. Va. 635; *Parsons v. McCracken*, 9 Leigh 495; *Blackwell v. Bragg*, 78 Va. 539; *Fitzhugh v. Anderson*, 2 H. & M. 289.

Thus it is well settled that when the statute of limitations has begun to run in the lifetime of the ancestor, it will not cease to run against his infant

heirs, unless so specially provided by statute. *Merritt v. Hughes*, 36 W. Va. 356, 15 S. E. Rep. 56; *Wheasons v. Harper*, 25 W. Va. 182; *Caperton v. Gregory*, 11 Gratt. 505.

And if, after the right of action has accrued and the statute of limitations has begun to run, an ousted co-tenant dies, leaving infant heirs, the statute continues to run, and their rights are barred, notwithstanding their disability, in the same number of years as would bar their ancestor. They do not inherit the land, but a mere limited right of action, with days already numbered; and, unless they or their friends take the necessary legal steps to save the same within the period fixed by statute, their right of action is forever lost. *Talbot v. Woodford*, 48 W. Va. 449, 37 S. E. Rep. 333.

Unless there is an express saving in the statute of limitations, no person will come within its exceptions, and the prescribed limitations will operate against persons under disabilities as well as others; and the express exceptions refer only to such disabilities as exist at the time the right of action first accrued; for while, if several disabilities exist together at that time, the statute will only begin to run at the cessation of the last of them, yet if a second disability occur after those then existing have ceased, it cannot be pleaded; for it is the settled law that when the statute has once begun to run no subsequent event will interrupt it. *Jones v. Lemon*, 26 W. Va. 629.

15. MERGING CAUSE OF ACTION.—A personal judgment upon any cause of action merges and ends that cause of action, and thereafter the statute of limitations runs against the judgment. *Fisher v. Hartley*, 48 W. Va. 330, 37 S. E. Rep. 573.

A decree against an absent debtor merges the original cause of action and repels the statute of limitations, except so far as the statute may apply to a judgment or decree. *Rootes v. Tompkins*, 3 Gratt. 98.

16. VOID LEGAL PROCEEDINGS.—An attachment in equity was instituted in Virginia in July, 1861, against a nonresident debtor in the state of New York, and a garnishee, resident in Virginia. Service of process was made on the latter, and an order of publication was made against the former. The subject of the action was within the five-year limitation of the Virginia statute. The nonresident debtor was brought in the case by an amendment in 1879, and interposed the plea of the statute of limitations. It was held, that proceedings against him being void did not suspend the running of the statute. *Dorr v. Rohr*, 82 Va. 360. See 13 "Legal Proceedings," *infra*.

17. STATUTORY PROVISIONS.—Va. Code, sec. 2934, authorizing a new "action" within a year after abatement of a former action seasonably commenced, or reversal of a judgment on a ground not precluding a new trial for the same cause, notwithstanding the bar of limitation in the meantime, does not apply to equitable proceedings. *Dawes v. New York, etc., R. Co.*, 96 Va. 733, 32 S. E. Rep. 773.

Persons claiming rights of personal property, being under disability of infancy or coverture when their rights accrue, may prosecute any remedy in equity they are entitled to by *prochein ami*, at any time while the disability continues, no matter how long; or, in their proper persons, within five years the disability removed; the right to such remedy after being within the saving of the statute of limitations. 1 Rev. Code, ch. 123, sec. 12; *Hansford v. Elliott*, 9 Leigh 79.

In an action against the maker and surety on a joint and several note, brought by the administrator of the payee, it appeared that the payee could have taken the suitors' test oath, prescribed by Acts 1868, ch. 136, sec. 27, and that the maker could take the oath, but the surety could not, it was held that as to the surety in such joint action the Acts of 1872, p. 76, extended the five-year limitation. *Keller v. McHuffman*, 15 W. Va. 64.

Section 3577 of the Code of 1887, which prescribes the limitation of the right to issue executions on a judgment, and to bring *scire facias* or action thereon, provides that "in computing time under this section there shall, as to writs of *scire facias*, be omitted from such computation the time elapsed between the 1st day of January, 1869, and the 29th day of March, 1871." This section as to the quoted clause was construed in *Fadeley v. Williams*, 96 Va. 397, 31 S. E. Rep. 515, not to apply to writs of *scire facias*.

In computing time under the statute of limitations, a period of one year from the qualification of the personal representative of a person for whose benefit an action is brought in the name of another cannot be excluded, since such person is not a party to the record. Acts 1897-98, pp. 345-6; *Fadeley v. Williams*, 96 Va. 397, 31 S. E. Rep. 515.

In effectment the fact that the plaintiff had always claimed the land in controversy, and had not brought suit therefor because of his poverty, does not operate to suspend the operation of the statute. Section 2916 of the Code says: "No continual or other claim upon or near any land shall preserve any right of making an entry or bringing an action." *Voight v. Baby*, 90 Va. 799, 20 S. E. Rep. 824.

18. LEGAL PROCEEDINGS.

a. PENDING SUITS IN GENERAL.

Suit to Enforce Mechanic's Lien.—Where a sub-contractor brings suit to enforce a duly recorded mechanic's lien, and makes the general contractor a defendant, and properly alleges the recorded lien in the bill, the act of limitation is stopped, not only as to the lien of the plaintiff, but also as to the general contractor's lien, and all claiming as contractors under him, and also suspends any suit by sub-contractors, instituted during the pendency of his suit. *Spiller v. Wells*, 96 Va. 598, 33 S. E. Rep. 46.

Administration Suit.—When an administrator or executor sues in equity to convene the creditors of the estate and administer the assets for their benefit, the statute of limitations stops running against their debts at the commencement of the suit. *Rowan v. Chenoweth*, 49 W. Va. 297, 38 S. E. Rep. 544.

Suit for Different Property.—An executor having delivered certain slaves to legatees as their property under the will, a subsequent action of detinue against him, for other slaves which the testator held in the same right, is not sufficient, though prosecuted to a judgment, to prevent the act of limitations from running, both at law and in equity, in favor of the legatees. *Spotswood v. Dandridge*, 4 E. & M. 139.

Ward Delayed by Suit against Representative of Guardian.—The statute of limitations does not apply to a suit by a ward after becoming of age against the surety of his guardian, where the ward was delayed for more than ten years by the pendency of a suit against the administratrix of the guardian. *Roberts v. Colvin*, 3 Gratt. 368.

Claim Pending before Supervisors.—Where a party presents his claim against a county to the board of supervisors within the time limited by statute, and they decline to take it up and adjourn, and no entry

is made of it until a subsequent meeting of the board, after the time of limitation, the statute will not be allowed to bar the claim. *Dinwiddie County v. Stuart*, 28 Gratt. 526.

Suit Pending from Beginning of Transaction.—The statute of limitations does not run to bar an order of restitution in a cause which has been pending from the beginning of the transaction to the entering of the decree complained of. *Keck v. Allender*, 42 W. Va. 420, 26 S. E. Rep. 437.

b. **SUIT IN ANOTHER STATE.**—In a suit by an administrator and widow of a decedent, brought in Virginia against his heirs, to sell lands to pay debts and satisfy the widow's dower, wherein the debts are decreed against the decedent's estate and subjecting its assets, such decree will not save such debts from the statute of limitations for the purposes of a suit prosecuted in West Virginia against lands there. *Hull v. Hull*, 35 W. Va. 155, 13 S. E. Rep. 49.

c. **SET-OFFS.**—In *Hurst v. Hite*, 20 W. Va. 188, the statute of limitations did not cease to run against the offsets of the defendant respectively, until the time the defendant's answer and account of offsets were filed in the cause. Sec. 9, ch. 126, W. Va. Code 1869. See *Rowan v. Chenoweth*, 49 W. Va. 297, 38 S. E. Rep. 544.

d. EXECUTIONS.

Voidable Executions Effective.—The issuance of an execution on a judgment contrary to an agreement of the parties entered of record, is voidable and not void, and is effectual to prolong the life of the judgment and protect it from the operation of the statute of limitations. *Fulkerson v. Taylor*, 100 Va. —, 8 Va. Law Reg. 256.

e. **INJUNCTIONS.**—The statute of limitations to judgments does not run while an injunction to the judgment is pending. *Hutsonpiller v. Stover*, 12 Gratt. 579. See monographic notes on "Judgments" appended to *Smith v. Charlton*, 7 Gratt. 425, and "Injunctions" appended to *Clayton v. Anthony*, 15 Gratt. 518.

The pendency of an injunction suit, which prevents the enforcement of a right of action, will suspend the running of the statute of limitations against the claim. *Braxton v. Harrison*, 11 Gratt. 30.

Against Sale of Executor's Land under Decree.—Before ten years had expired from the date of a decree against an executor, an injunction was awarded against the sale of the executor's place, but the decree was not assailed, nor the issuance of an execution thereon affected. This was held to be no such suspension as would permit revival after the lapse of ten years under sec. 13, of ch. 182, of Code of 1873. *Series v. Cromer*, 88 Va. 426, 13 S. E. Rep. 859.

f. AMENDMENTS.

General Rule.—When an amendment to a bill or declaration is properly allowed, so far as regards the statute of limitations, it will have the same effect as if it had been originally filed in the amended form at the commencement of the suit or action, and a cause not then barred will not be treated as barred at the time of the amendment by reason of such amendment. *Kuhn v. Brownfield*, 34 W. Va. 252, 12 S. E. Rep. 519; *Lamb v. Cecil*, 28 W. Va. 653. See monographic notes on "Amendments" appended to *Snead v. Coleman*, 7 Gratt. 300, and "Amended Bills" appended to *Belton v. Apperson*, 26 Gratt. 207.

Action on Insurance Policy.—In an action on a policy of fire insurance, an amended declaration may

be filed claiming larger damages, or on additional property, under the same policy by the same fire. Where such amendment is made, the time as to the larger claim made by the amendment, whether under the statute of limitations or under a clause of the policy fixing a limitation for action under it, will stop running at the commencement of the suit, and not continue to the filing of the amended declaration. *Bentley v. Standard Fire Ins. Co.*, 40 W. Va. 720, 23 S. E. Rep. 584.

Action on Penal Statute.—The plaintiff in an action on a penal statute more than a year after the cause of action accrued, was allowed to amend his declaration, whereupon the defendant pleaded that the plaintiff ought not to maintain his action because it did not accrue within one year, or before he filed his amended declaration. It was held that under the law in force in West Virginia on the 9th of March, 1860, in such case the statute of limitations did not run in favor of the defendant up to the time of the filing of the amended declaration, but only until the commencement of the suit, that is the issuing of the original writ. *Hart v. Baltimore, etc.*, R. Co., 6 W. Va. 336.

g. LIMITATION CEASES ON COMMENCEMENT OF ACTION.

When Action Begins.—An action begins with the issuance of the summons to answer the declaration, and therefore the statute of limitations ceases to run at the date of the issuance of the summons. *Lawrence v. Winifrede Coal Co.*, 48 W. Va. 139, 35 S. E. Rep. 925; *Jones v. Jincey*, 9 Gratt. 708.

Same—From Date of Summons.—A suit to enforce a mechanic's lien, in which summons was issued, but not served within six months from the recordation of the lien, is not barred by the statute, as the suit begins from the date of the summons, not from its service. *U. S. Blowpipe Co. v. Spencer*, 46 W. Va. 590, 33 S. E. Rep. 342.

Same—Original Writ Quashed.—The suing out of a writ is the commencement of an action, and where the original writ is quashed and a new writ is ordered, the commencement of the action, so far as the act of limitations is concerned, begins with the issuing of the new writ. *Noell v. Noell*, 93 Va. 433, 35 S. E. Rep. 242.

Same—Petition—Date of Filing.—Where one lien creditor files his petition by leave of court in a suit brought by another lien creditor against their common debtor, the statute of limitations ceases to run against the debt of such petitioner at the time he files his petition, and not at the time when the process to answer it is served on the defendant. *Jackson v. Hull*, 31 W. Va. 601.

Court of Appeals—Order for Supersedeas.—The order of a judge of the court of appeals for a writ of supersedeas, is the true commencement for the proceedings in that court, and therefore if it be within five years from the date of the judgment complained of, although the writ is not taken out until five years have elapsed, it will be in time. *Overstreet v. Marshall*, 8 Call 192.

Effect of Void Process.—A summons commencing a suit, which is void because it has a wrong return day, is nevertheless effective to bring into existence a suit, such that its dismissal by the court for that cause will give one year after its dismissal for a new suit under the statute of limitations. *Ketterman v. Dry Fork R. Co.*, 48 W. Va. 606, 37 S. E. Rep. 683.

Suit to Enforce Contract for Sale of Land Not Process to Suspend Executions.—A suit to enforce a con-

tract for the sale of a judgment debtor's land, is not such legal process, as under Code of 1873, ch. 182, sec. 13, suspends the right of the judgment creditor to sue out executions, and stops the statute of limitations against such judgments. *Straus v. Bodeker*, 86 Va. 543, 10 S. E. Rep. 570.

h. DISMISSAL, NONSUIT OR FAILURE OF ACTION.—A suit brought by a judgment creditor to enforce satisfaction of his judgment, suspends the operation of the statute of limitations during its pendency. But if it is dismissed without satisfaction of the judgment, it will not prevent the bar of the statute to another suit brought after its dismissal. *Braxton v. Wood*, 4 Gratt. 25.

Failure to File Declaration.—A suit begun by the issuance of a summons, and dismissed at rules for the mere failure of the plaintiff to file his declaration, will not save his second suit for the same cause of action, brought within one year after such dismissal, from the statute of limitations. Sec. 13, ch. 104, Code of 1891; *Lawrence v. Winifrede Coal Co.*, 48 W. Va. 139, 35 S. E. Rep. 925.

Adequate Remedy at Law.—If a bill in chancery be dismissed upon the ground that plaintiff's claim is exclusively cognizable at law, he cannot plead the pendency of such suit in chancery to prevent the act of limitations from being a bar to his subsequent recovery at law. *Gray v. Berryman*, 4 Munf. 181.

No Hand to Receive Fund.—Where a suit is brought and decided in 1868, but retained on the docket until 1867, because there was no hand to receive the fund, when it is dismissed with leave to reinstate it on motion of any person interested, and it is reinstated in 1878, and a supplementary suit is brought, the latter is deemed a continuation of the former as to questions arising under the statute of limitations. *Sharpe v. Rockwood*, 73 Va. 34.

Want of Formality.—It is no answer to the bar set up by the plea of the act of limitations, that the plaintiff sued out a writ for the same cause of action within the time prescribed by the act, which writ was executed and returned, and went off the docket for want of formality. *Callis v. Waddy*, 2 Munf. 511.

Nonsuit on Plaintiff's Motion.—Where an action is brought within the statutory period, and after the expiration of that period, the plaintiff is nonsuited upon his own motion, the statute of limitations is a bar to another action for the same cause. *Mantel v. Norfolk, etc.*, R. Co., 99 Va. 183, 37 S. E. Rep. 857. See *Braxton v. Wood*, 4 Gratt. 25.

The operation of the statute to bar a judgment obtained against a testator in his lifetime, will not be prevented by *scire facias* sued out within five years from the qualification of the personal representative on which the latter suffered a nonsuit. *Peyton v. Carr*, 1 Rand. 436.

Unsuccessful Action of Ejectment.—An unsuccessful action of ejectment makes no change in the possession of land, and consequently does not stop the running of the statute of limitations. *Nelson v. Triplett*, 99 Va. 421, 39 S. E. Rep. 150.

Distress Warrant Unexecuted.—The contention that the issuing of a distress warrant fifteen years prior to the institution of the suit, which warrant was returned unexecuted, and which remained filed in the clerk's office, without vitality or effect until suit was instituted, would operate to suspend the running of the statute, was held unsupported by principle or authority in *Ashby v. Bell*, 80 Va. 811.

VIII. ACKNOWLEDGMENT, NEW PROMISE AND PART PAYMENT.

1. ACKNOWLEDGMENT AND NEW PROMISE.

a. GENERAL PRINCIPLES AND RULES.

Statement of Rule.—An acknowledgment in writing, to operate as a new promise to remove the bar of the statute of limitations, must be a clear and definite acknowledgment of a precise sum, plainly importing a willingness and liability to pay, not in any wise conditional, nor by way of promise or attempt at settlement. *Stiles v. Laurel Fork Oil & Coal Co.*, 47 W. Va. 838, 35 S. E. Rep. 986; *Jackson v. Hull*, 21 W. Va. 601; *Bell v. Crawford*, 8 Gratt. 110; *Aylett v. Robinson*, 9 Leigh 45; *Abrahams v. Swann*, 18 W. Va. 274; *Quarrier v. Quarrier*, 36 W. Va. 810, 15 S. E. Rep. 156; *Sutton v. Burruss*, 9 Leigh 381; *Switzer v. Noffsinger*, 82 Va. 523; *Coles v. Martin*, 99 Va. 223, 37 S. E. Rep. 907; *Stansbury v. Stansbury*, 20 W. Va. 23.

If the new promise is to be raised by implication of law from such acknowledgment, there must be an unqualified acknowledgment of a subsisting debt, which the party is liable and willing to pay. *Abrahams v. Swann*, 18 W. Va. 274; *Jackson v. Hull*, 21 W. Va. 601; *Bell v. Crawford*, 8 Gratt. 110; *Aylett v. Robinson*, 9 Leigh 45; *Coles v. Martin*, 99 Va. 223, 37 S. E. Rep. 907; *Sutton v. Burruss*, 9 Leigh 381; *Switzer v. Noffsinger*, 82 Va. 523.

Conditions.—If the acknowledgment or new promise be coupled with any terms or conditions, they must be proven to have been performed, or else no recovery can be had. *Stansbury v. Stansbury*, 20 W. Va. 23; *Jackson v. Hull*, 21 W. Va. 601; *Bell v. Crawford*, 8 Gratt. 110; *Aylett v. Robinson*, 9 Leigh 45; *Farmers' Bank v. Clarke*, 4 Leigh 603.

In an action of debt on a promissory note negotiable at a bank by the holders against the indorser, the latter pleads the general issue with leave to give the statute the limitations in evidence. At the trial the plaintiffs prove a conditional promise by the indorser to pay the debt within the period of limitations. Such conditional promise does not suffice to take the case out of the statute, unless performance of the condition be shown. *Farmers' Bank v. Clarke*, 4 Leigh 603.

Promise "to Settle."—**Acknowledgment of Debt.**—Thus a promise to settle, or an acknowledgment that something is due, but mentioning no certain amount, although in writing, will not remove the bar of the statute of limitations. *Bell v. Crawford*, 8 Gratt. 110; *Aylett v. Robinson*, 9 Leigh 45; *Sutton v. Burruss*, 9 Leigh 381. See also, *Dinguid v. Schoolfield*, 32 Gratt. 808; *Horner v. Speed*, 2 Pat. & H. 643; *Switzer v. Noffsinger*, 82 Va. 523; *Gover v. Chamberlain*, 83 Va. 237, 5 S. E. Rep. 174; *Rowe v. Marchant*, 36 Va. 182, 9 S. E. Rep. 995; *Coles v. Martin*, 99 Va. 223, 37 S. E. Rep. 907; *Abrahams v. Swann*, 18 W. Va. 280; *Quarrier v. Quarrier*, 36 W. Va. 817, 15 S. E. Rep. 156; *Tazewell v. Whittle*, 13 Gratt. 329, and *note*.

United States Supreme Court Rule.—The doctrine is laid down by the supreme court of the United States in the leading case of *Bell v. Morrison*, 1 Pet. 351, that to remove the bar of the statute of limitations by a new promise, it must be determinate and unequivocal; and to imply a promise from a subsequent acknowledgment, the acknowledgment must be an unqualified admission of an existing debt which the party is liable for and willing to pay. This rule has been repeatedly recognized by the Virginia court. *Switzer v. Noffsinger*, 82 Va. 518; *Bell v. Crawford*, 8 Gratt. 110.

b. WHAT CONSTITUTES.

Promise "to Settle."—It requires a promise to pay, or such an acknowledgment in writing that a promise to pay may be implied from it, to take a debt out of the statute of limitations, and it is well settled that a promise merely "to settle" is not sufficient. *Gover v. Chamberlain*, 83 Va. 236, 5 S. E. Rep. 174; *Aylett v. Robinson*, 9 Leigh 45; *Bell v. Crawford*, 8 Gratt. 110. See "A. General Principles and Rules," *supra*.

An acknowledgment by the defendant that the items in the plaintiff's account are just, but that he had some offsets thereto, and a subsequent promise "to settle" all differences and accounts fairly, and not to take advantage of the statute of limitations, is not sufficient to remove the bar of the statute. *Sutton v. Burruss*, 9 Leigh 381, 33 Am. Dec. 246.

Where a testator said, "I am too unwell to do business now, but when I am better I will settle your accounts," these words were held not to import such promise to pay or acknowledgment of the debt as would take the case out of the statute of limitations. *Aylett v. Robinson*, 9 Leigh 45.

The fact that the defendants had in writing referred to a "settlement," and one had written to one of the plaintiffs desiring and proposing a settlement, does not amount to such a promise as to prevent the bar of the statute. *Pendleton v. Whiting*, Wythe 38.

Undelivered Writing.—An undelivered writing or due bill, found among a supposed debtor's papers after his death, is not a sufficient acknowledgment to prevent the bar of the statute of limitations. *Cann v. Cann*, 40 W. Va. 133, 20 S. E. Rep. 910.

Entries by Party.—Mere entries by a party in his own book of accounts will not operate as an acknowledgment, to take a demand out of the statute of limitations. *Stiles v. Laurel Fork Oil & Coal Co.*, 47 W. Va. 838, 35 S. E. Rep. 986.

Deposition.—A deposition of a maker of a note given and signed by him, in a case in which the obligee was not a party, for the purpose of obtaining a credit for it as to be paid by him, and for which he was allowed such a credit in that case, is such an acknowledgment of the debt by him as will defeat the plea of the statute of limitations in an action on the note by the obligee against him. *Dinguid v. Schoolfield*, 32 Gratt. 803.

Statement of Account.—No statement of account can have the effect of stopping the running of the statute of limitations upon the items of account which are included in the account stated, and which will otherwise be barred, unless there be a writing signed by the party to be charged, or his agent, expressly promising to pay the balance thus ascertained to be due, or in which there is such an acknowledgment of the liability that a promise of payment may be inferred therefrom. *Magarity v. Shipman*, 93 Va. 64, 24 S. E. Rep. 466.

Same—Not Signed.—A stated account not signed by the parties will not operate as an acknowledgment to take the demand out of the statute of limitations. *Stiles v. Laurel Fork Oil & Coal Co.*, 47 W. Va. 838, 35 S. E. Rep. 986.

Acknowledgment of Destruction of Bonds by Obligor.—The obligor and obligee of bonds, which were barred by the statute of limitations, resided together, and the obligor supposing the obligee *in extremis*, took the bonds and destroyed them. When the obligee recovered the obligor acknowledged that he had destroyed the bonds and that they were unpaid and stated their amounts. It was

held that such acknowledgment implied a promise to pay the bond. *Rowe v. Marchant*, 86 Va. 177, 9 S. E. Rep. 995.

Promise of Personal Representative.—In West Virginia the administrator by his verbal promise can no more prolong the vitality of a debt of his decedent, not yet barred, beyond the limit of the statutory bar, than he can revive a debt already barred; neither has he any option about protecting the estate by interposing the statute of limitations when applicable. *Van Winkle v. Blackford*, 83 W. Va. 573, 11 S. E. Rep. 26.

In Virginia a debt which is barred by the statute of limitations at the death of the debtor cannot be revived by the promise of the personal representative to pay it. *Seig v. Acord*, 21 Gratt. 365; *Brown v. Rice*, 26 Gratt. 473; *Brown v. Rice*, 76 Va. 659; *Smith v. Pattie*, 81 Va. 668; *Switzer v. Noffsinger*, 82 Va. 524.

Admission by Representative.—Where there are two joint executors or administrators, to one of whom the deceased was indebted in his lifetime for money loaned so long before his death, that when he died it was barred by the statute, the debt cannot be revived by the admission of the other administrator or executor that the money had been loaned and was due. *Seig v. Acord*, 21 Gratt. 365.

An administrator cannot by the acknowledgment in the pleading of a debt against his decedent, which is barred by the statute of limitations, or in any other way, remove the bar of the statute. *Stiles v. Laurel, etc., Coal Co.*, 47 W. Va. 888, 36 S. E. Rep. 986.

Charge in Will.—A charge in a will for payment of debts will not revive a debt barred by the statute at the death of the testator. *Jackson v. Hull*, 21 W. Va. 601. See *foot-note* to *Baylor v. DeJarnette*, 18 Gratt. 152.

Although specific direction be given in a will, the executors cannot pay debts which are barred by the statute of limitations when relied on by the debtors. *Dunn v. Renick*, 33 W. Va. 476, 10 S. E. Rep. 810.

A provision in a will that the money arising from the sale of the testator's personal property, after the payment of his just debts, shall be applied to certain purposes, does not create a trust for the payment of debts, nor take any debt out of the operation of the act of limitations. *Brown v. Griffiths*, 6 Munf. 450.

C. CERTAINTY AND SUFFICIENCY REQUIRED.

Identification by Extrinsic Evidence.—If an acknowledgment of a debt or promise to pay is contained in a letter, it is not necessary that the amount of the debt or its date should be specified therein, but the particular debt, to which the letter refers, may be identified by extrinsic evidence; and if so identified clearly, and the promise is unequivocal, or the acknowledgment is of a subsisting debt, for which the defendant is liable and willing to pay, the bar of the statute is thereby removed. *Abrahams v. Swann*, 18 W. Va. 274.

Where there is a promise to pay, not specifying any amount, but which can be made certain as to the amount, it is sufficient. *Coles v. Martin*, 99 Va. 223, 37 S. E. Rep. 907.

Fixed Sum.—A new promise, in order to remove the bar of the statute of limitations, must not be uncertain, but it must acknowledge a fixed sum or balance, which admits of ready and certain ascertainment. *Quarrier v. Quarrier*, 86 W. Va. 310, 15 S. E. Rep. 154.

"Agreed Balance"—Amount Not Appearing.—A promise to pay the "agreed balance on your judgment," is not good as a new promise, the amount of such agreed balance not appearing. If such balance refer to one thereafter agreed upon, and it does not appear that any balance was agreed, the promise is inoperative. *Quarrier v. Quarrier*, 86 W. Va. 310, 15 S. E. Rep. 154.

Acknowledgment of Property.—In an action of detinue brought for the recovery of a diamond pin, the act of limitations was pleaded, and the plaintiff replied that the defendant within five years next before the action was brought acknowledged the pin to be the property of the plaintiff. On demurrer to the replication, it was held that the acknowledgment was not sufficient to repel the effect of the statute, and that the five-year limitation could not be enlarged by any acknowledgment. *Morris v. Lyon*, 84 Va. 331, 4 S. E. Rep. 784.

d. CONSTRUCTION AND OPERATION.

Section 2922, Code Virginia.—It is enacted by sec. 2922 of the Code that if any debtor on contract promises payment in writing, the creditor may maintain an action within the number of years after the promise that he might have maintained it, if it were the original cause of action. *Robinson v. Bas (Va.)*, 40 S. E. Rep. 660.

Acknowledgment of Claimant's Right by Possessor of Land.—Whenever the possessor of land acknowledges a right in the claimant, the statute of limitations does not operate, because it negatives the idea of adverse possession. *Erskine v. North*, 14 Gratt. 60.

New Assumpsit for Store Account Barred.—A new assumpsit, for a store account barred by the six months' act of limitation, binds the debtor. *Beall v. Edmondson*, 3 Call 514.

Promise by Letter—Illustrative Case.—The plaintiff, as a member of a partnership, which ended in 1880, and alone from 1880 to 1888, was the physician of the testatrix, but during this time rendered no bills. From 1888 to 1896, when the plaintiff removed to another locality, annual bills were rendered and paid, with the exception of the latter year. When he removed the testatrix wrote the plaintiff that it was a shame that the failure of herself and his other patients to pay him had caused his departure, and that if he would send her his bill she would pay it in a short time. This letter was held not to remove the bar of the statute as to the accounts prior to 1888. *Coles v. Martin*, 99 Va. 223, 37 S. E. Rep. 907.

e. WHO MAY MAKE.

Person Liable.—A promise, to repel the plea of the statute of limitations, must be made by the person against whom the right to maintain an action has accrued. See Code of 1873, ch. 146, § 10; *Switzer v. Noffsinger*, 82 Va. 518.

By One Partner.—Although the acknowledgment of a debt by one or more of the partners of a mercantile firm, after the dissolution thereof, is competent to do away with the bar of the act of limitations in an action brought against the firm, the existence of the debt being first proved by other testimony, or admitted by the pleadings, yet such acknowledgment is not proper evidence of the existence of the debt, so as to charge the other partners. *Shelton v. Cocke*, 8 Munf. 191.

One partner cannot as against his copartner revive an old obligation, which is barred by the statute of limitations. *Davis v. Poland*, 92 Va. 225, 23 S. E. Rep. 292. See *Woodson v. Wood*, 84 Va. 473, 5 S. E. Rep. 277.

2. PART PAYMENT.

Must Be on Specific Debt.—In order for part payment to take the case out of the statute of limitations, it must be a payment upon a specific debt, and not a payment upon account. *Bell v. Crawford*, 8 Gratt. 110.

Made after Debt Is Barred.—It was held in *Gover v. Chamberlain*, 83 Va. 286, 5 S. E. Rep. 174, that a part payment of a note made after it had become barred by limitation was not sufficient to remove the bar of the statute.

IX. IN EQUITY.

1. WHERE EQUITY HAS EXCLUSIVE JURISDICTION.—The statute of limitations is not binding on courts of chancery in matters which are exclusively cognizable in equity. *Heiskell v. Powell*, 28 W. Va. 717. And where a suit is founded on a right purely equitable in its nature and without any corresponding legal right, there exists no analogy by which the statute of limitations may be applied, but it must be determined entirely upon equitable principles and rules, regardless of the statute of limitations. *Cranmer v. McSwords*, 24 W. Va. 594. Thus on partition, part of a tract was set off to the survivor of the two equal owners, and the remainder, belonging to the heirs of the deceased joint owner, was sold to complainant. Several years later it was discovered that the part set off to the surviving owner contained a large quantity in excess of his share, and that the part sold to complainant was proportionately deficient. The right to relief being purely equitable, the statute of limitations cannot be set up as a bar. *Fore v. Foster*, 86 Va. 104, 9 S. E. Rep. 497.

2. WHERE JURISDICTION IS CONCURRENT—RULE OF ANALOGY.—In *Rowe v. Bentley*, 29 Gratt. 756, **JUDGE BURKS**, delivering the opinion said: "The general rule undoubtedly is that in the application of statutes of limitations equity follows the law, and wherever a demand would be barred at law, an equitable demand of the like character will be barred in equity. The bar is applied by analogy, or according to some authorities, by obedience to the statutory enactment." *Coles v. Ballard*, 78 Va. 129; *Wheeling v. Campbell*, 12 W. Va. 46; *Switzer v. Noffsinger*, 82 Va. 518; *Hutcheson v. Grubbs*, 80 Va. 251; *Drumright v. Hite*, 2 Va. Dec. 465; *Harshberger v. Alger*, 81 Gratt. 67.

Thus there can be no doubt that where a debt is of a strictly legal nature, of which equity has concurrent jurisdiction with law courts, it is as much subject to the operation of the statute of limitations in a court of equity as in a court of law. In such cases the statute virtually includes courts of equity. At all events the bar of the statute is applied by analogy, if not in obedience to the statutory enactment. *Rowe v. Bentley*, 29 Gratt. 756; *Wilsons v. Harper*, 25 W. Va. 179; *Houck v. Dunham*, 82 Va. 211, 23 S. E. Rep. 238; *Graham v. Graham*, 16 W. Va. 598; *Redford v. Clarke*, 100 Va. —, 40 S. E. Rep. 630, 7 Va. Law Reg. 861; *McCarty v. Ball*, 82 Va. 872, 1 S. E. Rep. 189; *Ayre v. Burke*, 82 Va. 841; *Cottrell v. Watkins*, 89 Va. 810, 17 S. E. Rep. 328; *Rankin v. Bradford*, 1 Leigh 163; *Harrison v. Harrison*, 1 Call 419.

Actions to Recover Land.—In *Wilson v. Harper*, 25 W. Va. 179, it was held that when a suit for land was not brought until twenty-five years after the right of action accrued, the bar of the statute was complete, as the time prescribed by statute to bar an entry on land was fifteen years when the cause of action accrued.

Thus it was held in *Drumright v. Hite*, 2 Va. Dec. 465, that sec. 2915 of the Code, limiting an action to recover land east of the Alleghany mountains to fifteen years next after the right to bring it accrues, will be applied in equity when a suit is brought for the land, and for an account of the rents and profits. *Rowe v. Bentley*, 29 Gratt. 759; *Harshberger v. Alger*, 81 Gratt. 67; *Hutcheson v. Grubbs*, 80 Va. 257.

Mortgages and Deeds of Trust.—In Virginia the limitation in equity as against mortgages and deeds of trust, if the statute of limitations does not govern, is twenty years, and such limitation is based upon the presumption of payment, and even when more than twenty years have elapsed from the time the right to sue accrues, in some cases the payment will not be presumed. This limitation is not by analogy to the statute of limitations as applicable to ejectment, or any other real action, but by analogy to the limitation from presumption of payment, in actions at law or upon a single bill, if it is not merely a rule of courts of equity. *Pitzer v. Burns*, 7 W. Va. 68.

The right to enforce the lien of a deed of trust, being an equitable remedy, the statute of limitations has no direct operation upon such right. But courts of equity have adopted a general rule as to the limit for the enforcement of such lien by analogy to the right of entry at law under the old statute of limitations—21 Jac. 1. ch. 15. *Camden v. Alkire*, 24 W. Va. 674. See monographic notes on "Mortgages" appended to *Forkner v. Stuart*, 6 Gratt. 197, and "Deeds of Trust."

Claim for Deficiency in Land.—A claim for compensation for deficiency in quantity of land conveyed by deed, where the purchase money has been paid, is a mere personal demand, not cognizable alone in equity, but at law, and is subject to the statute of limitations. *Burbridge v. Sadler*, 46 W. Va. 39, 32 S. E. Rep. 1028.

Claim for Money Deposited.—Money deposited by one person with another to be paid to a third, and not paid, does not create a trust cognizable alone in equity, not subject to the statute of limitations, but is only a legal demand and is subject to the statute. *Burbridge v. Sadler*, 46 W. Va. 39, 32 S. E. Rep. 1028.

Exception in Case of Trust.—An exception exists to the rule that equity applies the statutory bar by analogy, in the case of controversies between trustee and *cestui que trust*, which are subsisting technical trusts cognizable only in courts of equity. *Harshberger v. Alger*, 81 Gratt. 53.

Liability of Guardian.—Although an action by an infant on the bond of his guardian is barred both as to the guardian and his sureties, after ten years from the arrival of the ward at age, yet an action may be maintained against a guardian on his general responsibility in equity, if not barred by laches. *Magruder v. Goodwyn*, 2 P. & H. 561.

Vendor's Lien.—In the leading case of *Hanna v. Wilson*, 3 Gratt. 242, it was decided that although an action at law to recover the purchase money was barred by the statute, yet the right to maintain a suit in equity to enforce the vendor's lien on the land could not be affected by any lapse of time short of the period sufficient to raise the presumption of payment. *Tunstall v. Withers*, 86 Va. 892, 11 S. E. Rep. 565.

Judgments.—Although a judgment is actually barred by the statute of limitations, yet the remedy in equity to enforce the lien is not affected by any time short of the period sufficient to raise the pre-

sumption of payment. *Gibson v. Green*, 80 Va. 524, 16 S. E. Rep. 661; *Paxton v. Rich*, 85 Va. 378, 7 S. E. Rep. 531. See monographic note on "Judgments" appended to *Smith v. Charlton*, 7 Gratt. 425.

Bond or Note Secured by Deed.—In equity a deed of trust is regarded merely as a security for the debt, and therefore as long as a recovery on the bond or note given for the debt is not barred by the statute, the right to enforce the lien of the trust continues and it may be enforced. *Camden v. Alkire*, 24 W. Va. 674.

X. IN CRIMINAL CASES.

In *State v. Beasley*, 21 W. Va. 777, which was decided in 1883, it was held that sec. 12, ch. 13 of the Code which said, "The time that any act is to be done shall be computed by excluding the first day and including the last," applied to criminal as well as to civil statutes of limitation.

Presentment.—A presentment is the bringing of a prosecution, and if the prosecution is not barred when commenced, the failure to file an information before the regular time expires will not bar it. *Com. v. Christian*, 7 Gratt. 631.

Information.—An information in the nature of a writ of *quo warranto*, though in form a criminal proceeding, yet is in substance a civil proceeding for the trial of a civil right, and therefore the act which limits the prosecution of an information on any penal law to one year does not apply to such informations. *Com. v. Birchett*, 2 Va. Cas. 51.

Information for Assault.—Under the Act of Jan. 25, 1806, sec. 2, amending the penal laws, an information for an assault cannot be filed after more than one year from the commission of the assault. *Com. v. Chichester*, 1 Va. Cas. 312.

Presumption.—After a conviction on a trial for a misdemeanor, the presumption in the appellate court is that the offence was proved to be within the period of limitations, in the absence of anything in the record to the contrary. *Earhart v. Com.*, 9 Leigh 671.

Averments.—When the time within which the prosecution for offences is limited by statute, the time as averred in the indictment should appear to be within the limit; but it is not necessary to aver that it occurred within that period. *State v. Ball*, 30 W. Va. 382, 4 S. E. Rep. 645.

If an indictment for an offence, the prosecution of which is by statute limited to a certain period after the offence was committed, shows upon its face that at the time of the indictment the prosecution was barred by such statute, it is fatally defective, and the defendant may take advantage of such defect by motion to quash the indictment, by demurrer, or by motion in arrest of judgment. *State v. Ball*, 30 W. Va. 382, 4 S. E. Rep. 645. See generally, monographic note on "Indictments, Informations and Presentments" appended to *Boyle v. Com.*, 14 Gratt. 674, and the other criminal law titles of this series.

XI. PLEADING AND PRACTICE.

1. THE PLEA.

Foundation for.—It is essential as a foundation for the plea of the statute of limitations that there be proof of adversary possession. *Lamar v. Hale*, 79 Va. 147.

Trespass—Certainty.—In an action of trespass on the case for damages for removing and mining coal, a plea of limitations that more than three years before the commencement of the suit, the defendants were in peaceful possession of the land, claiming title under lease, and that they have con-

tinuously remained in possession more than three years before the commencement of the action, was bad for want of certainty, and for the reason it did not state under whom the lease mentioned was claimed. *Perdue v. Caswell Creek Coal & Coke Co.*, 40 W. Va. 372, 21 S. E. Rep. 870.

Assumpsit—General Rule.—The plea of nonassumpsit within five years, if general, will refer to the time of the plea pleaded, whereas it ought to refer to the institution of the suit, and should conclude with an averment. *Smith v. Walker*, 1 Wash. 134.

2. MUST BE PLEADED.

General Rule.—Nothing is better settled than the rule that in order for the statute of limitations to be of avail to a party it must be relied on in the pleadings. *Gibson v. Green*, 80 Va. 524, 16 S. E. Rep. 661; *Hickman v. Stout*, 2 Leigh 6; *Smith v. Hutchinson*, 78 Va. 683; *Colvert v. Millstead*, 5 Leigh 88; *Trimyer v. Pollard*, 5 Gratt. 460; *Seborn v. Beckwith*, 30 W. Va. 774, 5 S. E. Rep. 450.

It is the established rule that where the statute is pleaded, either at law or in equity, the plaintiff to bring himself within its savings, must set forth the facts specially upon which he relies, either by replication to the plea, or by amendment of the bill. *Switzer v. Noffsinger*, 82 Va. 518.

Wherever it is necessary to plead the act of limitations, in order for it to form a bar, it ought to be specially pleaded, or at least insisted on; that is, the term prescribed by statute should be particularly pleaded, or relied on, to let the plaintiff show in his replication, avoidance of the bar, if he can. *Hudsons v. Hudson*, 6 Munf. 352.

Waiver.—Before a party can have the benefit of the bar created by the statute of limitations, he must plead the statute, or in some manner indicate his intention to claim the benefit of it, otherwise, it will be considered by the court to be waived. *Smith v. Brown*, 44 W. Va. 342, 30 S. E. Rep. 160.

Action for Seduction.—In an action by a father for damages for the seduction of his daughter, if the defendant would rely on the statute of limitations of one year, he must plead it before or at the trial. It cannot be relied upon by instructions to the jury. *Riddle v. McGinnis*, 22 W. Va. 253.

Action on Store Account.—A defendant cannot take advantage of the act imposing a limitation of one year on actions on store accounts without pleading it, the court not being directed to cause such items as have been of more than one year's standing in such accounts to be expunged, or to instruct the jury to disregard them, and the jury not being required to disallow and reject them without a plea. *Taylor v. Richards*, 3 Munf. 8.

Appellate Court.—Where the statute of limitations is not pleaded nor relied upon in the lower court, the appellate court will consider that the statute is out of the case. *Ogle v. Adams*, 13 W. Va. 212. See section XII "Appeals," *infra*.

Writs of Error.—The statute of limitations of writs of error, if it applies to writs of error *coram nobis*, cannot be relied on without being pleaded. *Eubank v. Rails*, 4 Leigh 308.

Exception—General Replication to Equitable Set-Off.—As a general rule the statute of limitations must be pleaded specially or it cannot be relied on, but there are some exceptions to the rule. In the case of equitable set-off under sec. 3399 of the Code, it cannot be specially pleaded, and the only reply that can be made to such plea is a general replication, and under it the statute of limitations may be relied upon. *Sexton v. Aultman*, 92 Va. 20, 22 S. E. Rep. 533.

1 HOW PLEADED.

a. PLEA.

Sufficiency—Statement of Facts Constituting Bar.—

The defence of the statute of limitations is an affirmative one, and a plea of the statute which merely avers the pleader's conclusions of law, is bad. The plea must as a general rule set up the facts constituting the bar, as for instance, that the alleged cause of action did not accrue within certain designated years previous to the institution of the suit. *Atkinson v. Winters*, 47 W. Va. 226, 34 S. E. Rep. 834.

A plea of the act of limitations should state on what act defendant relies. *Wortham v. Smith*, 15 Gratt. 487.

Same—Covenant.—A plea to an action of covenant that the defendant "did not, within twenty years next before the bringing of this suit, break his covenant as the plaintiff hath alleged," is a good plea of the statute of limitations, as it is equivalent to saying that the cause of action did not accrue within that time. *Davis v. McMullen*, 86 Va. 256, 9 S. E. Rep. 1005. See monographic note on "Covenants, The Action of."

Same—Assumpsit.—In an action of assumpsit for the use and occupation of land, where the cause of action arises upon the breach of the contract, and not at the time of making the same, the plea that the defendant did not assume, as in the declaration set forth, within five years prior to the commencement of this suit, is not a proper plea. It should be that the action did not accrue within five years, etc. *Atkinson v. Winters*, 47 W. Va. 226, 34 S. E. Rep. 834. See monographic note on "Assumpsit" appended to *Kennaird v. Jones*, 9 Gratt. 183.

Mistake of Counsel Sufficient Grounds.—A mistake of the defendant's counsel in advising him that he could avail himself of the defence of limitation without pleading it, is sufficient grounds for leave to file the pleas in addition to the answer. *Jackson v. Cutright*, 5 Munf. 308.

Action of Debt.—Where an action of debt is brought on a judgment after ten years from the date thereof, and the defendant wishes to avail himself of the statute of limitations, it is necessary that he should do so by plea. A demurrer to the declaration is not the proper mode to take advantage of the statute. *Herrington v. Harkins*, 1 Rob. 591. See monographic note on "Debt, The Action of" appended to *Davis v. Mead*, 13 Gratt. 118.

b. DEMURRER.

In Equity—West Virginia Rule.—In West Virginia it is held, contrary to the Virginia doctrine, but in accordance with the general rule in the other state courts, and in the supreme court of the United States, that the defence of the statute of limitations can be taken advantage of by demurring to a bill. *Jackson v. Hull*, 21 W. Va. 601; *Thompson v. Whitaker Iron Co.*, 41 W. Va. 574, 23 S. E. Rep. 795; *Van Winkle v. Blackford*, 33 W. Va. 573, 11 S. E. Rep. 26; *Whittaker v. Southwest Va. Imp. Co.*, 34 W. Va. 217, 12 S. E. Rep. 507; *Paxton v. Paxton*, 38 W. Va. 617, 18 S. E. Rep. 765; *Humphrey v. Spencer*, 36 W. Va. 17, 14 S. E. Rep. 412; *Seborn v. Beckwith*, 30 W. Va. 774, 5 S. E. Rep. 450; *Laidley v. Laidley*, 25 W. Va. 530; *Crumlish v. Railroad Co.*, 28 W. Va. 637.

Although the rule is that a defendant at law must plead the statute of limitations and cannot raise the defence by demurrer, yet where a cause of action which did not exist at law is given by statute, and the bringing of the suit within a certain period is made an essential element of the right to sue, and

there is no saving or qualification, objection may be taken by demurrer. Such a statute is not strictly a statute of limitations, and the right to sue must be accepted in all respects as the statute gives it. *Lambert v. Ensign Mfg. Co.*, 42 W. Va. 813, 26 S. E. Rep. 431.

Since the disuse of special replication in equitable practice, if the bill in equity shows on its face that the relief it prays for is barred by the lapse of time, advantage may be taken of such bill by demurrer, as well as by plea. *Jackson v. Hull*, 21 W. Va. 601.

Same—Virginia Rule.—In the recent case of *Hubble v. Poff*, 96 Va. 646, 37 S. E. Rep. 277, it was decided that the statute of limitations could not be interposed in Virginia by a demurrer to a bill in equity. The conclusion of the court is founded on the principle that if the statute could be interposed by demurrer, the plaintiff would thereby be cut off from introducing new matter to show that the bar had been removed by a new promise or otherwise. The following cases were cited in the opinion: *Hickman v. Stout*, 2 Leigh 10; *Tazewell v. Whittle*, 13 Gratt. 329; *Colvert v. Millstead*, 5 Leigh 98; *Smith v. Pattie*, 81 Va. 605; *Gibson v. Green*, 89 Va. 526, 16 S. E. Rep. 661.

At Law.—The declaration in an action for death by wrongful act showed on its face that the action was instituted more than twelve months after the injury occurred. A demurrer to the declaration was properly sustained. *Manuel v. Norfolk, etc., R. Co.*, 99 Va. 188, 37 S. E. Rep. 957.

See, for full collection of cases, monographic note on "Demurrers" appended to *Com. v. Jackson*, 1 Va. Cas. 501.

c. ANSWER.

Sufficiency.—Anything in an answer which apprises the plaintiff that the defendant relies on the statute of limitations, is sufficient, if such facts are stated as are necessary to show that the statute is applicable. *Tazewell v. Whittle*, 13 Gratt. 329.

In a bill by a creditor of a testator against the executor of a legatee, where the latter relies upon the statute of limitations in his answer, it is sufficient to protect the estate from a decree against the executor. *Jackson v. Hull*, 21 W. Va. 601.

The same strictness of pleading is not required in equity as at law. It is not common to plead the statute specially or formally in equity, but only to rely upon it in general terms in the answer. The only reason for requiring the defence to be made by a plea or answer is that the plaintiff may have an opportunity to take the case out of the operation of the statute if he can. *Tazewell v. Whittle*, 13 Gratt. 329; *Smith v. Pattie*, 81 Va. 654.

d. AMENDMENT.—In *White v. Turner*, 2 Gratt. 503, a defendant in equity was allowed to amend his answer for the purpose of setting up the statute of limitations in bar of the plaintiff's claim.

In an action of detinue, the replication to the defendant's plea of the statute of limitations being insufficient, a demurrer was sustained, and the action was dismissed. The declaration contained the averments for the lack of which the replication was defective. It was erroneous to dismiss the action, as the plaintiff should have been given leave to amend the replication. *Morris v. Lyon*, 1 Va. Dec. 615.

After issue has been joined and the cause set for hearing, the defendant in chancery may be permitted for good cause shown to amend his answer and plead the statute of limitations. *Jackson v. Cutright*, 5 Munf. 308.

e. EXCEPTION TO COMMISSIONER'S REPORT.—The bar of the statute may be set up in equity by

excepting to the report of the commissioner. *Jackson v. Hull*, 21 W. Va. 601; *Woodyard v. Polsley*, 14 W. Va. 221; *Smith v. Pattie*, 81 Va. 666; *Johnston v. Wilson*, 20 Gratt. 884; *Jincey v. Winfield*, 9 Gratt. 721; *Leith v. Carter*, 83 Va. 889, 5 S. E. Rep. 584; *Ayre v. Burke*, 82 Va. 338, 4 S. E. Rep. 618; *Blair v. Carter*, 78 Va. 621.

If a creditor fail to contest a claim, which on the face of the commissioner's report appears to be barred, he may except, and it is the duty of the court to sustain the exception, unless it appear that the bar of the statute had been removed, or he may for good cause recommit the report. *Woodyard v. Polsley*, 14 W. Va. 211.

f. BEFORE COMMISSIONER.—The statute of limitations may be relied on before a commissioner, even where it has not been pleaded before the court prior to the order of reference. *Woodyard v. Polsley*, 14 W. Va. 211.

In a suit by a creditor against an expired corporation, where the corporation in its answer pleads a set-off against the plaintiff's demand, the plaintiff may file a plea of the statute of limitations before the commissioner, or in any other manner make that defence before the commissioner taking an account in the case. *Stiles v. Laurel, etc., Coal Co.*, 47 W. Va. 838, 35 S. E. Rep. 986.

g. ON TRIAL.

Set-Off—Notice—Opportunity for Replication.—If a defendant in an action of debt does not plead a set-off, but gives notice of it, and files an account of set-off, the plaintiff has no opportunity to reply to the statute of limitations, and may avail himself of the statute upon the trial. *Sexton v. Aultman*, 92 Va. 20, 22 S. E. Rep. 838; *Trimyer v. Pollard*, 5 Gratt. 460; *Smith v. Pattie*, 81 Va. 664; 4 Min. Inst. (1st Ed.) 660.

h. REPLICATION.—In Virginia a defendant may make the defence of set-off, other than the equitable set-off under the Code, sec. 8299, either by a formal plea or by a notice of the set-off, accompanied by an account of set-offs. If the defence be by plea, the plaintiffs must reply the statute specially. *Sexton v. Aultman*, 92 Va. 20, 22 S. E. Rep. 838; *Trimyer v. Pollard*, 5 Gratt. 460.

4. WHEN PLEADED IN GENERAL.

After New Trial Granted.—The statute of limitations may be pleaded after a new trial has been granted, the jury having found against the presumption of payment, which prevented its being pleaded on the former trial. *Tomlin v. How, Gilmer* 1.

After Joinder of Issue on Another Plea.—A plea of the act of limitation ought not to be received after issue has been joined on another plea, unless some good reason be assigned why the plea of the act was not sooner tendered. *Martin v. Anderson*, 6 Rand. 19.

No Right Accrued.—It is provided by secs. 8 and 9 of ch. 146, of the Va. Code of 1873, that the statute of limitations shall not begin to run in favor of the sureties of an administrator until the return day of an execution against him, or from the time the right arises under an order of court acting on his accounts to require payment. Hence the plea of the statute was untenable where there was no order of the court directing payment, until the entry of the decree against which the statute is pleaded. *Robertson v. Gillenwaters*, 85 Va. 118, 7 S. E. Rep. 371.

Barred by Mistake.—In *assumpsit*, defendant pleaded the general issue at the September term 1818, his death was suggested in October, 1823, and the cause was revived against his administrator at

the March term, 1824. The administrator obtained leave, at the October term, 1825, to plead the statute of limitations, but by mistake, as it appeared, the plea was not then filed. At the March term, 1826, the cause was called for trial, and the administrator asked leave to put in his plea. *Held*, that it could not then be received. *Clopton v. Clarke*, 7 Leigh 58.

Office Judgment Set Aside.—A defendant cannot plead the act of limitations upon setting aside an office judgment, after the next succeeding term, without good cause shown. *Backhouse v. Jones*, 5 Call 462.

5. REPLICATION.

Sufficiency—Action of Detinue.—In an action of detinue a replication to a plea of the statute of limitations is bad, which admits an averment in the plea that the cause of action accrued more than the statutory five years before the action was brought, but alleges a subsequent acknowledgment by the defendant of title to the property in question in the plaintiff, made within five years of bringing suit. This replication was deficient in not averring a promise to deliver the possession. *Morris v. Lyon*, 1 Va. Dec. 615. See *Morris v. Lyon*, 84 Va. 331, 4 S. E. Rep. 784.

Same—Action for Deceit.—In an action on the case for a deceit, if the defendant pleaded that the cause of action did not accrue within five years next before suing out the writ, a replication that the fraud came to the plaintiff's knowledge within that time is not good, and issue joined upon it should be set aside by the court as immaterial. *Callis v. Waddy*, 2 Munf. 511.

Same—Promise of Defendant to Pay.—A plea of the act of limitations in bar of a *scire facias* to revive a judgment cannot be repelled by a replication that the defendant within five years next before the suing out of the *scire facias* promised to pay the amount of the judgment. *Day v. Pickett*, 4 Munf. 104.

Insufficient Replication.—To an answer setting up the statute of limitations, the plaintiff files his replication, alleging that he did bring and prosecute his suit in his behalf, within five years from the time of the defendant's liability to be sued, and notice to the plaintiff of the matter complained of in the bill. This replication will not avoid the statute of limitations. *Vanbibber v. Belrne*, 6 W. Va. 168.

Suit against Corporation—Affidavit Required by W. Va. Code 1868.—Acting under legislative authority the county of Greenbrier, W. Va., made a parol contract in 1863 for the purchase of salt. Suit was not brought thereon until 1876, hence it was barred by limitation. To the plea of the statute the plaintiff could not reply that he could not truly make the affidavit required by the Code of W. Va. 1868, ch. 106, sec. 27, as no plaintiff can do so when he sues a corporation. *Stuart v. County of Greerbrier*, 16 W. Va. 95.

Allegation of Obstruction to Action.—A replication to a plea of the statute of limitations under sec. 18, ch. 104, of the W. Va. Code, need not allege that the defendant removed from the state with intent to obstruct the plaintiff in the prosecution of his action, as the removal itself is such an obstruction. *Abell v. Penn., etc., Ins. Co.*, 18 W. Va. 400 (1881).

Allegations of Suspension by War.—To an action brought upon a bond or promissory note after the Code of West Virginia went into operation on the 1st day April, 1869, sec. 5, ch. 104, applies; and con-

sequently a special replication to the plea of the statute of limitations, that said statute was suspended in any county during the whole of the late war between the so-called Confederate States and the United States, presents an immaterial issue and should be rejected. *Huffman v. Callison*, 6 W. Va. 301.

Same—Certainty Required.—A special replication to the plea of the statute of limitations, which does not allege the exact period of the war, or exactly how long the courts were closed, when these facts are relied upon as an avoidance, is bad, for that period only could be excepted from the computation of time which might otherwise prove a bar; for it should appear upon the face of the pleading that, after taking out the excepted time, five years have not elapsed since the action accrued. The replication by not stating the period, but leaving it wholly in blank, does not present a certain issue. *Huffman v. Callison*, 6 W. Va. 301.

Fraud Answer to Plea.—It seems that if fraud was not discovered until some time after it was practiced, and within the time of limitation, this would suffice to take the case out of the statute. To enable the plaintiff to avail himself of such matter he must plead it specially in his replication. *Rice v. White*, 4 Leigh 474.

Exceptions in Act.—If the defendant in equity plead the statute of limitations, and the plaintiff comes within any of the exceptions in the act, he will not be entitled to the benefit thereof, unless he sets it forth by a replication. *Lewis v. Bacon*, 3 H. & M. 89.

Where the claim upon which a suit was predicated was barred by the statute of limitations, if the plaintiff relied upon any exception to take the claim out of the operation of the statute, it should have been set forth in a replication to the plea of the statute by the defendant. *Laidley v. Smith*, 32 W. Va. 287, 9 S. E. Rep. 209.

Want of Replication Not Cured by Verdict.—A plea of the statute of limitations concludes with a verification, and should be replied to before trial, and a want of replication is not cured by verdict. *Balt., etc., R. Co. v. Faulkner*, 4 W. Va. 180.

Allegations Must Be Supported by Evidence.—In order for a replication to the plea of the statute of limitations to take the case out of its operation, its essential allegations must be established by the evidence. *Ragland v. Owen*, 84 Va. 227, 5 S. E. Rep. 91.

Former Suit.—In assumpsit the defendant pleaded the act of limitations, and if the defendant would avoid the plea by a former suit having been brought in time he must reply to the former suit specially; he cannot give it in evidence under general replication to the plea. *Bogle v. Conway*, 3 Call 1.

Insufficient Replication and Plea.—If a replication be insufficient and demurred to as such, yet if the plea be also insufficient, the court will go up to the first fault and give judgment for the plaintiff. *Day v. Pickett*, 4 Munf. 104. See *Baird v. Mattox*, 1 Call 261; *Kirtley v. Deck*, 3 H. & M. 388; *Callis v. Waddy*, 2 Munf. 511.

Action against Administrator for Slaves.—In an action of assumpsit against an administrator, he pleaded the statute of limitations. It is no answer to the plea that the defendant's intestate sold to the plaintiff slaves in payment of the debt declared on, and that the defendant since the death of his intestate had, as administrator, sued for and recovered upon the title alone, without regard to the intestate's indebtedness to the plaintiff, the slaves from the

plaintiff within five years before the action was brought. *Johnson v. Jennings*, 10 Gratt. 1.

6. DECLARATION.

Joinder of Counts.—In an action of assumpsit against an administrator *de bonis non*, counts upon promises made by an executor or former administrator of the deceased debtor may be joined with counts on promises by the deceased debtor himself in order to save the statute of limitations. *Bishop v. Harrison*, 2 Leigh 532.

Action of Debt—Subsequent Acknowledgment.—If, in any case of an action of debt on simple contract, the plaintiff would rely on a subsequent acknowledgment to take the case out of the statute of limitations, it seems he must count on such subsequent acknowledgment in his declaration. The rule is otherwise in an action of assumpsit. *Butcher v. Hixton*, 4 Leigh 519. See monographic note on "Debt, The Action of" appended to *Davis v. Mead*, 13 Gratt. 118.

7. INSTRUCTION.

Burden of Proof.—An instruction to the jury that the burden of proving the cause of action to be barred by the statute of limitations is upon the defendant, and further charging as to the time when the said statute begins to run, is insufficient and misleading, if not erroneous, where it does not go further and state that the cause of action would be barred and the plaintiff entitled to recover, if the suit was not instituted in the time limited by law. *Hansbrough v. Neal*, 94 Va. 722, 27 S. E. Rep. 593.

When Plaintiff Entitled to Defence without Pleading.—Where a plaintiff has a right to the defence of limitation without pleading it, an instruction that the same if believed would be a defence, is not erroneous as operating as a surprise to the defendant. *Sexton v. Aultman*, 92 Va. 20, 22 S. E. Rep. 838.

Action for Seduction.—If the defendant in an action for the seduction of a female would rely on the statute of limitations, he must plead it at or before trial, and he cannot rely on it, and raise the question upon instructions to the jury. *Riddle v. McGinnis*, 22 W. Va. 253.

Correct Instruction Refused.—Where the statute of limitations has been pleaded, the court erred in refusing to give the following instruction: "If the jury believe from the evidence that more than five years elapsed from the day the note sued on fell due and became payable, until the institution of this suit, then it is barred by the statute of limitations." *Huffman v. Callison*, 6 W. Va. 301.

8. EXECUTION.

Two Years after Judgment.—An execution issued upon a judgment after two years from its rendition without an order of court allowing its issuance, is properly quashed. *State v. Brookover*, 38 W. Va. 141, 13 S. E. Rep. 476.

9. VERDICT.

Sufficiency.—In *Hansbrough v. Neal*, 94 Va. 722, 27 S. E. Rep. 593, the court said: "The jury found in favor of the plaintiffs, and assessed their damages for the full amount claimed by them. To do this it was of course necessary for the jury to find that the defendant has assumed to pay as alleged in the declaration, and that he had done so within the statutory period. The verdict was a full response to both issues and in the usual form."

Same—Detinue.—Issues being joined in an action of detinue on the general issue and the act of limitations, a verdict that the defendant doth detain the slaves, in manner and form, etc., is sufficiently re-

sponsive to both issues. *Boatright v. Meggs*, 4 Munf. 145.

Curative Effect.—When the plea of the statute is defective, but is not demurred to, it is cured after verdict by sec. 8, ch. 177, Code 1873. *Davis v. McMullen*, 86 Va. 256, 9 S. E. Rep. 1095.

A plea of the statute of limitations concludes with a verification and should be replied to before trial, and the want of replication is not cured by verdict. *Balt., etc., R. Co. v. Faulkner*, 4 W. Va. 180.

10. BILL OF REVIEW AND DISCOVERY.

Necessity of Pleading Act.—It is not necessary to plead the act of limitations against a bill of review, for it ought to appear in the bill itself that it is exhibited within the time prescribed by law, or that the complainant is protected by some of the savings in the act, otherwise it ought not to be received. *Shepherd v. Larue*, 6 Munf. 529.

When Received.—A bill to review a decree pronounced before the 11th of February, 1814, could not be received after five years had elapsed from the date of such decree. *Shepherd v. Larue*, 6 Munf. 529.

Discovery When Defendant Made New Promise.—Where an action of assumpsit is brought at law, and the statute of limitations is pleaded, the plaintiff may file a bill of discovery in equity calling on the defendant to answer whether he has not made a new promise within the time of limitation, in order to use this matter on the trial of the action at law, in avoidance of the bar of the statute, and the defendant shall answer the allegation of the new promise on oath. *Baker v. Morris*, 10 Leigh 284.

XII EVIDENCE.

1. ADMISSIBILITY, SUFFICIENCY AND WEIGHT.

Length of Possession against Commonwealth.—Evidence as to length of possession against the commonwealth is improper, as time does not run against it. *Hurst v. Dulany*, 84 Va. 701, 5 S. E. Rep. 803.

Agreement Not to Sue.—A mutual understanding and agreement between the debtor and creditor, that suit shall not be brought on an account until the debtor shall have gone to Europe and returned, may be given in evidence to prevent the court's expunging from such account items appearing to have been due five years before his death. *Holladay v. Littlepage*, 2 Munf. 316.

Deed Fixing Date of Transaction.—Upon an issue joined on the plea of the statute of limitations, the court did not err to the prejudice of the plaintiff by admitting in evidence a deed, which tended to fix the date of the transaction, out of which the action arose. *Kyger v. Roberts*, 27 W. Va. 418.

Assumption by Partner of Partnership Debt.—If one of several partners, after the partnership is dissolved, assumes a partnership debt, but afterwards pleads the act of limitations, jointly with the other partners, the assumpsit may be given in evidence, for the plea of nonassumpsit admits that the defendants did once assume. *Brockenbrough v. Hackley*, 6 Call 51.

Statutory Notice Must Be Given.—Under Va. Code, sec. 2923, providing that a new promise may be shown in evidence by a plaintiff without pleading it to repel a bar of the statute of limitations, pleaded by the defendant, on reasonable notice to the defendant before trial, it is not error to reject such evidence where no notice has been given. *Noell v. Noell*, 93 Va. 433, 25 S. E. Rep. 242.

Immaterial Evidence.—The right of action to re-

cover back money paid on a war-trespass judgment, accrues as soon as the constitution was adopted, which declares such judgment void. And an order thereafter made setting aside a judgment under the provisions of sec. 8, ch. 58, Act of 1872-3, upon the only issue in the case, which was on the plea of the statute of limitations, would be immaterial evidence, and the court would not err in refusing to admit it in evidence. *Kyger v. Roberts*, 27 W. Va. 418.

Parol Gift of Slaves.—Although under the act of 1758, evidence of a parol gift of slaves cannot be given, yet such testimony may be received in order to prove five years' possession, so as to bar the plaintiff's demand. *Jordan v. Murray*, 3 Call 85.

Assumpsit of Executor.—On the trial of an issue on the assumpsit of the testator within five years, an assumpsit of his executor cannot be given in evidence to prevent the operation of the act of limitations. *Fisher v. Duncan*, 1 Hen. & M. 563.

Insolvency of Debtor Making New Promise.—Although a debtor is insolvent when he makes a new promise, while such fact is a circumstance to be considered in determining whether there is collusion between the debtor and creditor, it is not proof of the same. *Robinson v. Bass* (Va.), 40 S. E. Rep. 660.

Replication That Trade Was between Merchants Unsupported.—A replication was filed to the plea of the statute of limitations that the accounts concerned the trade of merchandise between merchant and merchant; no evidence was adduced to prove that either party was a merchant during the time of their dealings, nor any evidence of the character of the dealings between them. The replication was not supported by the evidence and the demand was therefore barred by the statute. *Watson v. Lyle*, 4 Leigh 236.

2. PRESUMPTION AND BURDEN OF PROOF.

Presumption of Payment.—The presumption of payment of a debt does not, as a matter of law, arise within the statutory period of limitations, though the lapse of time may be relied on in connection with other circumstances as evidence of payment. *Parsons v. McCracken*, 9 Leigh 495.

Presumption as to Demand.—If a demand be necessary before suit, the period of limitation does not commence to run until demand; but demand must be made within a reasonable time, which is the term fixed by the statute of limitations; and where no demand is shown, it is presumed to have been made within that period. *Thompson v. Whitaker Iron Co.*, 41 W. Va. 574, 23 S. E. Rep. 795.

Where Executor Fails to Pay Himself in Statutory Period.—Where an executor, having power to retain and appropriate so much of his testator's estate as is equal to a demand due to himself, neglects so to do within the period of time limited by law, he will be presumed to have abandoned the same or to have received satisfaction therefor; and when it appears that such executor kept no accounts, and a bill brought by his representatives long after his death, praying the payment of a balance which was due to him from his testator, the statute of limitations may be pleaded in bar. *Pendleton v. Whiting*, Wythe 38.

Burden on Party Pleading Statute.—The burden of proving that his case comes within the statute of limitations lies upon the one pleading it. *Lewis v. Mason*, 84 Va. 731, 10 S. E. Rep. 529. So where suit is brought in August, 1889, for lumber delivered in 1884, and does not allege in what month it was delivered

and the defendant fails to show it was delivered prior to August, a verdict for the plaintiff is proper. *Goodell v. Gibbons*, 91 Va. 606, 23 S. E. Rep. 504.

The burden of removing the bar of the statute of limitations by a new promise rests upon the defendant, and an acknowledgment or admission to have that effect, must not only be unqualified in itself, but there must be nothing in the attendant acts or declaration, to modify or rebut the inference of willingness to pay. If the acknowledgment be coupled with terms or conditions of any kind, a recovery cannot be had, unless they are fulfilled. *Stansbury v. Stansbury*, 20 W. Va. 28.

The burden of showing that a conveyance attacked as voluntary was made more than five years before the institution of the suit, is upon the party who pleads the statute. *Vashon v. Barrett*, 99 Va. 844, 38 S. E. Rep. 300. See *Stansbury v. Stansbury*, 20 W. Va. 28.

But the defendant in detinue may protect himself under the general issue without pleading the act of limitations, by proving that he and those under whom he claimed had possession of the property in controversy more than five years before the issuing of the writ. *Elam v. Bass*, 4 Munf. 301.

In an action by the administratrix of a sheriff, against a deputy and his sureties, for default of the deputy in not paying over money collected by him on an execution, where the defence is that the claim of the creditor against the administratrix is barred by the statute of limitations, the burden of proof is on the defendant to show such fact. *Cox v. Thomas*, 9 Gratt. 323.

XIII. APPEALS.

1. FROM INTERLOCUTORY DECREES.—The statutory bar of one year to appeals from decrees applies only to final decrees, and not to interlocutory decrees. *Barker v. Jenkins*, 84 Va. 865, 6 S. E. Rep. 490. See *Rawlings v. Rawlings*, 75 Va. 76. See generally, on this subject, monographic notes on "Appeal and Error" appended to *Hill v. Ferry Turnpike Co.*, 1 Rob. 263, and "Decrees" appended to *Evans v. Spurgin*, 11 Gratt. 615.

The statute of limitations is not applicable to an interlocutory decree and an appeal will lie therefrom in a proper case, regardless of the length of time that has elapsed since it was made. *Jameson v. Jameson*, 86 Va. 51, 9 S. E. Rep. 480.

Although by sec. 8454, of the Va. Code 1887, the right of appeal is given from certain interlocutory decrees, still a party entitled to such appeal is not bound to appeal from them when they are rendered, but may do so at any time within a year after a final decree has been rendered in the cause, provided all the other requisites for an appeal exist. *Southern Ry. Co. v. Glenn*, 98 Va. 309, 36 S. E. Rep. 395. See *Jameson v. Jameson*, 86 Va. 51, 9 S. E. Rep. 480; *Harper v. Vaughan*, 87 Va. 426, 12 S. E. Rep. 785.

2. RAISING QUESTION ON APPEAL.—Limitation is no defence, unless pleaded or otherwise relied on in the lower court. *Seborn v. Beckwith*, 30 W. Va. 774, 5 S. E. Rep. 450.

In a creditors' suit, if the statute of limitation has not been specially pleaded, nor relied on before the commissioner, and he failed to recognize the statute, and therefore endorsed no exception on the report, the appellate court will consider the statute of limitations out of the case, although the report upon its face shows that some of the claims allowed by the commissioner were barred by the statute. *Woodyard v. Polsley*, 14 W. Va. 211. See *Ogle v. Adams*, 13 W. Va. 213.

Where, in an action to enjoin a sale under a trust deed on the ground that it has been merged in a judgment on the bond secured by it, the bill not only fails to plead the statute of limitations as to the judgment, but prays that the parties entitled to it be required to enforce it in the usual way, the statute is not available on appeal. *Gibson v. Green*, 89 Va. 524, 16 S. E. Rep. 661, 37 Am. St. Rep. 888.

3. MOTION TO DISMISS.—A motion to dismiss an appeal, granted on insufficient petition, made more than three years after the appeal was granted, and after the right to appeal has become barred, on the ground of such insufficiency, should not be sustained. *Orr v. Pennington*, 93 Va. 268, 24 S. E. Rep. 928.

4. APPEAL BOND.

Must Be Given in Proper Time.—Section 17, ch. 178, of the Code of 1873, provides that an appeal from a final decree shall be dismissed whenever two years elapse since its date, before bond is given. Where a final decree is entered June 2, 1877, and an appeal is allowed therefrom May 8, 1879, but the bond is not given until June 9, 1879, under this section the appeal must be dismissed. *Pace v. Ficklin*, 76 Va. 292. See monographic notes on "Statutory Bonds" appended to *Goolsby v. Strother*, 31 Gratt. 107, and "Appeal and Error" appended to *Hill v. Ferry Turnpike Co.*, 1 Rob. 263.

A. PRESENTATION OF PETITION.

a. IN VIRGINIA.

Five Years.—The act limiting appeals to the court of appeals, refers to the time of presenting the petition for an appeal to the court or a judge in vacation; and if the petition be presented within five years from the date of the judgment or decree, the appeal is not barred by the statute. *Williamson v. Gayle*, 4 Gratt. 180.

Same—Applies to Commonwealth.—The act of April 16, 1831, which limits the right of appeals to the courts of appeal to five years, applies to the commonwealth. *Com. v. Moore*, 1 Gratt. 294.

Prior to Act November 5, 1870.—The longest period of limitation within which a petition for an appeal, writ of error and supersedeas can be presented is two years nine months and ten days, as to final judgments, decrees and orders rendered before the passage of the act of November 5, 1870, and as to those since rendered, such period of limitation is two years. *Callaway v. Harding*, 23 Gratt. 542.

Two Years—Act March 15, 1867.—The act of March 15, 1867, which amended sec. 3, of ch. 182, of the Code of 1860, changing the limitation of time for presenting a petition for an appeal from, or writ of error or supersedeas to, any final decree or judgment, from five to two years after it was made or rendered, did not amend sec. 26, of that chapter which allows five years for perfecting an appeal. Therefore an appeal might be perfected at any time within five years from the date of the decree. But see sec. 17, ch. 178, of the Code of 1873; *Bolling v. Lersner*, 26 Gratt. 36.

Bills of Review—Six Months—Acts 1884.—Under secs. 3 and 17, ch. 18, of the Sess. Acts of 1884, requiring a petition for an appeal from a decree refusing a bill of review to a final decree, rendered more than twelve months before, to be presented within six months from such refusal, it is immaterial whether the statute intended the refusal to be of the prayer of the bill or merely of permission to file it, and in either case, after the expiration of the prescribed time the appeal cannot be granted. *Jordan v. Cunningham*, 85 Va. 418, 7 S. E. Rep. 540.

If a final decree, from which an appeal is asked, is a decree refusing a bill of review to a decree rendered more than six months before, no appeal from or supersedeas to such decree shall be allowed unless the petition be presented within six months from the date of such final decree, Va. Code 1887, sec. 3455; *Mason v. Mason*, 97 Va. 108, 33 S. E. Rep. 1015. The limitation begins to run from the actual date of the decree appealed from, and not from the beginning or end of the term at which it was rendered. *Buford v. North Roanoke Land Co.*, 94 Va. 616, 37 S. E. Rep. 509.

Delivery of Record to Clerk.—It is provided by sec. 3474 of the Code that the record, with petition for a writ of error, is to be delivered to the clerk of the court of appeals and bond given, within one year from the entry of the judgment or decree appealed from, exclusive of the period between the presenting of the petition and the delivery of the papers to the clerk, or the writ of error is to be dismissed. This section contemplates merely an actual delivery to the clerk, and where the petition and papers are received on the last day of the period allowed, and the bond is not filed until the next day, the writ should be dismissed, although the clerk did not know that he did not have the petition and record, until the time when the bond was filed. The statute of limitations in such cases is imperative, and the appellate court cannot relieve the plaintiff or appellant from the effect of misfortune, accident or mistake. *Bull v. Evans*, 96 Va. 1, 30 S. E. Rep. 468. See *Pace v. Picklin*, 76 Va. 292; *Otterback v. R. Co.*, 26 Gratt. 940; *Yarborough v. Deshazo*, 7 Gratt. 374.

b. IN WEST VIRGINIA.

Two Years.—Under ch. 157, Acts 1883, the court of appeals of West Virginia has no authority to award an appeal from any appealable decree, or to review errors in it or any decree or order preceding it in the cause, unless the appeal from such appealable decree is taken before the expiration of two years from its date. *Hoy v. Hughes*, 27 W. Va. 778.

If, after the expiration of two years from the date of an appealable decree, an appeal is properly obtained from a subsequent decree for errors not arising out of the first decree or any order or decree preceding it, the court of appeals can only consider and review the errors complained of in such subsequent decree, or the orders and decrees entered in the cause subsequent to said appealable decree. *Hoy v. Hughes*, 27 W. Va. 778.

Five Years.—Under provisions of sec. 3, ch. 44, W. Va. Acts 1877, and sec. 3, ch. 157, W. Va. Acts 1882, no petition can be entertained by the court of appeals for an appeal from a decree of any character, which was rendered more than five years before the petition was presented for the appeal. *Lloyd v. Kyle*, 26 W. Va. 534.

A party cannot be granted an appeal upon a petition assigning errors in appealable decrees rendered more than five years before the petition is presented, although the errors thus assigned may be the foundation of, and be given effect in, a subsequent decree rendered within five years, from which an appeal is also prayed. *Lloyd v. Kyle*, 26 W. Va. 534.

XIV. THE STATUTE IN PARTICULAR INSTANCES.

In this section the application of the statute in particular instances has been set out. The collection of cases is by no means exhaustive, and reference is made to the monographic note on each specific subject of the series, where all the cases

will be found relating to the limitation of actions in that particular branch of the law.

1. ACCOUNTS.

Retail Store Accounts.—Sec. 5, ch. 149, Code 1880, limiting actions on store accounts to two years, does not embrace wholesale dealings of importing and wholesale merchants, but applies exclusively to the store accounts of retail dealers with their customers. *Wortham v. Smith*, 15 Gratt. 487.

Same—Auctioning Imported Goods.—The act of October 1779, "for discouraging extensive credit, and repealing the law prescribing the method of proving book debts," providing that all actions founded on accounts for goods sold and delivered, or for any articles charged in any store account, shall be commenced within six months after the cause of action accrues, applies only to store accounts of retail merchants, and not to an action for wares and merchandise imported for sale by one who kept no retail store, but who sold the same at public auction and delivered them twelve months before the suit was brought. *Tomlin v. Kelly*, 1 Wash. 190.

Same—Accounts Stated.—Retail store accounts, though barred by limitations in two years, when presented to the debtor, and agreed by him to be correct, become accounts stated, and are governed by a different statute. *Radford v. Fowlkes*, 85 Va. 820, 8 S. E. Rep. 817.

Suit to Surcharge and Falsify Accounts.—There is no statute of limitations, fixing time within which suits may be brought to surcharge and falsify settlements of accounts of committees of lunatics. *Trowbridge v. Stone*, 43 W. Va. 454, 26 S. E. Rep. 383.

Recovery of Money from Attorney.—The act of limitations is a good plea to a suit in equity brought to recover money collected by an attorney for the plaintiff, and not accounted for by him. *Kinney v. McClure*, 1 Rand. 264.

Accounts between Merchants and Factors.—The accounts between merchant and merchant or merchant and factor, which are excepted from the operation of the statute, must be a direct concern of trade. Liquidated demands or bills and notes, which are only traced up to the trade of merchants, are too remote to come within the description and they are not excepted from the bar. *Roots v. Salt Co.*, 27 W. Va. 483.

Merchant and Merchant.—The saving in sec. 4 of the act of limitations, 1 Rev. Code 488, applies also to sec. 7 of the same act, by which an action between merchant and merchant is neither barred by one year, nor by five years. *Moore v. Mauro*, 4 Rand. 488.

Administration Accounts.—In 1755 a creditor was made an executor and guardian of the children of his debtor, but attended very little to the duties of executor. The devisees obtained possession of the estate of the testator, and the executor endeavored to have a settlement of the administration. In 1766 he died. In 1784 all parties expressing a desire for a settlement of accounts, an order was entered for that purpose, but the defendants refusing to proceed, the administrators of the executor filed a bill for that purpose. The defendants plead the statute of limitations which was held to be a bar. *Pendleton v. Whiting*, Wythe 38.

The act of 1792, which directs a court in an action upon open accounts against administrators or executors to strike out all items appearing to have been due five years before the death of the testator or intestate, was construed in *Brooke v. Shelly*, 4 H.

& M. 266, to relate only to open accounts and not to settlements of assumptions. See monographic note on "Executors and Administrators" appended to *Rosser v. Depriest*, 5 Gratt. 6.

2. BANKRUPTCY.

Accrual of Action to Assignee.—The federal statute of limitations requires that the assignee in bankruptcy shall bring his suit against persons claiming an adverse interest within two years from the time the cause of action accrued. Under this statute it is held that the assignee's cause of action accrued from the maturity of his cause of action, and not from the date of the assignment. *Smith v. Profit*, 82 Va. 832, 1 S. E. Rep. 87. See monographic note on "Bankruptcy and Insolvency" appended to *Dillard v. Collins*, 25 Gratt. 343.

Application.—The federal statute limiting actions by or against assignees in bankruptcy, as to property vested in them to two years, does not apply to suits against purchasers from such assignees. *Moorman v. Arthur*, 90 Va. 455, 18 S. E. Rep. 869.

3. BONDS.

Previous to July 1, 1850.—There was no positive limitation of time as to the right of action upon bonds before the passage of a statute which took effect July 1, 1850, and as to bonds payable before that time the statute of limitations began to run that day. *Alexander v. Byrd*, 85 Va. 690, 8 S. E. Rep. 577; *Bell v. Wood*, 94 Va. 677, 27 S. E. Rep. 504. See monographic note on "Bonds" appended to *Ward v. Churn*, 18 Gratt. 801.

Fiduciary Bond—Act 1826.—The act of limitations of March 8, 1826, does not apply to suits against fiduciaries for the balance of estates in their hands, but to suits on their official bonds against them and their sureties. *Winston v. Street*, 2 P. & H. 169.

Same—Accrual of Cause of Action.—By sec. 9, ch. 146, Code 1873, an action on a fiduciary's bond is only barred after ten years from the time the cause of action accrued. This is from the return day of the execution against the fiduciary, or from the time of right to require payment or delivery from the fiduciary. *Sharpe v. Rockwood*, 78 Va. 24; *Morrison v. Lavell*, 81 Va. 519; *Robertson v. Gillenwaters*, 85 Va. 116, 7 S. E. Rep. 871. See *McCormick v. Wright*, 79 Va. 534.

Same—Same—Guardian.—The right of action of a ward on an official bond of his guardian, within the meaning of the act, Sup. Rev. Code 1819, ch. 200, sec. 1, accrues to the ward immediately on his arrival at age, and if brought therefore more than ten years afterwards, it will be barred by that statute. See Code 1849, ch. 149, sec. 5, 6, 17; *Magruder v. Goodwyn*, 2 P. & H. 561.

Same—Same—Executor or Administrator.—It is provided by sec. 9, ch. 146, Code 1873, that limitation of an action upon the bond of an executor or administrator is ten years after the accrual of a right of action. There is no other limitation applicable to the sureties upon the official bonds. *Leake v. Leake*, 75 Va. 792. See monographic note on "Executors and Administrators" appended to *Rosser v. Depriest*, 5 Gratt. 6.

Where an administrator settles his administration accounts, by giving his bond to the widow for the balance due her, from the moment of its execution and delivery, a right of action accrues thereon, and where more than ten years elapses before she brings suit thereon, his sureties are discharged by the statute of limitations. Sec. 8, 9, ch. 149, Code 1873; *Tilson v. Davis*, 32 Gratt. 92.

Bonds of Married Women.—Bonds given by a mar-

ried woman with the intention of binding her separate estate, are valid in equity as evidences of debt against such estate, and therefore are not barred by the statute of limitations as simple contract debts. *Garland v. Pamplin*, 32 Gratt. 305.

Forthcoming Bond.—The statute of limitations 1 Rev. Code, ch. 128, sec. 5, whereby the remedy on a judgment by debt or *scire facias* is limited to ten years, is no bar to a motion on a forthcoming bond of more than ten years' standing. *Lipscomb v. Davis*, 4 Leigh 308.

Bond of Cashier—Misappropriation of Funds.—In an action on the bond of a bank cashier, where it appears that the cashier had misapplied an amount equal to the penalty of the bond within ten years next preceding the commencement of the action, it is immaterial whether the limitation in such cases be ten years or more. *Elam v. Commercial Bank*, 86 Va. 92, 9 S. E. Rep. 498.

4. CONVERSION.—Where a party delayed ten years after his right of action accrued before he began his action of trover, it was barred by the statute of limitations. *Phillips v. Martiney*, 10 Gratt. 333. See monographic note on "Trover and Conversion", appended to *Eastern Lunatic Asylum v. Garrett*, 27 Gratt. 163.

The period under the statute of limitations for an action for the unlawful conversion of personal property, or for its proceeds if sold, is five years. *Thompson v. Whitaker Iron Co.*, 41 W. Va. 574, 23 S. E. Rep. 795.

The act of limitations may be pleaded in bar to an action against a carrier for fraudulently embezzling goods entrusted to his care. *Cook v. Darby*, 4 Munf. 444.

5. DEATH BY WRONGFUL ACT.

Virginia Rule.—It was held in *Anderson v. Hygeia Hotel Co.*, 92 Va. 687, 24 S. E. Rep. 299, that where personal injuries result from the wrongful act, neglect or default of a person or corporation, an action to recover damages therefor must be brought within one year from the time the injury occurred under sec. 2927 of the Code, notwithstanding secs. 2902, 2908 and 2906. See monographic note on "Death by Wrongful Act" appended to *De Ende v. Wilkinson*, 2 Pat. & H. 663.

Limitation Determined by Object of Action.—The limitation of an action is not determined by its form but by its object, hence if the substance of a wrong is an injury to the person, the limitation in an action of trespass on the case in assumption is the same as if the action were in form *ex delicto*. *Birmingham v. Ches., etc., R. Co.*, 98 Va. 548, 37 S. E. Rep. 17.

Extension.—The act, January 29, 1894, providing that the right of action for death by wrongful act shall not be determined by the death of the person injured, does not extend the time for commencing actions caused by negligence from a year, as under the statute, to five years. *Birmingham v. Ches., etc., R. Co.*, 98 Va. 548, 37 S. E. Rep. 17. See sec. 2927 of the Code.

Incidental Damages.—A claim for indirect and incidental damages arising from an injury purely personal in its nature, does not cause the action brought to recover for such injuries, to survive, and hence the limitation is one year. *Birmingham v. Ches., etc., R. Co.*, 98 Va. 548, 37 S. E. Rep. 17.

West Virginia Cases.—Secs. 5, 6, ch. 103, W. Va. Code 1891, is the West Virginia Lord Campbell's Act, creating a cause of action where none existed at common law for wrongfully causing the death of

a person, and the provision that any such action shall be commenced within two years after the death of such deceased person is an essentially restraining element of the right of action given. *Lambert v. Ensign Mfg. Co.*, 42 W. Va. 813, 26 S. E. Rep. 481.

One year is the bar prescribed by the statute of limitations for the recovery of damages for an injury to the person in all cases, except the right of action given by secs. 5, 6, ch. 108, of the Code, to the personal representative of a decedent against any party, wrongfully causing his death. *Curry v. Town of Mannington*, 23 W. Va. 14.

It is declared by sec. 13, ch. 104, of the W. Va. Code 1881, that the limitation of all personal actions, if they be for matters of a nature that in case of the death of a party, they could not be brought by or against his representative, shall be one year from the time the right to bring the same shall have accrued. *Curry v. Town of Mannington*, 23 W. Va. 14.

6. DECREEES.—Where no execution has been issued on a decree within a year after it was rendered, and no proceeding has been had to revive it within ten years thereafter, it is barred by secs. 13, 18, ch. 123, Code 1873. *Series v. Cromer*, 88 Va. 420, 13 S. E. Rep. 359. See monographic note on "Decrees" appended to *Evans v. Spurgin*, 11 Gratt. 615.

Interlocutory.—There is no statute limiting a petition for rehearing an interlocutory decree which is not appealable. *Fowler v. Lewis*, 36 W. Va. 112, 14 S. E. Rep. 447.

Decree against Absent Defendant.—The limitation of seven years has no application to so much of a decree against an absent defendant, as it acts *in personam*, and establishes a personal demand. *Rootes v. Tompkins*, 3 Gratt. 98.

7. JUDGMENTS.

Ten-Year Limitation.—A judgment is barred by the statute of limitations in ten years, if no execution is issued on it, and no *scire facias* is sued out to revive it, in that time. *Dabney v. Shelton*, 82 Va. 349, 4 S. E. Rep. 605; *Hutcherson v. Grubbs*, 80 Va. 261; *White v. Offield*, 90 Va. 336, 18 S. E. Rep. 436. See further, monographic note on "Judgments" appended to *Smith v. Charlton*, 7 Gratt. 425.

When Execution Issues and Return Made.—Virginia Rule.—The right to issue a *scire facias* upon a judgment is not barred by the act of limitations in a case where execution was issued in due time, and return was made thereon, until the lapse of twenty years. *Gee v. Hamilton*, 6 Munf. 32; *Brown v. Campbell*, 33 Gratt. 402.

Under sec. 12, ch. 186, Code 1860, the limitation within which an alias execution may be issued is twenty years, where there is return of an officer, but whether such return is valid or sufficient is not a question which can arise under the section. *Hamilton v. McConkey*, 83 Va. 533, 5 S. E. Rep. 724.

Judgment was recovered against a debtor Sept. 1810, an execution was sued out in the same month, and another in Oct. 1815, but neither was returned. To a *scire facias* to revive the judgment against the executor of the debtor, sued out in July 1826, the defendant plead the statute of limitations. The plaintiffs reply the two executions, but on demurrer the statute was held a bar to the action. *Fleming v. Dunlop*, 4 Leigh 338.

Where a judgment in a justice's court was obtained February 23, 1866, and was duly docketed, but upon which no execution was issued and where a judgment of the circuit court of November 2, 1866,

was also duly docketed, and on which no execution was issued, and suit was not brought to enforce a lien of these judgments until April 30, 1887, it was held that the right to recover was barred by limitations in accordance with secs. 3573, 3577, 3578, Va. Code 1887. *Brown v. Butler*, 87 Va. 621, 13 S. E. Rep. 71.

Same.—In West Virginia.—In no event can a judgment be revived, under the West Virginia statute, sec. 11, ch. 189, Code, after ten years have elapsed from the return day of the last execution issued thereon, and, if more than five years of that period elapse during the life of the execution debtor, then the creditor has only the remainder of the ten years within which to revive the judgment against the personal representative of such debtor. *Handy v. Smith*, 30 W. Va. 195, 8 S. E. Rep. 604. See *Laidley v. Kline*, 23 W. Va. 565.

Where an execution has been issued upon a judgment more than ten years after the return day of the last preceding execution issued thereon, and a suit is brought by the creditor to enforce the lien of such judgment against the real estate of his debtor, the issuance of such execution will not avoid the bar of the right to enforce such lien, notwithstanding the said execution is merely voidable, and not liable to be assailed in a collateral suit. *Reilly v. Clark*, 31 W. Va. 571, 8 S. E. Rep. 509.

The lien of a judgment, on which no execution has ever issued, will not be enforced in a court of equity in a suit brought after the lapse of ten years from the date of the judgment, and where the debtor dies, the time in which it can be enforced may be less, as in no case can it exceed five years after the qualification of his personal representative, unless perhaps it may be kept alive by suing out successive executions after the death of the debtor, or by having sued out a *scire facias* continuing his right to do so. *Werdenbaugh v. Reid*, 30 W. Va. 588.

A judgment is rendered against an executor to be paid *de bonis testatoris* on November 30, 1870. An execution issued on this judgment on December 16, 1870, returnable to March rules 1871, and was returned then "no property found." Another execution issued September 13, 1880, returnable to December rules 1880, and ordered "to lie." At July rules 1881, a bill was filed to compel the executor to settle his accounts, claiming that there were sufficient assets in his hands with which to pay this judgment, and which he ought to have applied to its payment, and asking a personal decree against him for the amount of such judgment. This suit was not barred by the statute of limitations, and could have been brought without being so barred, at any time within ten years after December rules 1880, the return day of the last execution on the judgment. *Hurst v. Morgan*, 31 W. Va. 531, 8 S. E. Rep. 265.

Same.—Same.—Exception—Parol Evidence.—To avoid the bar of the statute of limitations in respect to the right to enforce the lien of a judgment, the creditor must bring his case within one of the exceptions declared in the statute, and he cannot by parol evidence or otherwise avoid such bar upon any ground not embraced in the statute, as by parol agreement binding him not to sue out execution or enforce the judgment until within ten years before the bringing of such suit. *Reilly v. Clark*, 31 W. Va. 571, 8 S. E. Rep. 509.

Action against Representative.—A judgment against a testator in his lifetime, and not revived against

his personal representative after his death, within five years from the time of his qualification, is barred by the statute of limitations. *Peyton v. Carr*, 1 Rand. 496.

Section 17 of the statute of limitations, providing that debt or *scire facias* on judgment against decedents in their lifetime, shall not be brought against their representative after the expiration of five years from the qualification of the representative, and that such judgment shall after the expiration of five years be deemed to be paid and discharged, is a bar to debt or *scire facias* on such judgments against an administrator of a deceased debtor, although no assets of the debtor's estate came into the hands of the representative within five years after his qualification, and the administrator is bound to plead the statute to actions of judgment creditors prosecuting the claim to which the act of limitations does not apply. *Tunstall v. Pollard*, 11 Leigh 1.

Sections 10 and 11, ch. 139, of the Code, are applicable to judgments rendered by a justice, so far as to provide that upon such a judgment, on which no execution within two years from the date of its rendition has issued, an action may be brought at any time within ten years after the date of the judgment; but, if such action be against a personal representative of a decedent, it shall be brought within five years from the qualification of such representative. *Livesay v. Dunn*, 33 W. Va. 433, 10 S. E. Rep. 806.

Same—Revival.—Under the provisions of secs. 11, 12, ch. 139 of the Code, a judgment may be revived by *scire facias* against the personal representative of the judgment debtor within ten years from the return day of the last execution thereon, although that time may be more than ten years from the date of the judgment; provided, such revival be made within five years from the date of the qualification of such representative. *Laidley v. Kline*, 23 W. Va. 565.

Limitation in 1825.—In *Randolph v. Randolph*, 8 Rand. 490 (1825), it was held that at that time there was no limitation by statute to an action of debt or *scire facias* upon a judgment, except only in the case of a judgment on which no execution had been taken out, and in cases of executors and administrators, upon a judgment against their testator or intestate. In all other cases the remedies were as at common law, and at that law there was nothing like a limitation upon them except the presumption of payment, arising after twenty years.

Lien Ceases with Right to Enforce.—The lien of a judgment ceases when the right to sue out execution on the judgment, or to revive it by *scire facias*, is barred by the statute of limitations. *Werdenbaugh v. Reid*, 20 W. Va. 588; *Shipley v. Pew*, 23 W. Va. 487.

Judgment Quando Acciderint.—A judgment *quando acciderint*, does not come within the operation of the statute of limitations in relation to judgments. 1 Rev. Code, ch. 128, sec. 5; *Smith v. Charlton*, 7 Gratt. 625.

Supersedeas.—A supersedeas awarded by a circuit court is not issued because of a vacancy in the office of clerk, and although a clerk is soon afterwards appointed, the plaintiff delays ten years before applying for the writ. As it is provided by statute, 1 Rev. Code, ch. 128, sec. 19, that no supersedeas shall be granted to a judgment after five years from the time when the judgment becomes final, it was proper to refuse the issuing of the supersedeas. *Anderson v. Lively*, 6 Leigh 77.

Action of Debt.—The statute 1 Rev. Code 1819, p. 489, ch. 128, sec. 5, declaring that where execution has issued and no return is made thereon, the party in whose favor the same was issued may obtain other executions for ten years from the date of the judgment and not after, does not bar such party from maintaining an action of debt on the judgment after ten years. *Herrington v. Harkins*, 1 Rob. 501.

8. MALICIOUS PROSECUTIONS.—An action for malicious prosecution sounding in consequential and punitive damages, although affecting business and property, does not survive to the personal representative, and is barred within a year after the accrual of the cause of action. *Porter v. Mack*, 50 W. Va. 581, 40 S. E. Rep. 459. See monographic note on "Malicious Prosecution."

Section 2037 of the Code provides a limitation of five years in every personal action for which no limitation is otherwise prescribed, "if it be a matter of such nature that, in case a party died, it can be brought by or against his personal representative; and, if it be for a matter not of such nature, shall be brought within one year next after the right to bring the same shall have accrued." In *Mumpower v. City of Bristol*, 94 Va. 787, 27 S. E. Rep. 581, which was an action on the case for maliciously and without probable cause enjoining the plaintiff from the use of waters of a creek for the purpose of running his mill, it was held that this action did not survive and was barred within a year after the dissolution of the injunction.

9. MOTIONS.

Virginia.—Motion to correct errors in judgments or decrees by default given by sec. 5, ch. 177, Code 1873, is barred after the lapse of five years from the date of the judgment or decree. *Kendrick v. Whitney*, 28 Gratt. 646.

West Virginia.—A motion to correct a decree rendered by default under sec. 5, ch. 134 of the Code, is barred in five years from the date of the decree. *Dick v. Robinson*, 19 W. Va. 159.

Motion for Quotas.—It was held in *Stratton v. Mutual Assurance Soc.*, 6 Rand. 22, that on a motion for quotas the act of limitations did not apply because the declaration for insurance was a sealed instrument.

Terminology.—Motions are included in the terms "suits" and "actions" in the act of 1789, for limitation of suits upon penal statutes. *Auditor v. Graham*, 1 CalM 476.

10. NOTES.—Under the act of limitations of 1882 (Acts 1882, p. 300, ch. 102, sec. 6), a note given is barred by the lapse of five years from the date of its maturity, after excluding the periods when the statute is barred. *Maslin v. Hiett*, 37 W. Va. 15, 16 S. E. Rep. 437. See monographic notes on "Bills, Notes and Checks" appended to *Archer v. Ward*, 9 Gratt. 622, and "Contracts" appended to *Enders v. The Board of Public Works*, 1 Gratt. 864.

Indorsement on Demand Note.—An indorsement of a note payable on demand, imports a guarantee of the note according to its terms, which cannot be altered by parol proof; and if an action on the guarantee is not brought within five years from the date of the note, it is barred by the statute of limitations. *Watson v. Hurt*, 6 Gratt. 633.

Deed of Trust as Collateral Security.—A deed of trust executed as collateral security for the payment of a promissory note, does not raise such note to the dignity of a specialty, and the note is barred by the lapse of five years. *Wolf v. Violet*, 78 Va. 57.

Husband and Wife—Surety—Failure to Claim.—A sec-

ond husband with his wife's money, paid a note to which he was not a party, but on which his wife's first husband, who had left her his estate, was surety, and the administrator of the second husband afterwards brought suit and recovered the amount paid of the principal obligor. It was held that the failure of the wife, having control of her estate by reason of a marriage contract, to lay claim to this fund within five years, bars an action by her administrator to recover it. *Leith v. Carter*, 83 Va. 889, 5 S. E. Rep. 584.

11. PAROL CONTRACTS.

Virginia.—Sec. 2020 of the Va. Code provides that no action shall be brought upon a verbal contract, unless within three years from the time the right of action accrues, and a verbal contract for stock is subject to this limitation. *Liberty Saving Bank v. Otter View Land Co.*, 96 Va. 352, 31 S. E. Rep. 511. See monographic note on "Contracts" appended to *Enders v. The Board of Public Works*, 1 Gratt. 364.

West Virginia.—A parol contract, not being under seal, is barred by the statute of limitations after the lapse of five years. *Stuart v. County of Greenbrier*, 16 W. Va. 95. See W. Va. Code 1899, ch. 104, sec. 6.

12. PARTNERSHIP ACCOUNTS.

Five-Year Limitation.—An action of account or a suit in equity by one partner against his copartner for a settlement of the partnership accounts must be commenced within five years next after the cause of action, and unless so commenced will be barred by the statute of limitations, 1 Rev. Code 1819, ch. 128, sec. 4, for such accounts do not concern the trade of merchandise between merchant and merchant and therefore are not embraced by the exception to the statute. *Coalter v. Coalter*, 1 Rob. 79. See monographic note on "Partnership."

Dissolution and No Valid Claims for or against.—In order to subject a suit brought for the settlement of partnership accounts to the bar of the statute of limitations, it must not only appear that there has been a dissolution of the partnership more than five years before the institution of the suit, but that there were no valid claims for or against the firm, paid or received or outstanding, within that time. Any claim outstanding, paid or collected by either partner, would form an item in account between them, and take the case out of the bar of the statute. *Smith v. Zumbro*, 41 W. Va. 623, 24 S. E. Rep. 663; *Smith v. Brown*, 44 W. Va. 342, 30 S. E. Rep. 180; *Sandy v. Randall*, 20 W. Va. 244.

Upon a bill filed by surviving partner against the administratrix of a deceased partner, the plea of the statute of limitations cannot be sustained, where it appears that there were good debts due to the firm outstanding within five years before the suit was brought. *Marsteller v. Weaver*, 1 Gratt. 391.

Partial Settlement.—Where there has been a partial settlement between partners, and a balance is ascertained in favor of one of the parties against the other, although the settlement is not full and complete, the statute will run as to such balance and the portion of the account embraced in it. *Foster v. Rison*, 17 Gratt. 321; *Roots v. Salt Co.*, 27 W. Va. 491; *Sandy v. Randall*, 20 W. Va. 244; *Boggs v. Johnson*, 26 W. Va. 321.

Settlement by One Partner.—One partner, for himself and another, settles the partnership accounts with the acting partner, and receives payments of money for himself and the other. As to the money so received, the statute of limitations will run from

the time he received it, although it may be necessary to go into chancery to ascertain the portion which each of the parties is entitled to receive, yet the statute will run against the claim. *Foster v. Rison*, 17 Gratt. 321.

Construction of Statute.—In sec. 5, ch. 149, of the Code 1849, the words, "five years from a cessation of the dealings in which they are interested together," do not refer to the cessation of the active operations of the partnership, but to the time when the affairs of the partnership are wound up. *Foster v. Rison*, 17 Gratt. 321. See *Smith v. Zumbro*, 41 W. Va. 623, 24 S. E. Rep. 663; *Sandy v. Randall*, 20 W. Va. 247.

13. TRUSTS.

Statute Applicable to Indirect Not to Direct Trusts.—The statute of limitations does not run in cases of direct or express trusts, and is ineffectual to bar the rights of one of the parties. But in indirect or constructive trusts the rule is otherwise, and the statute is applied as in any other case. *Redford v. Clarke*, 100 Va. —, 40 S. E. Rep. 630, 7 Va. Law Reg. 861; *Lamar v. Hale*, 79 Va. 147; *Rankin v. Bradford*, 1 Leigh 171; *Hunter v. Spotswood*, 1 Wash. 145; *Redwood v. Riddick*, 4 Munf. 222; *Turner v. Campbell*, 3 Gratt. 77; *Rowe v. Bentley*, 29 Gratt. 702; *Saum v. Coffelt*, 79 Va. 510; *Massie v. Heiskell*, 80 Va. 789; *Williams v. Lewis*, 5 Leigh 666; *Sheppards v. Turpin*, 3 Gratt. 373; *Gapen v. Gapen*, 41 W. Va. 422, 23 S. E. Rep. 579.

Not Applicable to Trustees.—The statute of limitations has no application to persons acting as trustee, whether regularly appointed or not. *Lamar v. Hale*, 79 Va. 147.

When Statute Begins.—The statute does not run in favor of trustees, as between trustee and *cestui que trust*, mortgagor and mortgagee, so long as the confidence may fairly be presumed to continue, but it runs both in equity and at law in favor of disincorporators and tortfeasors. *Harrison v. Harrison*, 1 Call 418. See *Spotswood v. Dandridge*, 4 H. & M. 130; *Redwood v. Riddick*, 4 Munf. 222.

And if a trustee unequivocally repudiates the trust, and such is brought to the knowledge of the beneficiary, the statute begins to run from the time of such knowledge. *Rowe v. Bentley*, 29 Gratt. 702; *Nease v. Capehart*, 8 W. Va. 95.

So where the relation of parties was that of trustee and *cestui que trust*, the statute of limitations did not commence to run until there had been an open denial and repudiation of the trust by the trustee, brought home to the *cestui que trust* in such a manner as required the latter to act as upon an asserted adverse title. *Key v. Hughes*, 32 W. Va. 184, 9 S. E. Rep. 77.

Thus where the treasurer of a special fund of a town died, and his personal representative delivered all securities, books, and papers belonging to the office, to his successor, with evidence of the decedent's exact indebtedness to the treasury, on which an action at law might have been maintained against the personal representative, the trust was terminated, and the statute of limitations began to run against the recovery of such indebtedness from that day. *Van Winkle v. Blackford*, 33 W. Va. 573, 11 S. E. Rep. 26.

Same—Absolute Deed a Mortgage.—Where a vendor conveys land by deed, which though absolute on its face, is in fact a mere trust or mortgage, and continues in possession after the conveyance, such possession will not be adverse to the title of the vendee, and start the running of the statute of

limitations, there must be a disclaimer or repudiation of the trust relation, and notice of that fact to the vendee. *Flynn v. Lee*, 81 W. Va. 487, 7 S. E. Rep. 430.

Notice of Trust.—Where a purchaser buys with notice of a trust he becomes charged with it himself, and the statute of limitations does not run against the rights of the beneficiaries. *Rankin v. Bradford*, 1 Leigh 163.

Same—Secret Trust.—A fraudulent secret trust was partly executed by the trustee who did not object to completing it. The trust property having come into the hands of one of the *cestui que trust*, on a bill filed by the others to have the trust executed, against the *cestui que trust* in possession, the statute of limitations is no bar. *Turner v. Campbell*, 3 Gratt. 77; *Turner v. Campbell*, 1 Pat. & H. 256.

Mortgages—In Equity—Presumption of Payment.—Although the remedy on a claim secured by a mortgage, deed of trust or vendor's lien, may be barred at law, yet the remedy in equity to enforce the lien is not affected by any time short of the period sufficient to raise the presumption of payment. *Paxton v. Rich*, 85 Va. 378, 7 S. E. Rep. 581; *Hanna v. Wilson*, 3 Gratt. 243; *Smith v. Washington, etc., R. Co.*, 33 Gratt. 617; *Bowie v. Poor School Soc. of Westmoreland*, 75 Va. 300; *Stimpson v. Bishop*, 82 Va. 190; *Roots v. Mason, etc., Min. Co.*, 27 W. Va. 433; *Criss v. Criss*, 28 W. Va. 338.

Executors as Trustees.—The doctrine is well established that an executor, as respects legatees and distributees, is to be deemed a trustee exercising a continuous trust, not affected by any statutory limitation. *Leake v. Leake*, 75 Va. 792; *Jones v. Jones*, 92 Va. 590, 24 S. E. Rep. 255. See monographic note on "Executors and Administrators" appended to *Rosser v. Depriest*, 5 Gratt. 6.

Fiduciaries—Sureties.—The statute of limitations has no application to fiduciaries. It is otherwise as to their sureties. Sec. 9, ch. 146, Code 1873; *McCormick v. Wright*, 79 Va. 524; *Peale v. Thurmond*, 77 Va. 753.

Possession Must Be Fiduciary as to Plaintiff.—To prevent length of time from barring a claim, on the ground that the possession of the defendant was fiduciary, such possession must have been fiduciary as to the plaintiff, or those under whom he claims, its being fiduciary as to any other person, is not sufficient. *Spotswood v. Dandridge*, 4 H. & M. 189.

Applies to Beneficiary as Well as Trustee.—If the statute of limitations will bar the action of the trustee against a third person for the recovery of the trust property, it will equally bar the action of the *cestui que trust* for the same subject-matter. *Sheppards v. Turpin*, 3 Gratt. 374.

Possession Five Years by Sale under Deed of Trust.—Property conveyed in a deed of trust was taken under execution and sold, and the purchasers remained in peaceful possession thereof for five years before suit was instituted by the trustees, or *cestui que trust* to recover it. The statute of limitations is a bar to recovery. *Sheppards v. Turpin*, 3 Gratt. 374.

Possession of Slaves Five Years.—A fraudulent bill of sale is made of a female slave, absolute on its face with a secret trust for the grantor's daughters, of whom the grantee becomes guardian in 1827, and in 1829 he settles his guardianship accounts, both wards having then attained to full age; they then set up a claim to the property, which the grantee denies to be just, and in 1837, they file a bill to establish the secret trust. *Held*, the statute of limitations would alone be a bar to the bill, as the law is well

settled that the quiet possession of slaves for five years transfers title to the holder. *Owen v. Sharp*, 12 Leigh 427. See also, *Turner v. Campbell*, 1 Pat. & H. 256.

A testator left property to be equally divided among his children, on condition that if either of his daughters die without lawful heirs, then her part should be divided among his surviving children. One of the daughters having taken possession of certain slaves as her share, and having married, died without issue. Her husband for more than five years after her death held and used the slaves as his own without any demand being made by any of the surviving children. His possession was considered adverse, and a purchase from him was protected by the act of limitations. *Garland v. Enos*, 4 Munf. 504.

Trust by Will—Nudum Pactum.—A trust created by will for the payment of debts by a general direction that all the testator's debts shall be paid, extends only to such as he was bound in conscience to pay, and therefore an undertaking which is merely *nudum pactum* is not comprehended, and may be barred by the act of limitations. *Chandler v. Hill*, 2 H. & M. 124.

14. VOLUNTARY CONVEYANCES.

Five Years.—The limitation of actions to avoid conveyances that are voluntary, or on consideration not deemed valuable in law, is five years. *Humphrey v. Spencer*, 36 W. Va. 11, 14 S. E. Rep. 410; *McCue v. McCue*, 41 W. Va. 151, 23 S. E. Rep. 639; *Thorn v. Sprouse*, 46 W. Va. 225, 33 S. E. Rep. 99; *Himan v. Thorn*, 82 W. Va. 507, 9 S. E. Rep. 930; *Glascok v. Brandon*, 35 W. Va. 84, 12 S. E. Rep. 1102; *Welsh v. Solenberger*, 85 Va. 441, 8 S. E. Rep. 91; *McCue v. Harris*, 85 Va. 687, 10 S. E. Rep. 981. See monographic note on "Fraudulent and Voluntary Conveyances" appended to *Cochran v. Paris*, 11 Gratt. 348.

Where a bill is filed to set aside a conveyance, the debt, which grew out of a partnership, having existed prior to the conveyance, which was more than five years before the institution of the suit, but no settlement having been had until within less than five years, the action is barred by the statute. The fact that no settlement had been made, and the amount due the complainant had not been ascertained, did not postpone the running of the statute until the settlement was made. The plaintiff had a right under sec. 2460 of the Code to avoid the conveyance even if his debt had not been due and payable at the time the conveyance was recorded. *Vashon v. Barrett*, 99 Va. 344, 38 S. E. Rep. 200. See 1 Va. Law Reg. 596.

But where a testator about a year before his death put each of his children in the possession of a tract of land, but did not convey it, and about the same time made his will in which he devised to each the land in his or her possession, it was held that neither the act of putting them in possession nor the devise to them, entitled them to the protection of sec. 16, ch. 146, of the Code 1873, which provides that no gift, transfer or conveyance, which is not upon a consideration deemed valuable in law, shall be avoided in whole or in part, for that cause alone, unless the suit is brought within five years after it is made. *Lewis v. Overby*, 31 Gratt. 601.

Recordation in Ten Days.—Sec. 2929 of the Va. Code 1887, limits suits to set aside conveyances as voluntary to five years from the time the right to avoid it accrued, but sec. 2467 provides that where the conveyance is recorded within twenty days after:

being acknowledged, it is as valid to creditors and purchasers as if it had been admitted to record on the day it was acknowledged, and the five years' limitation begins to run from the latter date. *Vashon v. Barrett*, 99 Va. 844, 38 S. E. Rep. 200. By Acts 1895-6, p. 285, sec. 2467 is amended by requiring admission to record within ten days from the acknowledgment.

Has No Application to Fraud.—Although a deed cannot be attacked as voluntary after the lapse of five years prescribed by statute, still there is no limitation by statute upon the right of a creditor to institute a suit to attack a deed as fraudulent in fact. Of course the right to institute such suit can be lost in equity by laches. *Bumgardner v. Harris*, 92 Va. 188, 23 S. E. Rep. 229; *Snoddy v. Haskins*, 12 Gratt. 368; *Hunter v. Hunter*, 10 W. Va. 343; *Thornburg v. Bowen*, 87 W. Va. 546, 16 S. E. Rep. 828; *Hutchinson v. Boltz*, 85 W. Va. 754, 14 S. E. Rep. 267; *Williams v. Blakey*, 76 Va. 254.

Has No Application Where There is Valuable Consideration.—The statute of limitations as provided in sec. 14, ch. 104, Code 1891, has no application to contracts founded on a valuable consideration, but is limited, by the wording of the statute, to contracts on consideration not deemed valuable in law. *Bogges v. Richards*, 39 W. Va. 567, 20 S. E. Rep. 599.

15. OTHER INSTANCES.

Abatement of Action.—If an action be commenced within five years from the time the cause of action accrued, and then it abates, the plaintiff is within the equity of the proviso in the act of limitations, if he recommences his action within a year after the abatement, otherwise he is barred. *Brown v. Putney*, 1 Wash. 802.

Assignments.—Where a party assigns a non-negotiable instrument he warrants its validity, and if the instrument is invalid there is an immediate breach of warranty, and a right of action accrues at once to the assignee to recover back the consideration paid. The limitation in such case is five years, and it begins to run from the date of the breach of the warranty, of the validity of the instrument assigned, unless some circumstance appears, which will avoid the commencement of the running of the statute at that time. *Merchants' Nat. Bk. v. Spates*, 41 W. Va. 27, 23 S. E. Rep. 681.

By the terms of an unsealed assignment of a bond, the assignor agreed to remain bound to the assignee without his taking any steps to enforce its payment, and to collect it without charge, giving as a reason that the assignment was for the accommodation of the assignor, in payment of a debt. It was held that as long as the bond was not barred, and the assignor lived and could perform his agreement, the statute was no bar against the assignee in the assignment. *Lightfoot v. Green*, 91 Va. 509, 23 S. E. Rep. 242. See monographic note on "Assignments" appended to *Ragsdale v. Hagy*, 9 Gratt. 409.

Assumpsit.—The period of the statute of limitations against a demand for money had and received by one for the use of another is five years, and it begins on the receipt of the money. *Jackson v. Hough*, 88 W. Va. 236, 18 S. E. Rep. 575. See monographic note on "Assumpsit" appended to *Kennaird v. Jones*, 9 Gratt. 183.

Awards.—When the conflicting claims of a judgment creditor and the beneficiaries under a trust deed, to the surplus from a prior trust deed, are submitted to arbitration, seven years after the award, the successful party under the award will

be protected by the statute of limitations. *Leslie v. Brown*, 1 P. & H. 216. See monographic note on "Arbitration and Award" appended to *Bassett v. Cunningham*, 9 Gratt. 684.

Breach of Promise.—The statutory bar is one year in an action for damages for the breach of a promise to marry. Sec. 12, ch. 102, Acts 1882; *Flint v. Gilpin*, 29 W. Va. 740, 8 S. E. Rep. 83.

Contribution.—The right of action which one surety has against his co-surety for contribution is based upon the implied promise arising from the equitable relations which the sureties bear to each other, and not upon the written contract by which they become sureties. Hence the limitation in such case is three years, and not the limitation which is applicable to the bond, note, or other writing which they have been compelled to pay. *Tate v. Winfree*, 99 Va. 255, 37 S. E. Rep. 956.

Covenant.—In an action of covenant for breach of warranty, if it appears that a portion of the land conveyed with covenants of general warranty was in the adverse possession of a stranger at the date of the conveyance, and held by a paramount title, the grantee in such deed will be held to be evicted on the day of the execution of such deed, and the statute of limitations will commence to run against the action from that date and will be barred in ten years thereafter. *Isley v. Wilson*, 43 W. Va. 757, 26 S. E. Rep. 551. See monographic notes on "Covenants" appended to *Todd v. Summers*, 2 Gratt. 167, and "Covenant, The Action of."

In covenant for alleged breach of contract to execute purchase-money notes, the fact that defendant accepted a deed to the property from plaintiffs six years after the time specified in the agreement does not constitute a waiver of the stipulation, so as to cause the statute of limitations to run only from the acceptance of such deed, where plaintiffs do not aver that they were ready and willing and offered to convey at the time specified, or were prevented from being ready and willing to convey or from conveying at that time by defendant, and there is no evidence that at the time of defendant's accepting the deed there was an agreement that the original contract was waived. *Davis v. McMullen*, 86 Va. 256, 9 S. E. Rep. 1095.

Detinue.—An action of detinue brought in five years by mortgagees to obtain possession of slaves, who had been sued under execution, is brought in time. *Rose v. Burgess*, 10 Leigh 186. See monographic note on "Detinue and Replevin" appended to *Hunt v. Martin*, 8 Gratt. 578.

Dower.—The statutory bar to a widow's remedies for the recovery of her dower is the lapse of ten years, from the death of her husband, when her right to sue accrues. *Smith v. Wehrle*, 41 W. Va. 270, 23 S. E. Rep. 712; *Morris v. Roseberry*, 46 W. Va. 24, 23 S. E. Rep. 1019. See monographic note on "Dower" appended to *Davis v. Davis*, 25 Gratt. 587.

Ejectment.—By sec. 17, ch. 138, Code 1849, it is provided that a tenant, against whom judgment has been recovered for arrears in rent, and execution issued for the land, shall be barred of all rights to be restored to the land, if he fail in twelve months after execution issued to file bill for relief from such forfeiture, or pay the arrears of rent. *Leonard v. Henderson*, 23 Gratt. 331. See monographic note on "Ejectment" appended to *Tapscott v. Cobbs*, 11 Gratt. 172.

Fee Bills.—Previous to 1839, no time was prescribed within which fee bills were to be placed in an officer's hands for collection. By the statute of

March, 1830, collection by distress or suit was prohibited after the expiration of five years. Until the claims were placed in the officer's hands and returned, no cause of action existed, and as the statute of limitations relates to the time the cause of action accrued, if such tickets had never been put in the officer's hands for collection and returned, there was no limitation upon them. *Craig v. Lobb*, 12 Leigh 627.

Impressed Property.—The act of November, 1781, relative to the adjustment of claims for property impressed for public service, and the subsequent continuing laws, were acts of limitations, and barred claims not asserted before the first of September, 1787. *Com. v. Banks*, 4 Call 338.

Justices.—After a lapse of eleven years a deputy sheriff is barred from suing the justices who gave judgment against him. *County Justices v. Fulkerson*, 21 Gratt. 182.

Lien.—Land burdened with a vendor's lien is conveyed, and as part payment the vendee conveys other land to the vendor, and in the deed charges it with a lien to indemnify the first grantee from the first lien. Money is paid by the grantor in the first deed to his grantee, with the agreement that it shall be applied to the payment of the vendor's lien, but this is not done. The right to claim such money as a discharge of the lien of indemnity is not subject to the statute of limitations, up to the amount of the lien, but beyond that it is subject to the statute. *Burbridge v. Sadler*, 46 W. Va. 39, 32 S. E. Rep. 1088.

Mortgages.—The right to enforce the lien of an equitable mortgage is not barred by the statute of limitations until such time has elapsed as would bar relief upon the instrument creating such lien. *Wayt v. Carwithen*, 21 W. Va. 516. See monographic note on "Mortgages" appended to *Forkner v. Stuart*, 6 Gratt. 197.

Obstruction to Right of Way.—An action for obstructing a right of way over real estate is a personal action, which may be brought within five years, as provided in sec. 13, ch. 104, W. Va. Code 1899, being a matter of such nature that in case a party die it can be brought by or against its personal representatives. It is not barred within one year. See also, sec. 20, ch. 85, W. Va. Code 1899; *Fleming v. Baltimore, etc., R. Co.* (W. Va.), 41 S. E. Rep. 168.

Ouster by Co-Tenant.—Acts of exclusive ownership by one of two co-tenants, such as the open sale, conveyance, and delivery of possession thereunder of the whole subject-matter, amounts to a complete ouster of the other co-tenant, and unless he brings suit within ten years thereafter his right of recovery will be barred by the statute of limitations. *Talbot v. Woodford*, 48 W. Va. 449, 37 S. E. Rep. 580. See monographic note on "Joint Tenants and Tenants in Common."

Personal Services.—Where a son, after his father's death, manages the estate for his mother, his claim for compensation for his services is barred by limitation, except for the five years preceding the death of the widow. *Chancellor v. Ashby*, 2 P. & H. 26.

Where a son makes improvements on his mother's land more than fifteen years prior to her death, his claim for compensation after she dies is barred by the statute of limitations. *Griggsby v. Osborn*, 82 Va. 371.

Rents.—Where trustees by authority of an act of assembly sold and conveyed land, reserving in the deed a ground rent to be paid to the proprietor

when he should be ascertained, and the proprietor afterwards filed a bill against the purchaser to recover the ground rent, the general statute of limitations was no bar to the recovery. *Mulliday v. Machir*, 4 Gratt. 1. See monographic note on "Landlord and Tenant."

Set-Offs.—Where an action is brought upon a claim and the plaintiff is entitled to the benefit of a set-off, which accrued prior to the institution of the action, the period of the statute of limitations is five years before the commencement of the action. *Trimyer v. Pollard*, 5 Gratt. 460.

But where the set-off accrued subsequent to the institution of the action, the period of limitation is five years before the plea of set-off is pleaded, or the account of off-sets is filed. *Trimyer v. Pollard*, 5 Gratt. 460.

Specific Performance.—In a suit in equity by the assignee of the purchase money of land against the purchaser and assignor, the suit being for a specific performance of the contract, the statute of limitations is no bar to the claim as it is inapplicable to the case. *Mayor v. Carrington*, 19 Gratt. 74. See monographic note on "Specific Performance" appended to *Hanna v. Wilson*, 3 Gratt. 248.

Sureties.—Where the distributees delay twenty-five years after the last settlement of the administrator before bringing suit against the administrator and his sureties for settlement of his administration, the plea of the statute of limitations as a bar to the demand against the sureties, should be sustained. *Castleman v. Dorsey*, 78 Va. 342.

Trespass.—The act of February 27, 1866, in relation to the statute of limitations, extending the time within which actions of trespass and trespass on the case may be brought in certain counties, does not apply to an action of trespass on the case in assumption, nor to actions *ex contractu*, but only to actions of trespass and trespass on the case. *Gore v. McLaughlin*, 3 W. Va. 489.

Unlawful Detainer.—A plaintiff cannot recover in unlawful detainer unless he prove that the defendant has not held possession of the land unlawfully for three years previous to the institution of the action. See sec. 1, ch. 130, of the Code 1873; *Pettit v. Cowherd*, 63 Va. 20, 1 S. E. Rep. 392. See monographic note on "Unlawful Detainer" appended to *Dobson v. Culpepper*, 23 Gratt. 352.

604

*Brent &c. v. Peyton.

February, 1843, Richmond.

(Absent CABELL, P. and BROOKE, J.)

Slaves—Injunction—Equity Jurisdiction—Case at Bar.

—A feme sole owning slaves made a bill of sale of them for 500 dollars, took from the purchaser his bond for that sum, and on the same day made her will releasing the bond. She died soon afterwards, and her will was offered for probat to the county court of Nelson, and the case continued until the next term. Before that term a bill in equity was exhibited to a judge in vacation, by the purchaser against two defendants, setting forth that at the time the instruments were executed the slaves were in Stafford, but that after the death of the testatrix, and before her will could be proved, one of the defendants went to Stafford and took possession of the slaves, and together with the other, who aided him in getting possession of them, had clandestinely removed

them, or was clandestinely removing them, from the county of Stafford, and would probably sell them to a trader, or so secrete them as to put it out of the complainant's power to regain the possession of them. An injunction was awarded, and the order directed to the clerk of the circuit court of Nelson, though neither the defendants nor the slaves had ever been in that county. The defendants, in their answers, objected to the jurisdiction, but did not set up any title to the slaves except through the decedent, and as her next of kin. HELD, 1. that the case made by the bill was not one for the equitable jurisdiction of any court; and 2. that if it were, that jurisdiction could not have been properly exercised by the circuit court of Nelson.

On the 8th of October 1833, Mary H. P. Brent, a maiden lady then living in Orange county, made a bill of sale to her cousin Henry S. Peyton for five slaves, for the consideration expressed therein of 500 dollars. The slaves consisted of a negro woman, her three children, and a girl named Eliza.

For the 500 dollars a bond was executed; but on the same day miss Brent made her will, whereby she gave the bond to Peyton.

Charles B. Quisenberry and another witness attested the bill of sale and the will, and the place of execution

605 *of both was Quisenberry's house in Orange. Frederick S. Peyton was by the will appointed executor.

The testatrix, after making her will, removed to the residence of Henry S. Peyton in Nelson county. She died soon afterwards.

On the 26th of November 1833, the will was offered for probat in the court of Nelson county, and the case continued until December court.

Before December court, to wit, on the 4th of that month, Henry S. Peyton exhibited a bill, setting forth that at the time of the execution of the said instruments Eliza was in the possession of Quisenberry, but the negro woman and her children were in the county of Stafford; that a short time after the death of miss Brent, Quisenberry, who was the husband of her sister, came to Nelson, but that immediately after her funeral, and before her will could be proved, he went to Stafford and took possession of the negro woman and her children, and together with one John Brent, who aided him in getting possession of them, had clandestinely removed them, or was then clandestinely removing them, from the county of Stafford, and that he would probably sell them to a trader, or so secrete them as to put it out of the complainant's power to regain the possession of them. The bill prayed that Quisenberry and Brent might be made defendants; that they, and all others combining and confederating with them, might be enjoined from selling or removing the said slaves out of the county where they then were; that a receiver might be immediately appointed to take possession of the said slaves and hold them in safe custody until the complainant's rights should be established to the

satisfaction of the court, or until the farther order of the court; that the said slaves might be restored to the complainant, and the said Quisenberry and Brent compelled to account for the value of such as had been, or might be, sold by them or either of them; and for general relief.

606 *Judge Thompson, to whom the bill was presented, awarded an injunction, and directed his order to the clerk of the circuit court of Nelson. Process issued from that court, by the judge's order, directed to the sheriff of any county in the commonwealth. And the process was served by the sheriff of the county of Orange, in which county the defendants and the slaves were at the time of service.

In the answers of the defendants, the jurisdiction of the court was objected to on two grounds: 1st, that if the plaintiff had a right to the slaves under the bill of sale, his remedy at law was complete; and 2dly, that the defendants were not residents of the county of Nelson, and never acquired or held possession of the slaves one moment of time in that county. The defendants set up no title to the slaves except through the decedent, and as her next of kin. They impeached the transactions of the complainant with the decedent for fraud and imposition, alleging that the decedent was incompetent to make a valid contract, because of her great imbecility of body and mind, and that she did not know the contents of the papers she was executing. Quisenberry also alleged, that at the time of his attestation, the complainant misrepresented to him the nature of those papers.

On the 24th of December 1833, the sentence of the county court of Nelson was pronounced, refusing to admit the will to record. From this sentence the executor appealed. And on the 30th of September 1834, the circuit court reversed the sentence and ordered that the will be established.

The next day, to wit, the 1st of October 1834, the injunction cause was heard, and the following opinion pronounced by the circuit court:

"The court is of opinion, that in consideration of the pendency, in the courts of this county, of a contest for probat; in consideration that the bill of sale and will *are so closely connected and interwoven in time, place, circumstances, and consideration moving to their execution, as to constitute but parts of one transaction, making even the bill of sale, with the parol agreement* therewith

*The language of the bill was as follows: "At the time of the execution of the deed aforesaid, your orator executed his note to the said Mary H. P. Brent for the sum of 500 dollars, the interest of which, during the life of the said Mary, he was to pay to her. But it being the intention of the said Mary that the principal of the note should not be exacted of him after her death, she made a will on the same day of the execution of the deed, by which she bequeathed him the amount of the note, or in other words released him the debt."—Note in Original Edition.

connected, though a contract as to some purposes, yet testamentary as to others; and in consideration of the fact that the defendant Charles B. Quisenberry was a subscribing witness to the bill of sale, and is now seeking to impeach his own attestation,—that some court of equity had jurisdiction to interpose by injunction, and, under the circumstances of this case, that that jurisdiction attached to this court, notwithstanding the nonresidence of the defendants and the absence of the property, relied on in the answers.”

Wherefore the court decreed that the injunction be made perpetual; that the defendants deliver up to the plaintiff the slaves mentioned in the bill; and that the said defendants render before a commissioner an account of the heirs of the said slaves from the time they became possessed thereof.

On the petition of the defendants Brent and Quisenberry, an appeal was allowed.

James Garland for the appellants. It is a standing and unyielding principle of equity, that where a party has a complete remedy at law, equity will not interpose. Story's Eq. Pl. 373; Mitford's Eq. Pl. 123; Cooper's Eq. Pl. 124; Beames's Pleas in Equity 79; Thornton & others v.

Spotswood, 1 Wash. 142; Tarpley's 608 *adm'r v. Dobyns, 1 Wash. 185. This principle has been so rigidly adhered to, that in cases where parties had a just legal defence, but neglected to make it at law, equity has refused to interfere. Chapman & c. v. Harrison, 4 Rand. 336. What fact is stated in the bill, that interposed the slightest obstacle to a complete remedy at law? Is it the apprehension that the appellants, on taking possession of the slaves, would remove them from the county of Stafford to some other county? This was no obstacle, because the remedy at law existed as well in one county as another. In whatever county the defendants were, they were amenable to the process of the court of that county; and the bill does not intimate that they intended any removal, either clandestinely or otherwise, out of the state. A suspicion is faintly expressed that the slaves would be sold to a trader; but even with this suspicion, the appellee does not intimate that the appellants would so remove their persons as to be out of the reach of the process of a court of law.

II. The circuit courts, sitting in chancery, have jurisdiction over all persons and in all causes in chancery within their respective counties. Sess. Acts 1830-31, p. 47, § 22. The defendants were not, when the bill was filed, and never had been, residents of the county of Nelson; and the slaves were not, and never had been, in that county. The question of jurisdiction is not affected by the probate case. If the defendants had demurred to the bill for want of jurisdiction, the demurrer must have been sustained: the record of the probate case could not have been introduced into the injunction case, for the purpose

of overruling the demurrer. The exception taken to the jurisdiction in the answers was equivalent to a demurrer.

Patton on the same side. The appellee shews by his bill that he was able to 609 establish the validity of his title *at law, and makes no suggestion that the defendants were concealing themselves so as to evade legal process. The process from a court of law would have been just as effective as this bill. The bill is in effect an action of detinue. The class of cases authorizing the interference of equity to prevent the sale of property under execution may be relied on: but the jurisdiction exercised in those cases is not extended to others. In Parks's adm'r and heirs v. Rucker, 5 Leigh 149, a stronger case than this was presented for the exercise of equitable jurisdiction, but the court refused to interfere.

II. If any court of equity could interfere, there is no foundation for the exercise of jurisdiction by the circuit court of Nelson. The rule on this subject is prescribed by the act 1 R. C. 1819, p. 203, ch. 66, § 38; Sess. Acts 1830-31, p. 56, ch. 11, § 41; Supp. to 1 Rev. Code, p. 151, § 41. And the interpretation placed upon this act in Randolph's ex'or & c. v. Tucker & al., 10 Leigh 655, is decisive of the present case. Here the bill makes no suggestion that any proceeding was apprehended in Nelson; the act apprehended was an act in Stafford. There is no suggestion even that the defendants contemplated removing the slaves out of the commonwealth; and in this respect the case is less strong than Randolph's ex'or & c. v. Tucker & al.

Robinson for the appellee. Upon the statement in the bill the defendants were clandestinely carrying off property to which neither of them had any right. That right was in the plaintiff, if his bill of sale was valid; and if the bill of sale was void, the right would be in the personal representative of the grantor, when there should be a grant of probat or administration. Brent and Quisenberry had right in neither aspect, and they claimed none. They were mere bailiffs or trustees for the parties

having right: and when it was seen 610 that *they were violating their duty, any one interested had a right to come forward and ask a court of equity to do what was necessary to preserve the property. This is but one of many cases in which the interference of equity by injunction is indispensable “to secure the enjoyment of specific property; or to preserve the title to such property; or to prevent frauds or gross and irremediable injustice in respect to such property.” 2 Story's Equity, p. 190, § 905.

The striking feature in the case is, that according not only to the allegations of the bill, but the admissions of the answers, the defendants had no legal title to the property. They were merely a part of the next of kin of the decedent, and could claim only through her personal representative such proportion of the slaves as might re-

main after the payment of debts, and could not have that unless the bill of sale were void. It could not be necessary for the plaintiff to go to law to recover a legal title from them, when they asserted no legal title at all. All that they had a right to ask was, that the property should be preserved until there should be a personal representative capable of disputing with the plaintiff the legality of his title. The injunction which the plaintiff sought would attain this, and the granting it, therefore, meted out exact justice to both parties. Suppose the case reversed,—suppose that after the death of miss Brent and before the grant of probat or administration, Peyton had obtained possession of the slaves, and been clandestinely removing them, and in this state of things a distributee had filed a bill asking an injunction to prevent the property from being improperly removed before there was any personal representative; can there be a doubt that such injunction would have been awarded? It would have been indispensable to justice, since the distributee would have no legal remedy against the plaintiff. *Atkinson v. Henshaw*, 2 Ves. & Beames 85.

611 *Here, too, an action of detinue would have been wholly inadequate. The defendants were going from county to county, and by the time the plaintiff could get a writ from the office of any county, and give it to a sheriff, they would have been in another. Independently of which, detinue has never been considered so efficient a remedy to preserve slaves as an injunction, where a removal is apprehended and distinctly alleged. No other remedy would have been effectual except that adopted here; to wit, a subpoena and injunction directed to the sheriff of any county in the commonwealth.

II. Admitting that some chancellor might award such injunction, judge Thompson clearly had jurisdiction to award it. For the act referred to on the other side (§41), provides that the judges shall each have and exercise a general jurisdiction in awarding injunctions, whether the judgment or proceeding enjoined be rendered within or without their respective circuits, or the party against whose proceeding the injunction be asked be resident within or without the circuit. The objection is merely that the order of the judge was not directed to the clerk of the circuit court of that county in which the proceeding was apprehended. But where was the proceeding apprehended? If the slaves had already been removed from Stafford, it was not there. It must have been in some other county, through which the removal was then going on, or in which the sale or secretion was then taking place; but in what other county, was unknown to the plaintiff and to the judge. Was this a sufficient reason for a denial of justice? Surely not. The general principle, that where a jurisdiction exists, every necessary power shall be implied to carry it into effect, forbids any such conclusion.

It would be peculiarly improper under this statute, which is remedial. Such a construction should be put upon it as will advance the remedy. The case of *Cocke & Co. v. Pollok & Co.*, 1 Hen. & Munf.

612 499, exhibited the curious *spectacle of two chancellors respectively disclaiming jurisdiction of a bill for an injunction to a judgment, in a case in which jurisdiction ought to have been exercised by some chancellor, and could not have been exercised by any save one of those two judges. And what is a little remarkable, judge Tucker thought both right in refusing. But the two other judges did not think the state of the law quite so defective, and redress was obtained. The legislature nevertheless acted on the subject. They thought it best that the judge of each superior court of chancery should have a general jurisdiction in awarding injunctions. *Sess. Acts 1813-14*, p. 48, ch. 16, § 18. Instead of determining, as the court of appeals had done, which of the two should have jurisdiction, the legislature determined that jurisdiction might be exercised by either of them, or by any other judge. The term jurisdiction excludes the idea that any party or any officer can refuse to obey the order of a judge awarding an injunction, upon the ground of its being extrajudicial. The judge having jurisdiction, his order is to bind to the extent to which he acts. No clerk is to refuse to issue process, upon the ground that the judge had no jurisdiction to order him to issue it; no sheriff or party is to refuse to obey, upon the ground that the judge has directed his order to, and caused the process to issue from, an improper court. What then is the meaning of the latter part of the section? It does not determine when the judge has jurisdiction, but it points out a course for making his jurisdiction effectual. It is a guide to him in the exercise of his jurisdiction, which he is to follow wherever he can. But where, from the nature of the case, the direction in the latter part of the clause furnishes no guide, the judge must act as he would have done had there been no such direction. In such case the judge of a district court of chancery would have directed his order to his own clerk.

613 Now, the judge of a circuit *court has several clerks within his circuit, and he must of necessity direct his order to one of those clerks; to which of them, is left to him in the exercise of a sound discretion. In the original act, the direction in regard to a ne exeat was, that it should be directed to the clerk of the court of that district in which the defendant resided. The consequence of this being palpable, the legislature made an amendment by the act in 1 R. C. 203, § 38. Their meaning is thus shewn to be, that in the cases in which the judge acts under the 38th section, such a course is to be pursued by him as will make his order effectual. That course, here, was to direct the order to the clerk of some court within the circuit; and the remarks of the judge, con-

tained in his opinion, shew that Nelson court was more proper than any other.

Stanard was on the same side, but added nothing to the views presented by Robinson.

C. Johnson in reply. The case of *Armstrong v. Huntons*, ante, pp. 323, shews that, as a general rule, a court of equity has no jurisdiction to try the title to slaves. In the present case, a writ in detinue might have been more readily served than the process of injunction, and the finding a full value would have given as much security for obtaining the specific property as any action of a court of chancery. The plaintiff sets up a title under an absolute conveyance; a title purely legal. The defendants stand amenable to him without regard to the fate of the will. They have the possession of the property, and have a right to oppose that to the plaintiff. It is necessary that the plaintiff should state in his bill some ground of equity; but there is none. The judge of the circuit court of Nelson, however, has thought proper to bring the case into his court,

because another case was pending in 614 that county, (not in his court but *in the county court) and because the deed and will were executed about the same time. Because two questions depend on similar evidence, are they to be tried together? But there is not even foundation for this: the decedent might be competent one hour, and incompetent the next. In such a case as this, not even consent could have given jurisdiction.

II. If the case of *Randolph's ex'or &c. v. Tucker & al.* be law, it is conclusive of this case. If that bill ought to have been sent from James City, this ought to have been sent from Nelson. But it is said, the bill did not give information where the proceeding was apprehended. It is new ground, that a defect in the bill is to be made the foundation of jurisdiction. Suppose the bill had been carried to the judge of the circuit court of Orange, and he had directed the order to the clerk of the circuit court of Nelson, would that have given jurisdiction to Nelson court? Under the former law, no judge could act beyond the limits of his district. Under the present law, any judge may award an injunction; but the order is to be directed to the clerk of the proper court, and is to have the same effect as if made by the judge of that circuit.

STANARD, J., delivered the following as the resolution of the court:

The court is of opinion that the case made by the bill was not one for the equitable jurisdiction of any court; and if it were, that jurisdiction could not have been properly exercised by the circuit court of Nelson. On this ground, without deciding or even considering any other question in the case, the court is of opinion that the decree is erroneous: therefore it is decreed and ordered that the same be reversed and annulled, and that the appellee do pay to the appellants their costs by them expended

in the prosecution of their appeal. And this court proceeding to pronounce 615 such decree as *the said circuit court ought to have pronounced, it is further decreed and ordered that the bill of the appellee be dismissed, and that he pay unto the appellants their costs by them about their defence in the said circuit court expended.

The United States *v.* Cottingham.

February, 1843, Richmond.

[40 Am. Dec. 710.]

(Absent BROOKE, J.)

Army—Construction of Act of Congress.—Construction of the eleventh section of the act of congress of March 16, 1802, fixing the military peace establishment of the United States.

Same—Enlistment*—Alien—Discharge.—A person of full age voluntarily enlisting in the army of the United States is not entitled to be discharged from the service upon the ground of his being an alien.

In October 1841, George Cottingham presented a petition to the judge of the first circuit, setting forth that he was born in the city of Dublin in the united kingdom of Great Britain and Ireland: that he migrated to this county in or about the year 1836, and shortly after, to wit, on the 16th of May 1837, enlisted in the army of the United States for three years, and served as a private in captain E. S. Hawkins's company (H.) of the seventh regiment of infantry of the said army of the United States: that he became entitled to and received an honourable discharge on the 16th of May 1840: that two days before the expiration of his term of enlistment, to wit, on the 14th of May 1840, he enlisted a second time in the army of the United States, to wit, in troop B. in the second regiment of dragoons, to serve as a private for five years: that at the time of such enlistment he the said Cottingham was an

alien, not having taken the oath of 616 allegiance to the United *States, nor taken any steps towards naturalization according to the laws of the United States: that being an alien he cannot legally be enlisted in the army of the United States: and that he is stationed at fortress Monroe, under the command of lieutenant colonel Alexander C. W. Fanning, where he is detained in custody without legal authority. The petition prayed for a writ of habeas corpus ad subjiciendum.

Affidavit being made by the petitioner of the truth of the facts set forth in the petition, the judge to whom the application was made granted the writ, directed to colonel Fanning.

Colonel Fanning brought the petitioner

***Contracts of Enlistment, Civil Contracts—Points of Difference between.**—The principal case is cited in *U. S. v. Blakeney*, 3 Gratt. 415, 425; *Burroughs v. Peyton*, 16 Gratt. 492.

See foot-note to *U. S. v. Blakeney*, 3 Gratt. 406.

before the circuit court of Norfolk county, and certified the cause of his detainer to be, that he was duly enlisted in the army of the United States. The material facts proved were made a part of the record. In the opinion both of the circuit court and of this court, they shewed the said George Cottingham to be an alien. And on the ground of alienage, the circuit court held that he was illegally detained in custody, and ordered that he be discharged.

The United States, by Robert C. Nicholas esq. their attorney for the eastern district of Virginia, presented a petition to the court of appeals for a writ of error, insisting that there is no legal impediment to the enlistment of aliens in the army of the United States, and that the judgment was therefore erroneous.

The writ of error was awarded accordingly.

- Nicholas for plaintiffs in error. In the first place it will be shewn by a reference to the general principles of law applicable to all contracts, that an enlistment in the army of the United States by an alien, (which is a contract between the U. States on the one hand, and the recruit on the other; U. States v. Bainbridge, 1 Mason 71,) is as binding upon the alien, as it would be upon a natural born citizen of the United States.

617 *A contract, in its most enlarged signification, is defined by the elementary writers to be "an agreement upon sufficient consideration, to do or not to do a particular thing." 2 Blac. Com. 442. It is essential to every contract, that there should be at least two contracting parties competent to make a contract. These parties may be either natural or artificial persons. Every natural person is competent to make a valid and binding contract, unless he labours under some particular disability making his case an exception to the general rule; and it is incumbent upon those who deny the capacity of a party in any given case to make a contract, to shew affirmatively the existence of such disability. To ascertain what are the disabilities which render persons incompetent to contract, we must have recourse to the jurists and elementary writers who have treated of this branch of the law.

Among the various causes of incompetency to contract, enumerated in the works upon this subject, mere alienage is not included. Chitty on Contracts, ch. 2, p. 107, (4th american from 2d London edi.) It is true, as we are informed in the same work, (p. 150,) that the contract of an alien enemy is void and cannot be enforced, because, as the writer says, "if an alien enemy were allowed to sue in the english courts on a contract made before or during his disability, he would be enabled to withdraw from this country resources which might be converted to purposes injurious to its interests." But the disability does not extend to an alien ami, to whom the con-

siderations of public policy which have been adverted to do not apply. And cessante ratiō cessat ipsa lex.

Moreover, although aliens labour under some disabilities, such as an incapacity to hold lands, to vote at elections, and to be appointed to offices &c. they nevertheless enjoy many of the rights and privileges of citizens, and are capable of acquiring, 618 holding and transmitting *moveable property in like manner as citizens; and they can bring suits for the recovery and protection of that property. 2 Kent's Com. 62; 1 Blac. Com. 371-2.

The right of aliens to make valid and binding contracts is sanctioned by the general policy of our government, as indicated in the federal constitution, and by legislative enactments made in pursuance thereof. By the constitution of the United States, art. 3, sect. 2, it is provided that the judicial power shall extend (among other enumerated cases) to controversies between the citizens of a state and foreign states, citizens or subjects. The judiciary act of 1789, sect. 11, gives to the circuit courts of the United States jurisdiction of all suits of a civil nature in which an alien is a party. 1 Story's Laws of U. S. 57. The authority thus conferred upon aliens to sue in the federal courts presupposes a capacity upon their part to make contracts; and the obligation of contracts must be necessarily mutual, and binding upon the alien as well as the citizen; for reciprocity of obligation is of the essence of all contracts. If an alien contracts a debt with a citizen or with the government, or makes a contract with either to do a piece of work, he would not be exempted from its performance by being an alien, but might be coerced by suit to a compliance with his engagements. Why therefore may he not make a valid contract to render military as well as any other species of personal service?

But it may be argued on the other side, that though there is no personal disability in the alien to make other contracts, his enlistment is nevertheless void on account of illegality, being inconsistent with the allegiance which he owes to his own sovereign or country.

That argument is founded upon a misconception of the duties and obligations which devolve upon individuals during their residence in a foreign country; and springs from an incorrect idea of the nature of allegiance.

619 *Allegiance, we are told, is distinguished by the law into two sorts or species, the one natural, the other local; the former being also perpetual, the latter temporary. Natural allegiance is such as is due from all men born within the king's dominions, immediately upon their birth. Local allegiance is such as is due from an alien or stranger born, for so long a time as he continues within the king's dominion and protection; and it ceases when he transfers himself to another country. 1 Blac. Com. 370; 2 Kent's Com. 63. And to the same effect see Vattel, book 1, ch. 19,

sect. 213. The authorities cited clearly establish the proposition, that a citizen or subject of one state or kingdom, by removing to and becoming a resident of a foreign country, thereby incurs the obligation of allegiance to the latter country, in consideration of the protection which it affords him, whilst a sojourner within its limits. Nor is this duty of temporary allegiance affected by the consideration that an individual may be involved in difficulties by owing allegiance to two different sovereigns at the same time; for it is his own act which brings him into this embarrassment.

Moreover, the argument against the enlistment of aliens, founded upon its incompatibility with the allegiance due to their native sovereign, would equally apply to the enlistment of naturalized citizens; who, according to the doctrines of the english law, (which have not been affected by any statutory provision in this country,) cannot by such naturalization throw off or renounce their allegiance to their native country. 2 Kent's Com. 48, 9. Now the counsel on the other side will hardly contend that a naturalized citizen may not be lawfully enlisted in our army.

But again, it is contended on our part that there is not only no illegality in the enlistment of aliens, but that, according to the principles of national law as laid down by the most eminent jurists, it is perfectly lawful for *the citizens of one country to enlist in a foreign service. Vattel, book 3, ch. 2, sect. 13. And the practice of all nations ancient and modern, it is believed, has been in conformity with the opinions expressed by the writers on public law.

If then there be nothing, either in the general principles of law applicable to contracts or in the law and usages of nations, which forbids the enlistment of aliens, let us enquire in the next place whether such enlistments are made illegal and void by the acts of congress relative to the army of the United States. It is contended by those who deny the legality of such enlistments, that they are in violation of the 11th section of the act of congress approved March 16, 1802, in 2 Story's Laws U. S. p. 832.

What was the object of this section? Was it designed to invalidate and render void every enlistment which was not in strict compliance with the regulations prescribed by it? It is absurd to suppose that such could have been the design of congress in adopting the provision in question. For, if it were, then every deviation from the requirements of the section, however trivial, would avoid an enlistment, and entitle the recruit to his discharge. For example, if he should want an inch of the required height, it would be just as valid an objection to his enlistment as the want of citizenship, which is relied on in this case. The requisitions in the section are merely directory to the recruiting officers, and a departure from them will not affect the validity or legality of their acts. *Whitney & al. v. Emmett & al.*, 1 Baldwin's C. C. R.

315, 16. The correctness of this position is sustained by decisions of the supreme court in analogous cases. For instance, in the case of *The United States v. Kirkpatrick*, 9 Wheat. 720, it is decided that the laws requiring disbursing officers of the government to settle their accounts at short and stated periods, are merely directory 621 to such officers, *and intended as a security to the government, but constitute no part of the contract with the sureties of such officers; and that consequently a failure by the government to require the settlements in the mode and time prescribed, will not affect the liability of the sureties for any default of the principal. See also *U. States v. Vanzandt*, 11 Wheat. 184, and *U. States v. Nicholls*, 12 Wheat. 505.

But it may be said, that the section referred to imposes a penalty on the recruiting officer for a deviation from its provisions, and that every contract which is prohibited under a penalty is void, although the statute do not expressly declare it to be so; and that consequently the enlistment in this case was void, the recruit not being a citizen of the United States.

Without questioning the correctness of the general principle of law referred to, its application to the case before the court is denied. For in the first place, suppose it was the design of the legislature to annex the penalty to a deviation from any one of its requirements, in regard either to age, height, or citizenship; upon whom is the penalty imposed? Why clearly upon the recruiting officer, who is the mere agent of the government. The contract of enlistment, however, is a contract with the government itself. Now the principle of law before cited invalidates a contract, and takes away all right of action upon it, wherever a penalty is imposed by statute upon the parties to such contract, or either of them: but in this case no penalty attaches to either of the contracting parties, the government or the recruit; it is designed merely as a security to the former for the faithful execution of the law, with which the latter has no concern.

But on our part it is contended further, that if the imposition of the penalty is to have any influence upon the construction of this section of the act, the penalty itself was not designed to be applied to the 622 enlistment *of persons not citizens of the United States, but merely to the enlistment of minors without the consent of their parents, guardians or masters: for although the first part of the section allows the sum of two dollars to the recruiting officer for the enlistment of each citizen of the U. States of a certain height and age, it does not prohibit the enlistment of persons not citizens; the only words of prohibition are contained in the proviso in regard to the enlistment of minors, and the penalty is annexed to the violation of that proviso only.

But conceding, for the sake of argument, that it was the intention of congress, by the section under consideration, to prohibit

under a penalty the enlistment of any person not a citizen of the United States, the question naturally arises as to the true meaning of the words "citizen of the United States," as used in the act. We contend that those words must be taken in a restricted or qualified sense, and do not mean a citizen entitled to all the privileges which appertain to citizenship in its most enlarged signification. It has been already shewn in a former part of this argument, by reference to Vattel, that an alien under the protection of a foreign states is for some purposes and to a certain extent to be regarded as a citizen, and as owing a temporary allegiance to that state. The principle is moreover well established, that for all commercial purposes, a person may acquire, without naturalization, and by residence merely, the rights of a citizen of another country; and the domicil of a party, without reference to the place of birth, becomes quoad hoc the test of national character. 1 Kent's Com. 75; 2 Id. 49.

Again, by the 11th section of the judiciary act of 1789, before cited, the circuit courts have jurisdiction of suits between citizens of different states, and the averment of the citizenship of the parties is a necessary averment, and must be proved under the general issue. But it has been repeatedly decided that the "citizenship" spoken of in the constitution and in the judiciary act, in reference to the jurisdiction of the federal courts, means nothing more than residence. To constitute a person a citizen of a state, so as to sue in the courts of the United States, he must have a domicil in such state. If he removes into a state *animo manendi*, that is sufficient, whatever may be his motive for removal. *Catlett v. The Pacific Ins. Co.*, 1 Paine's C. C. R. 594; *Case v. Clarke*, 5 Mason 70; *Cooper's lessee v. Galbraith*, 3 Wash. C. C. R. 546.

These authorities are abundant to shew that the word "citizen," employed in an act of congress, is not always to be understood in its most extended signification, but is sometimes used to express an inferior degree of citizenship, such as is described by Vattel. And such, it has been attempted to prove, is the proper interpretation to be placed upon the term "citizen" in the act under consideration.

By this construction the act of congress will be made to harmonize with the principles established by the law of nations, which have been shewn to authorize the enlistment of temporary residents. And according to the decision of the supreme court in the case of *Talbot v. Seeman*, 1 Cranch 1, "the laws of the United States ought not, if it be avoidable, so to be construed as to infract the common principles and usages of nations, or the general doctrines of national law." See opinion of the court in that case, delivered by chief justice Marshall, Id. p. 43.

Segar for defendant in error. It may be conceded that on general principles an alien may contract, either with the govern-

ment or its citizens. But the case of *Cottingham*, and all like it, are taken out of the operation of general principles by special legislation. The 11th section of the act of congress of the 16th of March 1802 forbids the enlistment of aliens in the army. "Surely the legislative power may place either citizen or alien under disability to contract about a particular subject. Here the disability is created by express law, and extends to both the contracting parties, unless the prohibition in the act of 1802 is to go for nothing.

That it was the intention of the legislature to exclude aliens from the military service, will clearly appear from the history of the legislation on this subject. In 1811, 1812, 1813 and 1814, laws were passed which virtually repealed the act of 1802, and dispensed with citizenship as a qualification of the recruit, by authorizing the enlistment of able-bodied men. See *Story's Laws U. S.* p. 1205, 1208, 1285, 1433. This change in the law of enlistment evidently grew out of the emergency of the case; the country being then either on the verge of war with Great Britain, or actually engaged in it, and requiring, in order to fill up its armies, a relaxation of the policy which had governed the previous peace establishment. But the war having terminated, and the emergency passed away which caused the suspension of the act of 1802, congress, by its act of March 3d 1815, (*Story's Laws U. S.* p. 1510, § 7,) repealed the laws of 1810, 1811, 1812 and 1813 which allowed the enlistment of aliens, and reinstated the 11th section of the act of 1802 and the 5th section of the act of 1808, which prescribed citizenship as a requisite of enlistment. This ascertains clearly the intention of congress that none but citizens should be employed in the military peace establishment. And the intention being discovered must prevail. *Brown v. Barry*, 3 Dall. 365. So imperative indeed is the legislative will, that where it can be ascertained by expressive circumstances, it will prevail even over the literal sense of terms. 1 Kent's Com. 462. There was an obvious and twofold motive for banishing aliens from the peace establishment. First, (in the absence of all emergency) to add to the moral character and respectability, by improving the material of the army, which could be accomplished by no other means so well as by substituting the native born american for the alien mercenary. Secondly, there has ever been in this country an excessive jealousy of standing armies in time of peace, which would naturally lead the representatives of the people, in framing a military peace establishment, to compose it of citizens. There is far more ground for distrust of aliens in time of peace than of war, for in the latter case the number of citizens in the armies of the republic would so far exceed that of foreigners as to remove then all ground for apprehension. These considerations tend to shew that it was the design of congress, by the

act of March 3d 1815 (reinstating that of 1802), to redress a mischief; and the judiciary should, *pro bono publico*, give such construction to those acts as will meet the intention of the legislature. Again, as indicating the intention of the legislature, we may look to the uniform construction given to the act of 1802 by that department of the government which is specially charged with the interpretation and execution of all laws relating to the military establishment; the department of war. From 1815 to this time, without interruption, the war department has interpreted the 11th section of the act of 1802 to exclude aliens from enlistment. It will suffice to refer to the general regulations for the army, published in 1841, where it is laid down at p. 121, in article 687, that the persons who may be enlisted are to be "citizens of the United States, native or naturalized." What other meaning can be given to the act of 1802? It cannot mean that the recruiting officer may enlist men possessing none of the qualifications therein prescribed, or possessing only some of them. It must be considered as prescribing a rule to be strictly observed by the recruiting officer; he is to enlist only those who shall possess at least the qualifications, each and every one thereof, marked out

626 in the act. Does *the district attorney suppose the interpretation to be, that for recruiting men possessing all those qualifications the recruiting officer shall receive the 2 dollars premium, but in the event of their not having those qualifications he shall only forfeit the premium, the enlistment all the while remaining valid? Such an interpretation supposes that congress, in framing the peace establishment, was looking rather to the pitiful interests of the recruiting officer than to the weal of the republic; and it leaves the whole policy of enlistments in the army, instead of being guarded by legislative provisions, to the naked discretion of the recruiting officers of the army. But the ground work of such a construction is overturned by the fact that the provision of the law of 1802, allowing a premium for enlisting recruits, is repealed by the 5th section of the act of congress passed March 2, 1833, (Sess. Acts 1832-3, p. 72,) and the commissioned officers charged with the recruiting service are still to enlist citizens of the United States.

With respect to the argument that a qualified citizenship was meant by the act of 1802, it is sufficient to observe that the term citizen there used must be taken in its common acceptation, to mean one born in this country, or one not born therein who has become a citizen by complying with the naturalization laws of the U. States. The cases referred to (Catlett v. The Pacific Insurance Company, Case v. Clarke, and Cooper's lessee v. Galbraith) have no reference to aliens or to the military service, and present no grounds for an argument from analogy.

II. It is not necessary that terms of positive prohibition be employed to render a statute prohibitory in its operation. In

Cohen v. Hoff, 2 Tredway's Rep. 661, Nott, J., lays it down, that "affirmative words in a statute sometimes imply a negative of what is not affirmed, as strongly as if expressed." And this happens in two cases: first, when a new rule is introduced; Hobart's Rep. 298; 1 Kent's Com. 467, 627 note d.; 6 Bac. Abr. *Gwill. edi. p. 377. Secondly, when a statute directs a thing to be done in a particular way, it includes in itself a negative; viz. that it shall not be done otherwise. See authorities just quoted; also Plowden 206 b.; Vin. Abr. vol. 19, p. 511, 12, title Statute. Now the present law of enlistment did at the time of its reenactment prescribe a new rule, by abolishing the rule which prevailed under the laws of 1811, 1812, 1813 and 1814, and introducing another in its stead: and the act of 1802 directing enlistments to be made in a particular way, viz. of able-bodied citizens &c. implies that they are not to be made otherwise; that is, by specifically including citizens, it excludes aliens, upon the well known maxim *inclusio unius est exclusio alterius*.

III. For the nonobservance of the qualifications enumerated in the act of 1802, a penalty is imposed of the value of the clothing received from the government by the recruit; say, some 30 or 40 dollars for each offence. There is no reason for considering this penalty as applicable exclusively to the enlistment of minors. If congress had so intended, they would have used the words "contrary to the true intent and meaning of this proviso;" or their language would have been—"And if any officer shall enlist any person under 21 years of age without the consent of his parent &c. he shall forfeit and pay the amount of clothing which may have been received by such recruit." But the words of the act affixing the penalty are general—"contrary to the true intent and meaning of this act."

Even if there were no penalty imposed by statute, it is imposed by another authority. It is clearly within the constitutional prerogative of the president, as commander in chief of the army and navy, to ordain general regulations for the government of the army, not forbidden by the constitution or the laws. And the first section of the act organizing the war department constitutes the secretary of war the organ of the

628 president, *for performing such duties and acts connected with the land forces, as may consist with the constitution. The general regulations of the army, then, when they have received the sanction of the president, have the force and obligation of law. The 687th article of the regulations published in 1841 (like those which have been in operation for many years) designates "able-bodied citizens of the U. States, native or naturalized," as those who may be enlisted. After thus designating citizens for enlistment, this code of regulations goes on, with the most guarded circumspection, to prevent the enlistment of any contrary to law or regulation. Boards of inspection are organized from time to

time, for the express purpose of enquiring whether any have been enlisted contrary to law or regulation; and if any be found to have been so enlisted, they are rejected, and the recruiting officer who may have enlisted them is mulcted in the amount of clothing which the discharged recruit may have received, to be deducted out of his pay. See articles 687, 713-719, 741. If it be said that the words of the 687th regulation are, "able-bodied citizens may be enlisted," the answer is that may, there, obviously means must; for that is its meaning whenever a positive duty is imposed, and not a mere discretionary power given. Minor and others v. Mechanics Bank of Alexandria, 1 Peters 64. Moreover, by the general order prefixed to the regulations, the officers of the army are commanded strictly to observe every article thereof; and any "change, alteration or departure therefrom" is expressly forbidden.

IV. Whatever is forbidden by penalty in a statute is unlawful and void. Bartlett v. Vinor, Carth. 252; 1 Kent's Com. 467; Chitty on Contracts (4th American from 2d London ed.) 538; Hallett v. Novion, 14 Johns. 273; Mitchell v. Smith, 4 Dall. 269; 1 Binn. 118; Seidenbender v. Charles's adm'rs, 4 Serg. & Rawle 151-160; Wheeler v. Russell, 17 Mass. R. 259-281. The 629 *distinction between offences mala in se and mala prohibita has been overruled. Ex parte Daniels, 14 Ves. 191; Appendix to 15 Peters p. 33. A breach of the statute law in either case is equally unlawful, and equally a breach of duty; and no agreement founded on the contemplation of either class of offences will be enforced at law or in equity. 1 Kent's Com. 467, 8; Pennington &c. v. Townsend, 7 Wend. 276; Law v. Hodson, 11 East 300; Bank v. Owens, 2 Peters 527-538; 1 Tuck. Com. (edi. 1831) book 2, p. 223; 2 Id. book 3, p. 130, 481. This court has itself solemnly adjudicated the principle that a thing prohibited by the imposition of a penalty in a statute is equally forbidden and equally unlawful with one expressly and absolutely prohibited; Wilson v. Spencer &c., 1 Rand. 76; M'Guire v. Ashby, 1 Rand. 101. Applying to the present case the principles ascertained by the authorities which have been cited, the conclusion is that the enlistment of Cottingham (who was not a citizen), being prohibited under a penalty prescribed both by statute and regulation, is altogether illegal and void.

V. The enlistment of Cottingham is void on another ground. As a contract it wants an indispensable ingredient of every valid agreement,—mutuality. The government might have put an end to it at its will; it might have discharged Cottingham at any moment for being an alien, whether he were willing or not. It is almost the daily practice to dismiss the enlisted soldier for want of the prescribed qualifications. If the government may do this, may not the soldier, for like reasons, claim his discharge? The contract, not being obligatory on the one, cannot bind the other.

BALDWIN, J. The error in the argument of the appellee's counsel consists in treating the enlistment in question merely as a contract, and as subject exclusively to the principles affecting the validity 630 of contracts. A *contract it undoubtedly is in a certain sense, inasmuch as it is an engagement between the parties, for a service to be rendered by one of them, in consideration of a compensation to be yielded therefor by the other. But it wants one of the usual requisites of contracts, a reciprocal obligation in regard to the subject matter. On the one hand, the recruit is bound to serve during the full term of his enlistment; but on the other, the government is not bound to continue him in service for a single day, but may dismiss him at the very first moment, or at any subsequent period, whether with or without cause for so doing. It has moreover a feature not to be found in most contracts; namely, a power in one of the parties to compel specific performance from the other by the exercise of physical force. If the soldier desert, he may be recaptured and coerced to the discharge of his duty by corporal restraint and punishment. These important traits of the engagement result not so much from the specific terms of the compact, as from the relation in which it places the parties towards each other; a relation of authority and control on the one side, and of obedience and submission on the other. It resembles in some respects the relation of master and servant, of the strictest kind between individuals; to wit, the condition of apprenticeship, or other indented servitude. And having regard to the circumstance that the government is one of the parties, it bears perhaps a still closer resemblance to the relation arising out of an appointment to a post or place under the civil administration; though, from the nature of the service, involving a sterner and more despotic supremacy. In fact, the enlistment is an appointment by the government of an individual to the lowest grade of military service; differing only from the commission to an officer, by the inferior rank, emolument and duties, and the incapacity to retire by voluntary 631 resignation. It is commonly founded in compact, *but not necessarily so; for the government, as the administrative sovereign of the country, has an unquestionable right, in certain emergencies, to call the inhabitants capable of bearing arms into its military service, and, by some equitable rule, to select from the whole number those best adapted to the purpose; and this without regard to their consent.

Now it cannot be doubted that the government, like an individual, in regard to appointments to its service, may prescribe the requisite qualifications, and insist upon or waive them in its discretion; and that the person appointed or selected has no right to relieve himself from his engagement, by objecting his own want of qualification. And so it is equally clear, as the act may

be done through the instrumentality of an agent, that if he should transcend or neglect the instructions of his principal in regard to qualification, the latter is not obliged to repudiate the transaction, but may sanction and confirm it without the concurrence of the other party to the engagement.

Let us now enquire how far these principles are applicable to the case before us. And this must depend upon the legislation of congress on the subject. The question may be considered as arising on the construction of the act of congress of the 16th of March 1802, fixing the military peace establishment of the United States; for though there has been subsequent legislation on the subject, it has no material bearing upon the present case. The provisions of the 11th and 12th sections of that act are as follows:

"§ 11. That the commissioned officers who shall be employed in the recruiting service, to keep up by voluntary enlistment the corps as aforesaid, shall be entitled to receive for every effective, able-bodied citizen of the United States who shall be duly enlisted by him for the term of five years, and mustered, of at least five feet six inches high, and between the ages of eighteen and thirty-five years, the sum of two dollars: provided nevertheless that this regulation, so far as respects the height and age of the recruit, shall not extend to musicians, or to those soldiers who may reenlist into the service: and provided also that no person under the age of twenty-one years shall be enlisted by any officer, or held in the service of the United States, without the consent of his parent, guardian or master first had and obtained, if any he have; and if any officer shall enlist any person contrary to the true intent and meaning of this act, for every such offence he shall forfeit and pay the amount of the bounty and clothing which the person so recruited may have received from the public, to be deducted out of the pay and emoluments of such officer.

"§ 12. That there shall be allowed and paid to each effective, able-bodied citizen, recruited as aforesaid to serve for the term of five years, a bounty of twelve dollars; but the payment of six dollars of the said bounty shall be deferred until he shall be mustered and have joined the corps in which he is to serve." Story's Laws U. S. p. 832.

These provisions, it will be seen, had a fourfold object: 1. To keep up the peace establishment of the army by voluntary enlistments. 2. To encourage recruiting, by a premium to the recruiting officer, and a bounty to the recruit. 3. To procure for the government recruits best adapted to the service, and protect it against inadequate selections. 4. To protect minors from their own improvident engagements. The protection to the government was afforded by the legislative instructions to the recruiting officer, and punishment for disobedience. The protection to the minor was extended in like manner, and still more effectually, by requiring the consent of his parent,

guardian or master. No protection was furnished or contemplated for the adult recruit. None whatever was requisite or proper. *His want of qualification is best known to himself, and his entering the service is a fraud upon both the government and its agent, if the defect be unknown to the latter; and if known, then it is an act of collusion with him to deceive and injure the principal. His conduct, instead of entitling him to protection, ought to subject him to punishment; and accordingly in the British recruiting service, by statute 10 Geo. 4, ch. 6, § 34; 7 Bac. Abr. by Dodd (London ed. of 1832) p. 379, title Soldiers, letter A. he is justly exposed to very severe penalties.

It will be seen that the qualifications prescribed by this act of congress, for the regulation of the recruiting officer, are, 1. That the recruit shall be effective and able-bodied; 2. That he shall be a citizen of the United States; 3. That he shall be at least five feet six inches high; 4. That he shall be between the ages of eighteen and thirty-five years. These requisites were obviously designed for the benefit of the government, and in order to obtain recruits best fitted for the service. They are all placed on the same footing, without discrimination; all based upon the idea of qualification alone, all embraced in the same mandate, and all enforced by the same penalty. It is impossible to distinguish between the want of citizenship and the want of any other qualification; and if a recruit be entitled to his discharge because he is an alien, he would be equally entitled to it because only five feet five inches and eleven twelfths in height,* or thirty-five years and one day old. There is no better rule of interpretation than this, that "no statute shall be construed in such manner as to be inconvenient or against reason." If a recruit were to claim exoneration from the service, on the ground that at the time of his enlistment he was under size, or under age, or infirm in body, would it not be a sufficient answer that the government, in its discretion, waived the objection, because he had since attained the requisite height or age, or had recovered, or would probably recover, from his disease; or because he possessed qualities which would more than compensate for his alleged deficiencies? And so if the plea be that of alienage, is it not enough to say that, though constrained to the admission that the native or naturalized citizen must be supposed to possess greater valour, higher intelligence and more approved fidelity than a mere stranger, yet there may be exceptions to the general rule; and that in the particular case the petitioner is a gallant and disciplined soldier, whose oath of fidelity when he took the bounty, and his long residence and connexions and interest in the country, furnish sufficient

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V. The enlistment of *Cottingham* is void on another ground. As a contract it wants an indispensable ingredient of every valid agreement,—mutuality. The government might have put an end to it at its will; it might have discharged *Cottingham* at any moment for being an alien, whether he were willing or not. It is almost the daily practice to dismiss the enlisted soldier for want of the prescribed qualifications. If the government may do this, may not the soldier, for like reasons, claim his discharge? The contract, not being obligatory on the one, cannot bind the other.

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security for the faithful discharge of his duties?

The law, in no part of it, is founded upon a supposed disability of the recruit to bind himself by his compact of enlistment. No such disability is recognized by the act even in regard to minors, but a mere protection granted to the immaturity of intellect, by requiring the consent of the parent, guardian or master. Without that qualified exemption, boys of any age would be subject to enlistment in the army, as they are in the navy, not only without but against the consent of their natural or legal protectors; for the national sovereignty, in the exercise of its constitutional powers, may overrule the municipal laws of the states in relation to the incapacity of infants. *United States v. Bainbridge*, 1 Mason's Rep. 71. An alien has no right, founded upon any principle either of municipal or international law, to claim exemption from the consequences of his own voluntary engagement, whether for military or any other service. No one supposes that he labours under a disability in this respect; for though, by such a stipulation, he may by possibility involve himself in difficulties

in regard to his allegiance to his native sovereign, "that is a matter for his own consideration, and cannot affect the validity of his new obligation. If any authority were necessary for so self-evident a proposition, it would be found not only in the practice of employing foreign mercenaries, which has prevailed amongst civilized nations in all ages, but in the doctrine as laid down by the most approved writers. Vattel, book 1, ch. 19, § 213; 1 Black. Comm. 370.

The rules by which the courts refuse to enforce contracts that are contrary to law have no application to a case like this; for the contract of enlistment, if to be so called, is not obligatory upon the government, under any circumstances, and cannot, as has been shewn, be the less obligatory upon the recruit because he does not possess the requisite qualifications. The act of congress does not in that event declare the enlistment to be void, or exclude the recruit from the service, but merely subjects the recruiting officer to punishment for his disregard of the legislative instructions. That the legal prohibition amounts to nothing more than this, is obvious from the consideration that the penalty is founded exclusively upon the actual misconduct of the officer; for though its letter is broad, its spirit surely would not reach beyond the case of wilful disobedience or culpable negligence; and such is the practical interpretation given to it by the war department. *Army Regulations of 1841*, p. 126, 127. Now it would be a new principle to establish, that the misconduct of a public officer in the performance of an official act shall avoid the transaction, against the consent of the party aggrieved, and for the sole benefit of another party in no wise prejudiced: and it would be still more strange, if the act prohibited to the officer has been

procured without his connivance or default, by the fraud of the party complaining.

In what has been said, I have regarded the law of congress as designed to regulate the recruiting service "with a view to the qualifications of recruits, and not by such weighty considerations as a fear for the public safety, or a jealousy of executive power. If in the legislative mind the republic would be endangered by the foreign nativity or the debility of enlisted soldiers, a policy so grave would have been marked by decisive enactments, and not exhausted in petty penalties upon a subaltern officer. It is moreover remarkable, in reference to unnaturalized inhabitants, that, by a fluctuating legislation, the policy of employing them has varied, not according to the hazard but the utility of their military services; for the authority to enlist them has been given to the recruiting officer in times of greatest peril, and withheld in those of greatest security. Thus by the acts of 1802, 1808, and 1815, he is directed to enlist able-bodied citizens; but by the acts of 1811, 1812, 1813, and 1814, the direction is to enlist able-bodied men. 2 Story's Laws U. S. p. 832, 1089, 1510, 1205, 1285, 1433. And in another branch of the public defence of not less importance, and deeper solicitude to the nation, aliens are habitually and lawfully employed on that perilous field of her glory where the treacherous mercenary may find fit allies in the treacherous winds and waves. The act of congress of the 3d of March 1813, "for the regulation of seamen on board the public and private vessels of the United States," 2 Story's Laws U. S. p. 1302, throws light upon the present subject in two points of view; for in the first place it expressly declares, that after the termination of the then existing war with Great Britain, the employment of aliens on board all such vessels shall be unlawful, and adopts the most decisive and vigorous measures, both precautionary and vindictory, to prevent it; and then provides that the provisions of the act shall have no operation with respect to the subjects of any foreign nation which shall not, by treaty or special convention with the government of the United States, "have prohibited the employment of native citizens of the United States on board of her public or private vessels. This act thus indicates, on the one hand, that where a policy of utter and unqualified exclusion from the service exists, it is not left by congress to a vague, indirect and doubtful implication; and on the other, that such a policy is never dictated by a puerile jealousy or a petty apprehension of danger.

A case like the present may, I think, be safely left to executive discretion in the discharge of the constitutional duty to take care that the laws be faithfully executed; inasmuch as the exercise of that discretion in the one way or the other can be no encroachment upon the legislative power; for as the war department may dismiss a recruit without cause shewn, so it is no good

cause for his dismissal that he has practised an imposition upon the government in regard to his qualification. This construction of the statute is, I think, in the true spirit of the law; while the opposite would open the door widely to the vilest frauds upon the public service. It is proper however to say, in justice to the petitioner, that the record of this case furnishes no evidence of his having practised a fraud upon the recruiting officer.

I have considered the case as standing upon the footing of an original enlistment; inasmuch as it does not appear from the record, that the petitioner's reenlistment was into the company or regiment to which he belonged at or about that time. If such were the fact, there could not be even a plausible objection on his part to the validity of his engagement; because the acts of congress of the 2d of March 1833 and the 5th of July 1838 give a bounty to "every able-bodied noncommissioned officer, musician or private soldier, who may reenlist into his company or regiment within two months before or one month after the expiration of his term of service;" thus dispensing with all other qualifications.

638 *Sess. Acts of 1832-3, p. 72, § 3, and of 1837-8, p. 105, § 29. Whether the irregularity of reenlisting into a different company or regiment would affect the question of qualification, I deem it unnecessary to consider: my impression is that it would not. However that may be, these acts serve to confirm the conviction, that in the legislation of congress on this subject, citizenship has never been regarded in any other light than as a mere qualification.

I am of opinion that the judgment of the circuit court ought to be reversed, and the appellee remanded to the service.

The other judges concurring, the judgment of the circuit court was accordingly reversed, and judgment entered declaring that the defendant was lawfully detained in custody, and remanding him into the service of the United States according to the terms of his enlistment.

Note by the reporter.—The supreme court of New York made a similar decision at May term 1848. The decision, so far, has only been made known through the newspapers. It will no doubt be found hereafter in the regular reports of the decisions at that term.

639 *Williams v. Manuel.

March, 1848, Richmond.

(Absent BROOKE and ALLEN, J.)

Slaves—Suit to Protect Future Right to Freedom.—A testatrix domiciled in the district of Columbia bequeaths a negro to a legatee, to serve him 27 years, and then be free. The legatee sells the negro for that period, and takes from the purchaser a bond conditioned that he will not sell the negro for a longer time. The negro is brought into Virginia by the purchaser, with the purpose of carrying him through this state to a city or

state farther south. On a bill in the name of the negro, an injunction is awarded by a judge in Virginia, to prevent his being carried out of the commonwealth until farther order. The purchaser, by his answer, denies that he has attempted to sell the negro for a longer period than the 27 years, and denies that he has designed, or does design, to do any act to prevent him from enjoying his liberty at the end of that time. The evidence in support of the bill only shews that the purchaser was engaged in the business of purchasing and selling slaves. HELD, as it does not appear by the evidence that the contemplated removal of the negro beyond the limits of this commonwealth was with intent to defeat his right to freedom when the same should accrue, or upon any claim to hold or sell him as a slave beyond that period, the injunction must be dissolved, and the negro restored to the purchaser's possession.

On the 19th of November 1839, a bill was presented to the judge of the circuit superior court of law and chancery for the county of Henrico and city of Richmond, in the name of Manuel sometimes called Manuel Dodson, setting forth, that he was late the slave and property of Elizabeth Magruder of Washington county in the district of Columbia, who, by her will bearing date the 7th of March 1827, and proved and recorded on the 13th of July 1827 in the orphans court of said county, bequeathed as follows: "I will and bequeath to my niece Elizabeth Hamilton my negro boy

640 Manuel Dodson, to serve for 27 years, and my negro woman *Mary Dodson, to serve for 15 years, and at the expiration of the term of service of each, the said negroes shall be free. It is my understanding that the term of service of all the slaves above named shall commence at the period of my death. It is my desire that George Watterston shall be, and I do hereby constitute and appoint him, the executor of this my last will and testament." That, shortly after the death of the testatrix, he passed into the possession of dr. Charles Hamilton, the husband of said Elizabeth Hamilton, and remained in his possession till on or about the 18th of October 1839, when he was placed in the jail of Washington city by said Hamilton, for the purpose of selling him. That Hamilton admitted at the time, that he had the right to retain him in servitude only for about 14 years, being the remainder of the term of 27 years in said will mentioned, and had previously assured him, at his request, that he should be sold to some person residing in the city of Washington. That on the 14th inst. (November 1839) the complainant was removed from the said jail to the jail of one Thomas Williams, a trader in slaves; and Williams stated, in reply to the complainant's enquiries as to his destination, that he (Williams) intended to remove him to his farm in Virginia, a short distance down the Potomac. That after Williams had handcuffed him and taken him on board the steamboat, he asked Williams whether he was not free, and Williams answered that the will had been done away by act of

congress, and that he had bought him for life. That Williams proceeded to convey him to the town of Fredericksburg, and thence to the city of Richmond, where he is now confined in the private jail of one Bacon Tait. That Williams has avowed his intention of transporting him to Charleston, S. C., or to some other foreign parts unknown to him; by which he will be deprived of every opportunity of establishing his right to freedom, and will

641 be doomed to slavery for the rest *of his life. The bill made Williams and Tait defendants, and prayed that they be enjoined from selling, transporting or conveying the complainant without the jurisdiction of the court, till the matters of complaint set forth in the bill can be heard; that the complainant be allowed to sue in forma pauperis; that counsel be assigned him, and that he be allowed the protection and aid of the court to enable him to assert his right to freedom, and be placed in the hands of the sheriff of Henrico till the final order of the court.

The bill was verified by the affidavit of the complainant, and by an extract from the will of Elizabeth Magruder, made by an attorney at law in Washington; and it was accompanied by the certificate of counsel practising in the circuit court of Henrico and Richmond, that in his opinion the complainant had just cause to apply to a court of equity for protection and relief.

Judge Nicholas awarded an injunction agreeably to the prayer of the bill, and ordered that unless the defendants, or one of them, should enter into bond with sufficient security in the penalty of 1500 dollars, to have the negro forthcoming to answer the decree of the court, the officer to whose hands the process might come should take possession of him, and safely keep him until the further order of the court.

The process was served the 19th of November 1839, by the sheriff of Henrico, on Tait, who refusing to give the bond required by the order, the sheriff took possession of the negro and committed him to jail.

On the first of January 1840, when a term commenced, the court made an order directing the sheriff of Henrico to hire out the plaintiff for the year, and thereafter from year to year until the further order of the court, taking from the hirer bond with good security for the payment of the hire, and for the return of the plaintiff well clothed at the expiration of the term

642 for *which he might be hired, unless he should be lost without the default of the hirer. As to the defendant Tait, the bill was taken for confessed. At August rules 1840, Williams appeared and filed his answer. He exhibited with his answer a copy of the will of Elizabeth Magruder, containing the clauses mentioned in the bill; and a bill of sale dated the 24th of October 1839, from C. B. Hamilton, purporting that Hamilton, in consideration of the sum of

262 dollars 50 cents, sold to Williams "a negro man by name Manuel Dobson, to serve as a slave until the 19th of June 1854, and then to be set free at the cost and proper charges of him the said Thomas Williams." He also exhibited a copy of a bond executed on the same day by him to Hamilton, in the penalty of 500 dollars, with a condition that if Williams shall not sell or keep the said negro man for a longer period than that after mentioned, viz. after the 19th of June 1854, then the obligation is to be void. And the answer, after referring to these exhibits, proceeded as follows: "This respondent denies that he has attempted to sell the slave for a longer period than that for which he holds and has a right to sell him, as already shewn; and this respondent also denies that he has heretofore designed, or does now design, to sell the said slave as a slave for life, or to do any act to deprive him of the means of enjoying his liberty when entitled to it. And this respondent insists that this court, as he is advised, has no lawful right or authority to restrain him in the exercise of his right to carry his slave to any part of the United States, or to sell him as a slave for the term before indicated."

Depositions were taken on behalf of the plaintiff, to prove that Williams was engaged in the business of purchasing and selling slaves; and one of the witnesses deposed that when Williams was in Richmond in the fall of 1839, he told him he was on his way to New Orleans.

643 *On the 11th of August 1840, a motion by Williams to dissolve the injunction was rejected.

The cause was regularly set for hearing, but did not come on until after the passage of the act of March 13, 1841, providing an additional judge to exercise the chancery jurisdiction that belonged to the circuit superior court of Henrico and Richmond. Sess. Acts 1840-41, p. 65, ch. 48.

On the 30th of April 1841, the cause came on to be heard before judge Robinson, who was appointed under the aforesaid act. It appearing that no formal order had been theretofore made allowing the plaintiff to sue in forma pauperis or assigning him counsel, (though such permission was reasonably to be inferred from the fact that the bill had been entertained, and from the former orders entered in the cause) the court thereupon assigned Herbert A. Claiborne senior and Herbert A. Claiborne junior counsel for the plaintiff, to conduct the suit on his behalf, and decreed that the defendant Williams should not be permitted to take the plaintiff into his possession, until he the said defendant should have given bond to the commonwealth of Virginia, with good security, in the penalty of 1500 dollars, with condition to be void if he should have the said plaintiff forthcoming, and produce him to the court, or to the sheriff of the county of Henrico, on the 19th of June 1854; the said bond and security to be approved by the clerk of the

court. The decree provided that the plaintiff was first to give security, by bond with good surety, approved in like manner, conditioned that he the said plaintiff should continue faithfully in the service of the said Thomas Williams, or of any person to whom the said Williams might sell him in this state or in the district of Columbia, until the said 19th of June 1854. And upon the said bonds being given and approved as aforesaid, and filed in the clerk's office,

the said plaintiff was to be delivered
644 up to the defendant on demand. *The

court further decreed that the sheriff of Henrico continue to hire out the plaintiff until the conditions aforesaid should be complied with, and that the said sheriff apply the proceeds of hire which might accrue, to the discharge of such jail fees as might have been incurred by the plaintiff while in confinement in the jail of the county of Henrico; that in the next place the sheriff, out of the same fund, pay and satisfy all the costs and charges which might have been incurred by the plaintiff in the prosecution of this suit; and that he pay the balance, if any, to the defendant Williams, when he should have complied with the said requisitions. And the cause was retained for further proceedings, with liberty to either party to apply from time to time for such other or further orders as they might be advised were necessary or proper.

From this decree an appeal was allowed, on the petition of the defendant Williams.

Lyons for appellant. The appellee is now, and will be until 1854, as much the slave of the appellant as if he were a slave for life. Being a slave, he can have no right to sue his master in the courts of Virginia.

The circuit court has not only taken jurisdiction of the suit, but, without the least evidence to sustain the allegation that the appellant intended to sell the appellee for a longer period than 1854, it has required the appellant to give bond and security for the production of the appellee before the court on the 19th of June 1854. The record shews that a bond for protecting the appellee's future right of freedom was entered into in Maryland; and according to the bill, the appellant was passing through the state of Virginia with the appellee, on his way to Charleston in South Carolina. Now if the jurisdiction of our tribunals was not ousted by the action in Maryland, neither would the jurisdiction of the courts of North and South Carolina, or of the courts
645 *of any state through which the ap-

pellant might pass with the appellee in his possession, be taken away by the action of the circuit court here; in each and every state a similar bond might be required. Who is to sue upon such bond, and take the benefit of it in case of forfeiture? *Sawney v. Carter*, 6 Rand. 173, and *Stevenson v. Singleton*, 1 Leigh 72, shew that no contract between master and slave, however clear and positive, and even though performed by the slave, can be a

ground of action against the master. The bond here, it is true, is to be taken to the commonwealth. But if the slave cannot sue upon a contract with his master, neither can he be the relator; and there is no other person who can have any interest in the matter. Besides, if, after the expiration of the period of servitude, the appellee should be alive and capable of suing, these facts would prove that the appellant had not deprived him of his right to freedom. Again, the bond of the appellant will bind him absolutely to produce the appellee to the circuit court on the 19th of June 1854. The act of God (as the death of the slave) or the act of the enemy (as deportation) might save the penalty of the bond: but suppose the appellee should run away or be stolen from the appellant within the period of servitude, without the consent or knowledge of the appellant, and the fact should not be capable of being proved (which might well happen); or that the appellee should be seized and sold under execution for a debt of the appellant, and removed out of his reach by the purchaser; would not the bond be forfeited by the appellant's failure to produce the appellee? And upon such forfeiture, to whom is the penalty to enure? Can the commonwealth of Virginia take the benefit of it?

The order of the circuit court further directs, that on the appellant's failure to give the bond required, the appellee shall be hired out, and the hire (or so much as may be necessary) applied to pay the
646 expenses of *this proceeding by the slave against the master. The decree could not be sustained, though there were no other objection to it but this.

H. A. Claiborne jr. for the appellee, referred to the cases cited in 2 Rob. Pract. 227, as to the right of a remainderman of personal property to require security from the tenant for life, for the preservation of the property, and its production when the period of enjoyment should arrive; and to the opinion of chancellor Taylor in *Mortimer v. Moffatt & wife*, 4 Hen. & Munf. 503. He also cited and relied upon the recent case of *Anderson's ex'ors v. Anderson*, 11 Leigh 616.

He called the attention of the court to the fact, that the order of the circuit court required the appellee to give bond and security, conditioned for his continuing faithfully to serve the appellant, until the expiration of his period of servitude. And he said, that as to hardship in the requisition of bond and security, it was obviously much greater on the appellee, a friendless slave, than on the appellant.

Lyons in reply. The power of the court to protect the rights of the remainderman is exercised by analogy to its jurisdiction in cases of waste of real estate. Such rights in personalty are always capable of being measured by a pecuniary equivalent, and are therefore sufficiently protected by personal security for the forthcoming of the property; which security, in case of failure to have the specific property forthcoming at

the period designated, enures to indemnify the remainderman by affording him an equivalent in damages. Further, if a chattel be removed from the jurisdiction, it is thereby placed beyond the reach and power of the remainderman; there is a separation between him and his property, and he is consequently exposed to the danger of losing it. A title to freedom in futuro is "analogous in none of these respects to a remainder in property. Its value cannot be measured by a pecuniary equivalent: if it could be so measured, still the equivalent would in no shape enure to the benefit of the injured party: and though removed from the state, the party will be capable, as soon as his right to freedom accrues, of asserting and protecting it as well in one part of the United States as in another; the property and the proprietor being in such case one and indivisible."

Adverting to the case of *Anderson's ex'ors v. Anderson*, 11 Leigh 616, he pointed out the difference between the terms of the will in that case, and the terms of the will in this; and also remarked that there the suit was brought, not by the infants themselves, who were slaves in *præ-senti*, but by their mother, who was a free woman.

BALDWIN, J., delivered the following as the resolution of the court:

The court, without deciding what relief (if any) the appellee would be entitled to upon the case made by his bill, if sustained by sufficient proofs, is of opinion, that it does not appear from the evidence in the cause, that the contemplated removal by the appellant of the appellee beyond the limits of the commonwealth, was with intent to defeat the appellee's right to freedom when the same shall accrue, or upon any claim to hold or sell him as a slave beyond that period: The decree is therefore reversed, and the cause remanded, with directions to dissolve the injunction, restore the appellee to the possession of the appellant or his agent, and, after disposing of the subject of hires, with the proper deductions for costs and charges, to dismiss the bill.

648 **Spencer v. Ford.*

March, 1848, Richmond.

(Absent BROOKE and ALLEN, J.)

Deed of Trust to Secure Creditors—Assent or Ratification.—On the 25th of August 1827, a deed of trust was made to four trustees of the second part, for the benefit of certain *cestui que trust* of the third part, conveying land, slaves and personal

***Deed of Trust for Creditors—Previous Assent or Subsequent Ratification.**—The principal case is cited in *Zell Guano Co. v. Heatherly*, 38 W. Va. 400, 18 S. E. Rep. 618. See monographic note on "Assignments for the Benefit of Creditors" appended to French v. Townes, 10 Gratt. 518.

Same—Same—Consultation with Creditors.—In *Dance v. Seaman*, 11 Gratt. 788, the court, in refer-

property, and also a growing crop of tobacco and corn, subject to such disposition as the trustees might find it necessary to make of the crop for the payment of any money due from the grantor (who was an attorney at law) to his clients. The deed was only executed by the grantor, and upon his acknowledgment was admitted to record. Two of the trustees expressly declined to act. On the 26th of November 1837, another deed was made by the same grantor to the two other trustees, conveying all the slaves mentioned in the deed of August 1827, as well as some others, and also the crop of tobacco, to secure to a party money advanced by him to pay off executions which had been levied upon the slave property mentioned in the first deed, one of which executions was for a debt due to a client, of greater amount than the value of the tobacco crop. The proceeds of the property conveyed by this deed are applied according to its provisions. It does not appear that the deed of August 1827 was made on previous consultation with, or received the subsequent ratification of, the creditors or trustees named therein, or that any claim was asserted under it until October 1832: when a bill is filed by a party not named in that deed, and, for aught that appears, not known until then as one embraced by the description of client creditor, asking a decree against the *cestui que trust* in the deed of November 1837 for the value of the tobacco crop. HELD that the plaintiff has no title to the relief sought.—Per STAKARD, J. The deed of August 1827, being, when the deed of November 1837 was made, without the sanction of assent or ratification, could not in that predicament be any shield of the property against the levy of executions of creditors, nor any effectual impediment to the bona fide conveyance of the property by the grantor for valuable consideration.

Alimony—Party to Suit—Husband.—A suit for alimony being brought by a wife against her husband, who has deserted her and left the commonwealth, and a sum of money being obtained for her by her attorney at law by a compromise of that suit, HELD that on a bill in equity, 649 in the name of the feme by her next friend, against the attorney for the money so obtained by him, a decree may be rendered for the same, although the husband be no party to the suit.

ence to the principal case, said: "In that case there were two deeds of trust, the first not appearing to have been made with the knowledge of, or to have been ratified by, any creditor or trustee named therein; and under which no claim was asserted until the execution of the second deed, and the application of the proceeds thereunder; and then the claim was asserted by a creditor not named in the deed, or known to be a creditor. It was held that such creditor was not entitled to relief against the *cestui que trust* in the last deed. The refusal of relief under such circumstances does not decide that a deed made without consultation with creditors, is for that reason fraudulent. Before any right or claim under the first deed was known or asserted, the property had been conveyed, and the proceeds applied to a fair creditor, against whom, under the circumstances, there was no just cause of reclamation."

†Alimony.—See monographic note on "Alimony" appended to *Carr v. Carr*, 23 Gratt. 168.

Costs—Liability of Feme and Next Friend for.—In a suit brought in the name of a feme by her next friend, a decree in her favour being reversed, and the bill ordered to be dismissed as to the appellant, he will recover his costs, both in the appellate court and the court below, as well against the next friend as against the feme.

Same—Successive Liability for Costs.—Case in which a bill against two defendants being dismissed as to one, the costs decreed to be paid to him by the plaintiff, were decreed to be paid to the plaintiff by the other defendant.

On the 25th of August 1827, a deed was made purporting to be between Daniel A. Wilson of the first part, George Booker, William M. Thornton, William F. Randolph and Samuel C. Anderson of the second part, and John V. Wilcox, William R. Johnson, John W. Nash, John Hughes and Allen Wilson of the third part, whereby, after reciting that the said Daniel A. Wilson was indebted to Wilcox by bond and to Johnson by bond, that Nash, Hughes and Allen Wilson stood bound as sureties for him in another bond, and that Allen Wilson was his endorser on a note, it was witnessed that the said Daniel A. Wilson conveyed unto Booker, Thornton, Randolph and Anderson, the tract of land in Cumberland on which he then resided, and sundry slaves and other personal property. Then came the following clause: "also my growing crop of tobacco and corn, subject to the deduction of the overseer's part, and subject to such disposition as the said Booker, Thornton, Randolph and Anderson may find it necessary to make of the said crop for the payment of any money due from me to the clients for whom I may have collected money, which moneys is to be first paid out of my part of said growing crop." The habendum was to Booker, Thornton, Randolph and Anderson, of the "land and premises with its appurtenances, rents, profits, growing crops (with the reservations aforesaid) and future crops, together with the aforesaid slaves with the
650 future increase of the *females of the same, and all other personal property hereby conveyed." And the conveyance was declared to be upon trust that Booker, Thornton, Randolph and Anderson should permit the said Daniel A. Wilson to remain in possession of the property, applying the crops of each year to the payment of the debts secured or intended to be secured by the deed, "except so much as may be necessary for the support of the family and support of the plantation and payment of overseer, until the creditors and securities aforesaid, or some one of them, shall require;" and then upon trust that they, or any one or more of them, should advertise the land and premises, crop on hand at the time, slaves with their increase, stock with its increase, and other personal property, and sell the same for cash, and out of the proceeds arising from the sale, first pay the expenses of executing the

trust, next pay the debts mentioned in the recital of the deed, in a certain prescribed order, and then pay the balance to the said Daniel A. Wilson. This deed was executed only by Daniel A. Wilson. On the 27th of August 1827, it was acknowledged by him in the court of Cumberland county, and admitted to record.

In October 1827, sundry executions against Daniel A. Wilson were delivered to the sheriff of Cumberland county; to wit, a fi. fa. in favour of P. T. Southall, a fi. fa. in favour of Thornton & Carrington, a venditioni exponas in favour of Miller & Andrew, and a fi. fa. in favour of Langhorne & Scruggs. And there seem to have been others in favour of George Booker and of Cather. The greater part, if not the whole of the slave property mentioned in the deed of August 1827, was levied upon under these executions. William B. Hobson, the deputy sheriff of Cumberland, deposed (in the suit herein after mentioned) that he levied the executions, and considered the property subject to them as amply sufficient to pay them all; but the
651 property levied on *was not sold, in consequence of an arrangement entered into between dr. John Spencer and Daniel A. Wilson, whereby Spencer assumed the payment of them all himself. Several of the executions were returned with endorsements by the creditors, shewing that they were satisfied; and some of the endorsements stated that they were satisfied by Spencer's executing his bonds to the execution creditors.

On the 26th of November 1827, a deed was made between Daniel A. Wilson of the first part, William M. Thornton and Samuel C. Anderson of the second part, and dr. John Spencer of the third part, whereby, after reciting that Wilson was indebted to Spencer in the sum of 4203 dollars 9 cents, due on demand, by bond of that date, Wilson conveyed to Thornton and Anderson sundry slaves (being all those mentioned in the deed of August 1827, as well as some others) "and also the crop of tobacco which the said Wilson now has on hand, being the crop of the present year," upon trust that Thornton and Anderson, when required by Spencer, should sell the slaves, or so many as would, with the then proceeds of the crop of tobacco, be sufficient to pay the costs of carrying the deed into effect and to discharge the debt and interest, upon such a credit as would make the proceeds payable on the 25th of December 1828. This deed was executed by Wilson and Spencer, and on the day of its date was acknowledged by Wilson in the court of Cumberland county and admitted to record.

On the 25th of October 1823, Nancy Ford, by James Muse her next friend, commenced a suit in chancery in the circuit court of Cumberland, against the parties to this deed. The bill set forth, that in the year — she employed Daniel A. Wilson, as an attorney at law, to prosecute a suit in her behalf in the county

*Costs.—See monographic note on "Costs" appended to Jones v. Tatum, 19 Gratt. 720.

court of Cumberland, against her husband Hezekiah Ford of the state of Alabama, for alimony. That such proceedings were adopted by Wilson, that he obtained 652 for her (by compromise, *as she is informed) the sum of 1000 dollars, the whole of which he, as her attorney, received. That, of the 1000 dollars, he accounted to her only for 250 dollars, leaving the balance of 750 dollars still due. That the matter thus remained until some time in the year 1827, when Wilson, finding himself ruinously involved, and desiring to secure to his clients all money he had collected for them as an attorney and had not paid over to them, made the deed of the 25th of August 1827, whereby he conveyed his then growing crop of tobacco and corn, deducting the overseer's part, in trust for the express and exclusive purpose of paying to clients any money which he had collected for them and had not paid over to them. That the complainant is informed and believes, and therefore charges, that her own debt of 750 dollars was the only one standing in that condition, and not otherwise secured; and consequently the crops aforesaid, with the reservation aforesaid, were in fact and in truth conveyed by the deed aforesaid for her exclusive advantage and benefit. That Booker and Randolph expressly declined to act as trustees in the execution of the deed; and before Thornton and Anderson were required to execute it, Wilson, combining and confederating with Spencer to injure and defraud the complainant and to deprive her of the security aforesaid, made the deed of the 26th of November 1827, whereby he conveyed to the said Thornton and Anderson a large amount of other property, together with the crop of tobacco aforesaid, for the payment of a large debt due Spencer from Wilson. That the crops of corn and tobacco were matured, and the complainant does not know what became of the corn; but she charges that by arrangement between Wilson and Spencer, without the knowledge of the complainant or of Thornton and Anderson, the crop of tobacco was shipped to Richmond, and the proceeds, amounting to about 600 dollars, were received by 653 Spencer under colour of *his deed, and applied by him in satisfaction of his debt, in violation of the complainant's rights. The bill prayed that Spencer might be compelled to pay over to the complainant the sum of 600 dollars, with interest, in part satisfaction of her debt, and that Wilson might be required to pay her the balance.

The answer of Spencer stated, that in 1827 Wilson applied to him and others hereinafter named, to aid him in procuring from Archer Taylor of Richmond an advancement of money upon the faith of his (Wilson's) then crop of tobacco, in order to discharge executions, then in the hands of the sheriff of Cumberland, in favour of George Booker and Miller & Andrew against Wilson. That the respondent and William M. Thornton, Allen Wilson and John W.

Wilson, (the persons alluded to above,) consented to aid the said Daniel A. Wilson, and did procure from the said Taylor an advancement of 700 dollars upon the faith of the said crop of tobacco. That afterwards the respondent consented to become liable for the whole of the executions then in the hands of the sheriff of Cumberland against Wilson, upon condition that the money to be received from Taylor should be applied as aforesaid, and that Wilson should give respondent a deed of trust on the property on which the executions had been levied, and include in the deed a debt of 600 dollars due to the respondent from Wilson, and that the property so conveyed should be sold on a credit till the 25th of December 1828. That the respondent did not receive the sum of 700 dollars advanced by Taylor, but the same came to the hands of Thornton, and was by him paid to Booker and Miller & Andrew, in discharge of their executions.* That the only reason why the crop of tobacco was included in the deed of trust was, that it was alleged to be worth more than the 700 dollars, 654 *and it was intended the balance should be appropriated, as directed by the deed, in discharge of the debt therein specified. That Taylor received from the crop of tobacco, after deducting expenses, only the sum of 558 dollars 20 cents, which was applied to the credit of the 700 dollars advanced by him. That the debt due to Cather and paid by respondent, amounting to 1339 dollars 5 cents, was money which Wilson in his character of attorney had received for Cather, as respondent has heard and believes; and that the sum of about 60 dollars, part of the debt due to respondent, was also of that character. The respondent further states that the whole of the transactions between Wilson and him were without any notice of the complainant's claim. He requires from the complainant full proof of her debt, and that it belongs to the class described in the deed of the 25th of August 1827 under the general denomination of clients' debts. If it shall be found to belong to that class, he states that he has heard, and therefore charges, that Wilson, by agreement with the plaintiff, was to have a third or a fourth of whatever he received. He states that the whole of the property conveyed by the deed of November 1827 has been disposed of, and leaves due and unpaid a large balance of his debt, to wit, 900 dollars or thereabouts; and that the avails of the crop of tobacco were disposed of long before he had any notice of the plaintiff's claim. He objects to the claim of the complainant, that there is no evidence accompanying the deed of the 25th of August 1827, that she accepted it, and consented to abide by its stipulations. And he insists that the said deed created no lien whatever upon

*The sum of 4203 dollars 9 cents appeared to include the amount of the executions of Booker and Miller & Andrew, as well as the others, and also the 600 dollars.—Note in Original Edition.

the tobacco in favour of that class of claims described in said deed as clients' debts.

As to all the defendants except Spencer, the bill was taken for confessed.

655 *Wilson, whose deposition was taken by leave of court, proved that he commenced suit for Mrs. Ford, and made a compromise under which he received 1000 dollars, which was subject to an abatement of one fourth for his interest, according to the understanding when he was employed. He stated that he considered the amount thus due from him, to be due to her as a client, and intended to provide for its payment in that clause of the deed of August 1827, in which he mentioned his crop of tobacco as at the disposition of the trustees for the payment of any money due from him to clients. The debt to Cather as surviving partner was, he said, also a debt originally due to Lynch & Cather as clients. He was unable to say what was the number of barrels of corn made from the crop growing on the plantation in August 1827, nor how much was consumed upon the plantation, nor to whom it was sold.

An order was made directing the defendants Thornton and Anderson to render before a commissioner an account of the funds that might have come to their hands under the deed of November 1827.

The record contained an account in these words: "Dr. John Spencer in account with William M. Thornton and Samuel C. Anderson, trustees for Daniel A. Wilson. 1828, Dec'r 25. To cash paid Dr. John Spencer, on account of Daniel A. Wilson's bond secured in the deed of trust dated 26th November 1827, by the sale of the property contained in the said deed, with the exception of the crop of tobacco, \$2957." Accompanying this account was a report of the commissioner, stating that he had been furnished with this item as the amount of money paid Spencer by the trustees in the deed of November 1827, from the proceeds of all the property therein contained, "except the crop of tobacco, which the said Spencer sold, and received the money arising therefrom himself."

656 *On the 16th of November 1835, the cause was heard. The entry was, that it came on to be heard on the bill, answer of the defendant Spencer, the exhibits filed, and depositions of witnesses, (not mentioning the report of the commissioner). And the decree was, that Spencer pay to the plaintiff 500 dollars, with interest from the 25th of August 1827 till paid, and her costs of suit.

From this decree, on the petition of Spencer, an appeal was allowed.

G. N. Johnson for appellant. I. The plaintiff, a married woman, could not maintain this suit; at least not without making her husband a party. The husband is a necessary party in every case in which the wife sues, whether at law or in equity. 2 Roper on Property 268, 9; 1 Foub. Eq. 100, note p.; Bingham on Infancy

and Coverture 262; Bogget v. Frier &c., 11 East 301. Nor does the absence of the husband from the commonwealth make any difference. Commonwealth v. Cullins, 1 Mass. Rep. 116. He may still be made a party.

II. There is no proof whatever to charge the appellant with the proceeds of the tobacco. The report of the commissioner is no proof, because what is said by the commissioner on that subject was not required by the order of reference, and because the case was not heard upon the report.

III. The appellant had no notice of the plaintiff's claim, and therefore could not be charged with her equity.

IV. The trustees may have had a discretion to apply the growing crop to pay the plaintiff or other clients. But if they had such discretion, it was not exercised: and then the crop was subject to the debts specified, or to the power of Wilson; and in either predicament the plaintiff had no right. Wilson might at least be dealt with in respect to the crop for the purpose of satisfying the debt due from him to his client Cather.

657 *V. If any decree could have been made in favour of the plaintiff, it could only have been for a ratable proportion of the net proceeds of the tobacco, regarding her and Cather as incumbrances upon the subject.

VI. No decree could have been made in favour of the plaintiff, until the trustees under the deed of August 1827 had been called upon to account for the corn crop; nor until a report of all liens in favour of clients had been made.

Taylor for appellee. I. If there can be any case in which the husband need not be a party to a suit brought by the wife for her separate property, this must be deemed such a case; for here the subject of the suit had been previously recovered from the husband. There is no conceivable object to be attained by making him a party. The husband too is not within the commonwealth. Story's Eq. Pl. p. 64, ch. 3, § 63.

II. The court must intend that the cause was heard in the court below on the report. The account was deemed necessary, and was directed; and it must be intended that as an account was required, and there is a report in the record, that report was acted on by the court when the final decree was rendered.

III. The deed of August 1827 subjected the growing crops of tobacco and corn to client creditors: it is good as a security for such creditors, though they be not specially named.

IV. Spencer, in withdrawing the property from the sheriff, and providing payment of the executions, took a fund proved to be sufficient to pay the executions without the tobacco, and he must abide the consequences of the subsequent inadequacy of the property.

V. The appellant, having received the

proceeds of the tobacco, ought to account to the appellee for the whole amount thereof. But for his intervention, the execution of Cather would have been satisfied without *the tobacco; and he has no equity, therefore, in respect to Cather's claim, which entitles him to a ratable share of the proceeds of the tobacco.

VI. Nothing seems to be known of the corn crop by any of the parties, and the case should be disposed of as though it had not existed. It is manifest that an order directing an account of it would prove abortive.

G. N. Johnson in reply. The husband cannot be dispensed with as a party by suggesting and shewing that he has no interest. That cannot be properly shewn in a case in which he is no party and is not heard. *Bingh. on Infancy and Coverture* 260. Notwithstanding what appears in this case, there might be other facts which, coupled with what appears, might shew the husband to be entitled to the money due from Wilson.

Of the act of the commissioner in making the report, no notice appears to have been given to Spencer.

The claim is under the deed of August 1827, and yet neither the trustees nor the cestuis que trust in that deed are made parties, nor any account of the trust claimed. The only notice chargeable to Spencer is notice of that deed; but this involves no notice of the claim of the appellee.

The power reserved to Wilson by that deed over the property and crops necessarily gave him the administration of the crops.

There is no proof that the property levied on was sufficient to pay the execution debts. We have nothing but the conjecture of the deputy sheriff, and this is rebutted by the actual sales. If there was such proof, Spencer is in nowise responsible for the loss.

If the appellee be entitled to any decree, it is against Wilson only.

STANARD, J. Many objections have been urged against the decree. The greater part of them considered *in themselves, though well founded, would, while they require the reversal of the decree, make it proper to remand the case for further proceedings. If there be an objection reaching the title of the appellee to any relief against the appellant, it will be unnecessary to consider any order.

It does not appear that the deed of August 1827 was made on previous consultation with, or received the subsequent ratification of, any of the creditors or trustees named therein, or that any claim was asserted under it from its date until the claim asserted by this suit in October 1832, by a party not named in the deed, and, for aught that appears, not known until then as one embraced by the description of client cred-

itor. In November 1827, when the deed was made conveying the crop of tobacco, among other property, to Thornton and Anderson in trust for the benefit of the appellant, the deed of August was without the sanction of such previous assent or subsequent ratification; and in that predicament it could be no shield of the property against the levy of executions of the creditors named therein, or other creditors, nor any effectual impediment to the bona fide conveyance by the grantor for valuable consideration.* In this view, the title under the deed of November 1827, which was such a conveyance, was paramount to the claim asserted for the first time in 1832, under the hitherto dormant and inoperative conveyance of August 1827. But again, assume *that the deed of August 1827 was assented to by the trustees Thornton and Anderson: they, having the legal title, have by the deed of November 1827 dedicated this crop of tobacco to the payment of Spencer's claim, without any notice to Spencer at least, and probably without any knowledge on their part, or the existence of the claim of the appellee; and the appellee, even if Thornton and Anderson could be made chargeable with this misapplication, could have no equity to pursue the fund into the hands of Spencer, who in law and equity is entitled to retain what he has fairly obtained. And furthermore, as he held the claim of a client creditor to a larger amount than the fund, if the deed of August had been fully accepted and acted under by the trustees, and the said trustees, under the discretion given by the reservation in that deed, had (though the deed of November had not been made) applied the fund to Cather's claim, in ignorance of the existence of that of the appellee, no effectual reclamation could have been made of the fund from the hands of Cather.

In every view of this case, my opinion is that the appellee has no title to relief against the appellant.

She is entitled, however, to relief against the defendant Wilson, who is confessedly indebted to her in the sum of 500 dollars, with interest from the 25th of August 1827; and the court of equity was the proper forum for the recovery of that claim.

The other judges concurred with judge Stanard, in entering a decree in the following terms:

That the decree of the circuit court be reversed, and that the appellee and James

*Note by the reporter. Though the decisions in *Walwyn v. Coutts*, 3 Meriv. 707; 3 Sim. 14; 5 Cond. Eng. Ch. Rep. 7, and *Garrard v. Lord Lauderdale*, 1 Sim. 1; 5 Cond. Eng. Ch. Rep. 1, were not cited in the argument of this case, and are not mentioned in this opinion, yet they were probably in the mind of the judge. There is no difficulty, however, in sustaining the decision in this case, whether the doctrine of those cases be sanctioned or not. On this subject, see *Skipwith's ex'or v. Cunningham &c.*, 8 Leigh 286-90, where those cases, and others involving the same doctrine, are cited and commented on.

Muse her next friend do pay unto the appellant his costs expended in the prosecution of his appeal. And this court proceeding to render such decree as the circuit court ought to have rendered, it is further decreed and ordered that the bill of the appellee be dismissed as to the appellant, and that *the appellee and James

Muse her next friend do pay unto the said appellant his costs by him about his defence in the said circuit court expended. And it is further decreed and ordered that the said Daniel A. Wilson do pay unto the appellee 500 dollars, with interest thereon from the 25th of August 1827 till paid, and also her costs by her expended in the prosecution of her suit in the said circuit court, including in those costs, the costs of the said circuit court above decreed to be paid by her to the appellant.

Ingrams v. Mutual Assurance Society.

March, 1848, Richmond.

(Absent BROOKE and ALLEN, J.)

Mutual Assurance Society—Insurable Property.—According to the original plan of the mutual assurance society, as developed by the acts of 1794 and 1796, none but an unincumbered fee simple estate was insurable; the insurance of mortgaged property was not thereby contemplated.

Same—Same—Mortgaged Property—Case at Bar.—In 1796 declarations were made for assurance in the mutual assurance society. In 1798, the party who declared for assurance died. And in 1821, a bill was filed by the society against his widow and heir, to subject the property insured to sale for the payment of certain quotas, which had been required in 1806 and in 1809, and succeeding years down to 1820, inclusive. It appearing that at the time of the insurance the property was under mortgage, and the lapse of time being also relied on, decreed that the bill be dismissed.

By an act of the general assembly of Virginia passed the 22d of December 1794, an assurance was established by the name of "The Mutual Assurance Society against fire on buildings of the state of Virginia;"

which act was explained by another act passed *the 23d of December 1795.

These two acts will be found in the session acts of 1794, p. 17, ch. 26, and in the session acts of 1795, p. 40, ch. 41.

On the 30th of April 1796, John Ingram, residing at Norfolk borough, declared for assurance in the said society certain property in that borough, consisting of six buildings, by three separate deeds or declarations numbered 93, 94 and 95.

The fifth section of the act of 1794 provided for "certain premiums to be paid by

the persons who shall have their property insured, at the time of such insurance, which shall be deposited and kept as a fund for the purpose of making immediate reparation to such persons as may sustain losses or damages by fire;" and the sixth section was as follows:

"If the funds should not be sufficient, a repartition among the whole of the persons insured shall be made, and each shall pay, on demand of the cashier, his, her or their share, according to the sum insured and the rate of hazard at which the building stands, agreeable to the rate of the premiums, for which purpose it is hereby declared that the subscribers, as soon as they shall insure their property in the assurance society aforesaid, do mutually for themselves, their heirs, executors, administrators and assigns, engage their property insured (but none other) as security, and subject the same to be sold, if necessary, for the payment of such quotas."

About the year 1798, John Ingram died, leaving a widow Sarah Ingram and three sons, of whom two died intestate and without issue, and the other, Thomas R. Ingram, survived them.

In January 1821, a bill was filed in the superior court of chancery for the Williamsburg district, by the mutual assurance society against Sarah and Thomas R. Ingram, claiming the amount of certain quotas or repartitions required and called for on the property insured as aforesaid,

*in the year 1805, and in the year 1809 and succeeding years to the year 1820, inclusive, with interest on the respective quotas from the time they became due; and praying a decree therefor against the defendants, and that if necessary the buildings, together with the land on which they stand, be sold to satisfy the demands of the complainants.

The answers of the defendants stated, that when the insurance was effected, the property was under a mortgage from John Ingram to one White for 250 pounds, which still continues: that the complainants had notice of this mortgage, and by reason thereof did not hold themselves liable to indemnify Ingram in the event of a fire, until after they discovered that the property was more than sufficient to pay the money for which it was pledged, and to discharge the quotas also; in evidence of which the following preamble and resolutions were adduced:

"At a meeting of the standing committee of the mutual assurance society against fire on buildings of the state of Virginia, held 23d May 1820, the following preamble and resolutions were adopted:

"Whereas it appears from the records of this society, that John Ingram did, on the 30th day of April in the year 1796, enter for assurance in this society certain buildings valued at 5760 dollars, situated in the borough of Norfolk, as will more fully appear by reference to his declarations filed and recorded in this office, numbered 93, 94

*Mutual Assurance Society—Insurable Property.—Leasehold tenements are not insurable by the Mutual Assurance Company. Mutual Assurance Company v. Mahon, 5 Call 517. See also, Mutual Assurance Society of Virginia v. Holt, 20 Gratt. 612; Shirley v. Mutual Assurance Society, 2 Rob. 706; Farmers Bank v. Mutual Assurance Society, 4 Leigh 69.

and 95: And whereas it is represented to this board that the said buildings, with the ground on which they stood, was mortgaged at and before the date of the said declarations, to wit, on the 4th day of December 1794, to — White for the sum of 250 pounds: And it appearing to the satisfaction of this board that a very small part of the property thus mortgaged would at all times have been sufficient to discharge the

664 said lien: Resolved that the insurance aforesaid, *by the said John Ingram effected under the said declarations numbered 93, 94 and 95, shall be placed in all respects on the same footing as if the said John Ingram had possessed, at the time of declaring the property for assurance, a complete unincumbered fee simple therein."

The defendants also relied upon the lapse of time.

It was referred to a commissioner to ascertain whether the mortgage embraced the insured property; and the fact was established by his report, and the depositions and exhibits filed.

The cause between transferred to the circuit court for James City county and the city of Williamsburg, that court, on the 1st of January 1835, made a decree for the sale of the property insured, to satisfy the demand of the plaintiffs.

From which decree, on the petition of Sarah Ingram and Thomas R. Ingram, an appeal was allowed.

The cause was argued by Harrison and the attorney general for the appellants, and C. Johnson for the appellees.

BALDWIN, J. I think it clear, according to the original scheme of the mutual assurance society against fire on buildings, none but an unincumbered fee simple estate was insurable. This is obvious from the nature and extent of the indemnity contemplated, and the means by which it was to be furnished. It was intended that the society should be perpetual, that the security against losses should be permanent, and that its resources should be supplied, not from accruing profits, but from a perennial income, to be yielded by a capital to be raised by the contributions of its members. The plan of mutual assurance was simple, and founded upon the idea of equality amongst the members in the principles of

665 indemnity, contribution and authority. *The premiums and quotas were to be apportioned according to the value of the property, to be ascertained by an appraisement, not of partial interests but of the entire and unlimited estate; and that appraisement furnished the measure of compensation to the insured in case of loss. The owner of property declaring for insurance bound not only himself, but the property itself, not merely during his individual ownership, but in the hands of his heirs, executors and assigns, and subjected the same to be sold, if necessary, for the payment of the quotas. And provision was made, in case of the declarant's selling,

mortgaging, or otherwise transferring the property, for constituting the purchaser or mortgagee a member in his stead; and he was required to apprise the purchaser or mortgagee of the assurance, and endorse to him the policy thereof.

The original scheme might, it is true, have authorized the insurance of partial or limited interests; but that would have required special provisions adapted to such a purpose. None such are to be found in the original acts of incorporation, nor in the original constitution, rules and regulations of the society; and a general declaration for insurance, such as is made by the absolute fee simple proprietor, must have been wholly inappropriate and abortive; for it would have furnished no criteria for graduating the premiums and quotas, nor for fixing the degree or rate of indemnity, nor for apportioning and distributing the compensation amongst successive or partial owners, or securing it to a substantial instead of a nominal owner, nor any authority to one to bind another by his declaration. Moreover, in the case of property subject to incumbrance, the effect of a general declaration, if operative, might and often would have been, to defeat the lien of the society, by means of the paramount title of the incumbrancer. I cannot doubt, therefore, that the original plan of the institution, as developed by the acts of 1794 and 666 *1795, did not contemplate the insurance of mortgaged property. The

first authority for insurance by persons having limited interests is to be found in the act of 27th January 1803, Sess. Acts of 1802-3, p. 7, ch. 5, by which the society was enabled to insure buildings held by tenants for life, widows in right of their dower, and guardians, or trustees for orphans; and the declarations of such persons were made obligatory upon the fee simple ownership, but with a provision giving to a tenant for life, in case of loss, only the interest upon the compensation during his estate, and at his death giving the principal money to those entitled in remainder or reversion. The next legislative enactment on this subject we find in the act of January 29th 1805, Sess. Acts of 1804-5, p. 23, ch. 24, by the 10th section of which the society was authorized to form rules and regulations for fixing the quantum of interest to be insured.

It was, I presume, under the authority of these two last mentioned acts, that the society adopted the provisions in regard to partial and limited interest, to be found in sections 4-12 of the ninth article of "the constitution, rules and regulations of the mutual assurance society against fire on buildings of the state of Virginia, as revised and adopted subsequent to the 16th of February 1809, and in force on the 15th of May 1819." The 7th and 8th sections are as follows:

"Sect. 7. Any mortgagees, trustees, or creditors for whose benefit buildings may be conveyed in trust, subscribing their declarations as such, may insure such

buildings, and such insurance shall be effectual after payment of the premium, and continue to be so until the first day of April in the following year, but no longer, unless the annual requisition or quotas shall then be paid at the general office of assurance in the city of Richmond, between the hours of 9 a. m. and of 3 p. m. in which case the assurance aforesaid shall
667 continue to *be good and effectual until sunset of the first day of April then next succeeding; when, for the effectual assurance of such buildings thereafter, the mortgagee, trustee or creditor shall again pay the annual requisition or quota, and failing to do so, shall forfeit all benefit of the assurance until such quota shall be paid with interest; and so of each succeeding year: provided, that such insurance shall continue to be in force only so long as the interest of such mortgagee, trustee or creditor may exist; and in case of accidental burning of the insured premises, that the amount to be paid by this society shall not exceed the sum due to him with interest thereon: provided also, that the sum to be paid for such loss shall not exceed the amount insured, after deducting four fifths of the salvage.

"Sect. 8. Any mortgagor or debtor who may have conveyed buildings, subscribing his or her declaration as such, may make a good and effectual insurance, on the terms and conditions which are required of a mortgagee, trustee, or creditor for whose benefit buildings may have been conveyed in trust: provided, that in case of accidental loss by fire, the sum to be paid to such mortgagor or debtor shall only be the balance after deducting the amount due to the mortgagee or creditor with interest; and the amount so due to such mortgagee, trustee or creditor (if not greater than the amount insured) after deducting salvage, shall be paid to him or her, on producing proper evidence of his or her claim on the buildings so insured and consumed by fire."

These provisions, it is manifest, are wholly inapplicable to an attempted assurance in 1796, the period of the declarations in question; and they only serve to illustrate how utterly impracticable it has ever been to effect an insurance of mortgaged property, under a general declaration as the absolute fee simple owner. According to

the principles of insurance law, a
668 material *misrepresentation, whether by fraud, or which is only the effect of accident, negligence, inadvertence or mistake, is fatal to the contract. 1 Marsh. on Ins. 347. There was no moment of time between the 30th of April 1796 and the 23d of May 1820, at which, if the buildings had been destroyed by fire, the society would have been bound to render to the declarant Ingram, or his representatives or assigns, a single dollar of compensation. And the only question is whether the contract, thus null and void as against the society, can be enforced against the other party. If it can, it is not upon the principles of the general law of insurance; according to

which, if through mistake, misinformation, or any other innocent cause, an insurance be made without any interest whatsoever in the thing insured, or to a much larger amount than its real value, in the one case the insurer shall return the whole premium, in the other he shall return upon all above the true value. For the premium paid by the insured, and the risk which the insurer takes upon himself, are considerations each for the other; they are correlatives, whose mutual operation constitutes the essence of the contract of insurance. The insurer shall not be exposed to the risk without receiving the premium; nor shall he retain the premium, which was the price of the risk, if in fact he ruins no risk at all, though it be by the neglect, or even the fault of the party insuring, that the risk be not run. 2 Marsh. on Ins. 548, 549; *Stevenson v. Snow*, 3 Burr. 1240. And in several cases, even where the policy was declared void for fraud committed by the insured, he obtained a return of the premium; but it is now settled that in all cases of actual fraud on the part of the insured, the underwriter shall retain the premium. 2 Marsh. on Ins. 559-63.

In the present case, there is no evidence or even imputation of fraud in regard to the conduct of the declarant; and there is the same reason for ascribing his at-
669 tempt *at insurance to misapprehension, as existed in the case of *The Mutual Ass. Co. v. Mahon*, 5 Call 517, in which it was held that a leasehold interest was not insurable, and the society therefore not liable upon the policy, but that the declarant was entitled to a return of the premium. I can perceive nothing in the peculiar structure of this corporation to take the case out of the influence of the general principles above mentioned. It is true that the members of the association are the assurers as well as the assured; but the membership, as I apprehend, is created by the insurance, and if there be no insurance there is no membership.

I express no opinion upon the question whether an action could be maintained by a declarant against the society to recover back quotas he has paid upon a void insurance. That question does not arise here. In the present case, the society is endeavouring to enforce payment of the quotas which accrued prior to its having incurred any hazard of loss, and after the lapse of many years from the time of the inception of its rights as now asserted, without any effort, so far as appears from the record, to prosecute them to a recovery. The premium actually paid is an ample compensation for any expense or disappointment incurred by the society, and there is no consideration of justice to move the judicial tribunals, especially a court of conscience, to an active interposition in behalf of such a pretension. It is true that the members of the society are bound by its constitution, rules and regulations, so far as made conformably to law; and that by the 7th section of the 10th article of the revised constitution, rules and

regulations, it is declared that "any insurance made by any person who shall, in the declaration of assurance, have misrepresented, or failed to represent truly, the capacity in which he acted when he subscribed such declaration, or his claim on or interest in the buildings offered for insurance, shall be ineffectual; the policy, 670 if any shall *have been issued, shall be void, and the premiums or quotas paid or due thereon shall be forfeited." But this regulation is evidently merely prospective, and has no application to declarations for insurance previously made; and it is therefore unnecessary to consider what would be its effect and authority, if intended to be retrospective.

The resolution of the standing committee of the society, of the 23d of May 1820, by

which they declared that the insurance in question should be placed in all respects on the same footing as if Ingram had possessed, at the time of declaring the property for assurance, a complete unincumbered fee simple therein, having been made without the concurrence of the representatives of the declarant, can give the society no rights which it did not previously possess, and rather indicates an attempt to give vitality to an act which the society had previously regarded as invalid.

My opinion is, that the decree of the circuit court ought to be reversed, and the bill dismissed with costs.

The other judges concurring, decree reversed and bill dismissed with costs.

REPORTS OF CASES DECIDED BY
THE GENERAL COURT OF VIRGINIA
AT JUNE AND DECEMBER TERMS 1842.

675

*JUNE TERM 1842.

JUDGES PRESENT.

*Smith,
Summers,
Field,
Leigh,
Thompson,
Brown,
Duncan,*

*Fry,
Clopton,
Christian,
Douglass,
Nicholas,
Wilson,
Johnston.*

Abrahams v. The Commonwealth.*

June, 1842.

Slaves—Suffered by Master to Go at Large—Warrant.—No warrant is necessary for apprehending a slave going at large or hiring himself out contrary to law.

Same—Same.—A slave is committed to the jail of a corporation "until the next court of hustings to be held for the same," by warrant from a justice of peace of the corporation, which recites that the slaves has been apprehended therein and brought before the justice by J. T. informer, for having been permitted by S. A. his master to go at large and hire himself out contrary to the act of assembly in such case provided, and that it appears to the justice that such slave comes within the purview of said act: **HELD,**

1. **Same—Same—Jurisdiction—Hustings Court.**—The court of hustings has jurisdiction to proceed against the master, according to the statute 1 Rev. Code, ch. 111, § 81.

2. **Same—Same—Same—Notice of Proceeding.**—It is no objection to the proceeding before the court, that the master had no notice of the proceeding before the justice.

3. **Same—Same—Same—Presentment, etc.**—In the proceeding before the court, no presentment, indictment or information against the master is necessary.

Same—Same—Qui Tam Prosecution.—Warrant committing to jail a slave apprehended for going at large and hiring himself out contrary to law, recites that he was apprehended and brought before the justice "by J. T. informer;" order of court directing master to be summoned states that the slave is "charged on the information of J. T.;" judgment imposing fine on master directs two thirds thereof to be paid "to J. T. the informer, who caused the fact to be established;" **HELD,** it sufficiently appears hereby, that the prosecution was qui tam, for the benefit as well of the informer as the commonwealth.

Same—Same—Summons.—Several slaves of one master, apprehended in a corporation for going at large and hiring themselves out contrary to

law, are committed to jail until the next corporation court, by separate warrants from a justice of the peace; the court awards a summons against the master, which is issued and duly served, requiring him to shew cause why he should not be fined as the law directs, for permitting his slaves D. A. &c. (naming them all) to go at large and hire themselves out in the city, contrary to law; the master appears and makes defence, and in respect to each slave a separate trial is had, and a separate fine imposed: in appellate court, the master objects that there was only one summons, and the corporation court had no authority to divide the trial: **HELD,** there is nothing in the objection.

Same—Same—Trial by Jury—Appellate Court—Quere.

—Whether a master, charged, under the statute 1 Rev. Code, ch. 111, § 81, with having permitted his slave to go at large and hire himself out contrary to law, is entitled to demand that the fact shall be tried by a jury? But whether he has such right or not, yet if he appear in court and make defence without demanding a trial by jury, and a judgment be thereupon rendered against him, he cannot object in the appellate court that such trial was not awarded.

Same—Same—Judgment—Costs, Jail Fees, Fine.—

Judgment in county or corporation court, against a master for permitting his slave to go at large and hire himself out contrary to law, is properly rendered for the costs of the prosecution, including jail fees as well as for the fine.

Fine—Affirmance of Judgment for—Damages—Statute.

—The statute allowing damages on affirmance (Acts of 1830-31, ch. 11, § 32, Suppl. to R. C. p.

677 149.) does not apply to the affirmance of a judgment imposing an amercement or fine: the amercement or fine not being a debt or damages, within the meaning of that act. But though the judgment of affirmance in such case award damages according to law for retarding the execution, yet as no specific damages are thereby adjudged, and the law gives none, the error is merely formal, and the appellate court will disregard it.

By six several warrants under the hand and seal of William Lambert mayor of the city of Richmond, dated the 8th of November 1841, and directed to the keeper of the jail of said city, the said jailor was required to receive into his custody, and safely keep until the next court of hustings to be held for the said city, or until thence discharged by due course of law, six slaves, described as belonging to Simon Abrahams of said city, namely Delphy Anderson, Randol Kinney, Hannah Cox, Nancy Hicks, Gabriel Jones and Tom Bow. Each of the warrants recited that the slave therein mentioned had been apprehended in said city, and that

*For monographic note on Arrests, see end of case.

day brought before the said Lambert, mayor of said city and a justice of the peace in and for the same, by James M. Taylor informer, for having been permitted by the said Simon Abrahams to go at large and hire himself (or herself) out, contrary to the act of the general assembly in such case made and provided; and that it appeared to him the said mayor, that such slave came within the purview of said act.

At a court of hustings held for the said city on the 10th of November 1841, the slaves were brought into court in the custody of the sergeant, "charged," (the record states) "upon the information of James M. Taylor, with being permitted by Simon Abrahams their master to go at large and hire themselves out contrary to law;" whereupon it was ordered that Abrahams be summoned to appear before the court on the following saturday (the 13th of the month) to shew cause why he should not be fined as the law directs, "for the said offence."

678 *A writ of summons was accordingly issued by the clerk, requiring Abrahams to shew cause "why he should not be fined as the law directs, for permitting his slaves Delphy Anderson," &c. (naming them all) "to go at large and hire themselves out contrary to law, in this city."

This writ being served upon Abrahams, he appeared at the return day thereof, and moved the court to discharge the summons, alleging the following grounds of his motion: 1. It nowhere appears by whom the slaves were arrested. 2. There is no warrant from a justice of the peace or other officer, authorizing or directing the apprehension of the slaves. 3. It does not appear from any proceedings had before any magistrate, where the slaves were going at large or hiring themselves out. 4. It is not charged in any of the proceedings had before the justice, that the slaves were going at large or hiring themselves out in the city of Richmond. 5. It does not appear that the slaves have ever been apprehended and carried before a magistrate of the city of Richmond, or any other magistrate. 6. If the slaves were ever apprehended and carried before a magistrate, the defendant had no notice that the magistrate would at any time proceed to the investigation of the supposed violation of the law, for which the trial is now sought to be had in the court of hustings. 7. The court of hustings cannot act on any case arising under the 81st section of the statute concerning slaves, free negroes and mulattoes, 1 Rev. Code, ch. 111, p. 442,* until the same shall

679 have *been acted on by a magistrate.

8. It does not appear from proceedings had before any magistrate of the city of Richmond, or from the records of this court, that the defendant is legally charged with violating the said 81st section, or any other act passed by the virginian legislature.

9. It does not appear upon the records of this court, that the defendant is charged with any offence, or the violation of any of the laws now in force in this commonwealth.

The court decided, that it appeared satisfactorily to them, from the warrants of commitment, and the summons with the return thereon, that the cases were regularly and properly before them, and therefore refused to discharge the said summons.

680 To which opinion the *defendant excepted, setting forth in his bill of exceptions the warrants of commitment, the summons and return, and the grounds of his motion as stated above.

Sundry witnesses being then heard and examined, the court gave judgment against Abrahams, for permitting the slave Tom Bow to go at large and hire himself out in the city contrary to law, for a fine of 20 dollars and the costs of the proceeding, including jail fees; directing that one third of the fine should be paid to the commonwealth for the benefit of the literary fund, and two thirds to Taylor the informer, who caused the fact to be established; and discharging the said slave out of custody.

he shall forthwith impose on the owner of such slave, or the person permitting him or her to go at large or hire himself or herself out, a fine not less than ten dollars nor more than twenty dollars; or may, in his discretion, order the slave to the jail of the county or corporation, there to be safely kept until the next court; when, if it shall appear to the court that such slave hath been permitted to go at large or hire himself or herself out, contrary to law, it shall be lawful for the said court, in their discretion, and they are hereby required, either to impose on the owner of such slave, or the person permitting him or her to go at large or hire himself or herself out as aforesaid, a fine not less than twenty dollars nor more than fifty dollars, or order the sheriff or other officer of their county or corporation to sell every such slave for ready money, at the next court held for the said county or corporation, notice being given at the courthouse door at least twenty days before such sale: one third of the amount of such sale shall go to the commonwealth for the use of the literary fund, and the residue shall be paid by the sheriff or other officer, after deducting six per centum on the whole amount for his trouble, and the jailor's fees, to the person who shall inform thereof and cause the fact to be established; and when there shall be no informer, the same shall go to the commonwealth for the use of the literary fund. And in every case of a fine imposed under this section, the slave shall be held in custody and liable therefor, and may be sold by order of the magistrate or court imposing the same, and in satisfaction thereof and all incidental charges, unless the same be paid within ten days after such fine is imposed; upon payment whereof, the said slave shall be discharged."—Note in Original Edition.

*This section enacts, that "If any person shall permit his or her slave, or any slave hired by him or her, to go at large or hire himself or herself out, it shall be lawful for any person, and it shall moreover be the duty of every sheriff, deputy sheriff, coroner and constable of a county, and sergeant, coroner and constable of a corporation, to apprehend and carry such slave before a magistrate of the county or corporation where apprehended; and if it shall appear to the magistrate that such slave hath been permitted to go at large or hire himself or herself out,

The proceeding was dismissed as to Gabriel Jones, another of the said slaves; and was continued as to the four others until the next term.

At the next term of the court, held in December 1841, the cases of the four remaining slaves were disposed of. On the 15th of December, the court adjudged that Abrahams had permitted his slave Randol Kinney to go at large and hire himself out contrary to law, and that he be fined therefor 35 dollars, and pay the costs of the proceeding, including jail fees; the fine to be disposed of as directed in the former case: and it was ordered that unless the fine and costs were paid within ten days, the slave Randol Kinney should be sold by the sergeant, as the law directs, in satisfaction of the judgment.

On the 17th of December, the court dismissed the proceeding as to the slave Delphy Anderson, and gave judgment against Taylor, the informer, for the costs, including jail fees. Taylor subsequently moved the court to set aside this judgment, and his motion being overruled, he filed a bill of exceptions, which was made a part of the record.

In the case of the slaves Hannah Cox and Nancy Hicks, judgments were rendered similar in all respects to that in the case of the slave Tom Bow. The judgment 681 *in the case of Hannah Cox was rendered on the 17th of December; that in the case of Nancy Hicks, on the 18th.

Writs of error to the judgments in the cases of Tom Bow, Randol Kinney, Hannah Cox and Nancy Hicks were awarded by a judge of the general court, on a petition of Abrahams, wherein he assigned the following objections to the proceedings and judgments: 1. Although two thirds of the several fines were awarded to James M. Taylor, yet the prosecution was in the name of the commonwealth against the petitioner, and not in the name of the said Taylor as well for himself as the commonwealth. 2. Judgment should have been rendered for the petitioner, for the costs incurred by him in the case of his slave Gabriel, who was discharged. 3. The proceeding before the court of hustings was by one summons only, and the court had no authority to divide the trial as they did. 4. The court of hustings had no jurisdiction of the case, it not appearing to have been sent to that court by any magistrate of the city of Richmond. 5. It does not appear, from the record of the hustings court, or the judgment of a magistrate of the said city, that any such magistrate had ever examined into the charge against the petitioner, or had in any manner notified the said court that the slaves, or any of them, had ever been apprehended and carried before him, or that it appeared to him they had been permitted to go at large and hire themselves out. 6. If any such proceedings were ever had before a magistrate of the city, the petitioner had no notice of them. 7. It does not appear, from the record of the court of hustings or any proceedings before

a justice of the peace of said city, that the petitioner was charged with permitting his slaves to go at large or hire themselves out in the said city. 8. The court permitted Taylor, who was no party on the record, to appear and make a motion in the cause, and to file his bill of exceptions, 682 *thus increasing the petitioner's expense in obtaining a copy of the record.

The circuit superior court for the county of Henrico and city of Richmond (to which, on the common law side, the writs of error were made returnable) affirmed the judgments of the hustings court, with damages according to law for retarding the execution, and costs.

Abrahams thereupon petitioned this court for writs of error to the judgments of the circuit court, assigning the errors alleged before the court of hustings, and in his petition for writs of error to the judgments of that court; and, as an additional error, the award of damages against him by the circuit court.

J. M. Gregory, for the petitioner.

The opinion of the majority of the court was delivered by

FRY, J. Many errors are alleged in the proceedings in this case.

1. It is said, that the prosecution was in the name of the commonwealth, and not in the name of Taylor, as well for himself as for the commonwealth.

It cannot be said that the prosecution here is in the name of the commonwealth only. The warrants of commitment must of course run in her name. But they recite that the slaves were charged on the information of Taylor; the order awarding the summons states that the slaves were brought in, charged upon the information of James M. Taylor; and in the record of the hearing and judgment, he is said to be the informer, who caused the fact to be established. This sufficiently shews the style and character of the prosecution.

But the objection supposes that a presentment, information or indictment, in due form, is necessary. The act, however, evidently shews that this was not contemplated *or required. The whole 683 proceeding may begin and end before the justice; or be carried on before monthly courts, having no authority to entertain such pleas. The slaves may be brought before a justice, without warrant; and if the master were present and fully heard, there might be nothing beyond the record of the judgment itself, if it sufficiently shewed the occasion and the grounds of it.

2. It is said, the slaves could not be apprehended without warrant, founded upon information on oath. But the arrest of the slaves did not touch the liberty of the master. As to him, it was similar to the service of process by attachment to compel an appearance; or to a proceeding in rem,—the taking up of estrays, &c. Besides, it may be regarded as an arrest for a continu-

ing offence, and analogous to an arrest *flagrante delicto*.

3. It was said that the master had no notice of the proceeding before the justice. But the justice did not decide finally. The proceeding before him was only inceptive. He did no more than commit the slaves until the next court, with a view to a proper trial. The master then had a full hearing; and if it was irregular for the justice to commit the slaves, in the first instance, without a summons to and hearing of the master, it could not affect the subsequent proceedings of the court, otherwise regular; whatever personal consequences might attach to the magistrate.

4. It was said also, that the hustings court had no jurisdiction, because it did not appear that the case had been sent to it by any magistrate. But the act does not require the case to be sent, formally, to the court. It only authorizes the magistrate, in his discretion, to commit the slave to the jail, there to be safely kept until the next court; which is precisely what was done by the mayor in these cases, as is seen by the warrants, which the defendant has made part of the record, if they were not so without the aid of the bill of exceptions.

684 *5. It is said that the court erred in not giving Abrahams his costs, on the dismissal of the case as to the slave Gabriel.

It is a sufficient answer to say that this judgment cannot be drawn in question before us. There has been no writ of error awarded to it, nor any action had thereon by the circuit court.

6. The fifth objection, as stated in the record, we think answered by an inspection of the warrants, and the reason fourthly above assigned.

7. It is said, there was but one summons, and the hustings court had no authority to divide the trial as they did.

In reply it may be said, that the informations were separate; that so were the warrants of commitment until the next court; that the summons was but notice to the party to appear, stating the matter of all the informations or charges; and that the defendant did appear, and had a full hearing upon the merits, on each charge; the court hearing each separately, and giving separate judgments. The summons is not like an information or indictment, nor do the usual objections against duplicity in pleading apply to it. If it performs the office of giving the party notice of the charges against him, and appoints him a day to be heard, especially if it brings him into court to be heard, upon the merits,—it has fulfilled all the objects of a notice, and objections to its form must be regarded as unimportant; more particularly so, if made for the first time in an appellate court.

Again, if the defendant Abrahams had appeared at the next court after the commitment of the slaves, without any summons, and the court had proceeded to hear the witnesses and give judgments in the

manner set out in the record, we suppose that the defendant could not afterwards object that there had been no summons; and if so, a summons merely informal or double could hardly be considered as worse than none at all.

685 *8. It is objected that the court gave judgment for costs. But the statute itself authorizes this, in saying that the slave may be sold for the fine and all incidental charges. Costs are certainly charges incidental to the prosecution.

In all convictions for misdemeanors, with us, judgment is uniformly given that the commonwealth recover her costs; and even in cases of felony, though no formal judgment is given for them, yet the statute provides that the prisoner shall pay them, if his estate is able to do so. *Tate's Dig.* 2d ed. p. 269, § 44; 1 Rev. Code, ch. 169, § 31, p. 608.

9. It is alleged that the circuit court erred in giving costs and damages, on affirming the judgments. As to costs, the objection is answered above; and as to damages, we think that the error is merely formal. The judgments give no specific damages, but damages according to law; and the law giving none in such cases, the judgments have, in that particular, no effect. An amercement or fine is not a debt or damages, within the meaning of the law allowing damages on affirmance; *Acts of 1830-31*, ch. 11, § 32; *Tate's Dig.* 2d ed. p. 581, § 140; *Suppl. to Rev. Code*, p. 149.

10. It has been suggested in conference, that the defendant ought to have had a trial by jury. But the act of assembly evidently contemplates a summary proceeding, without pleadings or jury; and if it be said that the legislature could not deprive the party of a trial by jury, because it was a right secured to him by the constitution, it should be shewn that the constitution did secure him such trial in these cases, and that he could not be otherwise tried. Without deciding whether he was entitled to such trial, if he had asked it, in order to ascertain the facts, we are of opinion that there was no error in the court in not ordering a jury *suo motu*. The defendant's objections, made in the hustings court, were to other matters, and none pointed to this right.

686 *There were some other objections taken; but having considered all that we deem material, we are of opinion to deny the writs of error.

DUNCAN, J. Without entering into a minute examination of the several grounds of error assigned in the petition, there is, in my opinion, a ground not assigned in the petition which ought to become the foundation for a writ of error in this case.

The proceeding is founded upon the 81st section of the statute concerning slaves, free negroes and mulattoes, which subjects to a heavy penalty the party who shall permit any slave owned or hired by him or her, "to go at large, or hire himself or herself out;" the slave to be held as security

for the payment of the fine and costs, or, in the discretion of the court, to be sold, and the entire proceeds of the sale, after the payment of the costs, to be divided, one third to go to the commonwealth, and the remaining two thirds to the informer.

In order to understand the nature of the objection which exists, in my opinion, to the proceedings in this cause, it may be well to refer for a moment to the peculiar, and, I may add, extraordinary effect of the statute upon the owner or holder of slaves falling within its operation. In the first place, any person, without an application to the judicial power of the country, may seize a slave and take him before a magistrate. The statute provides for no notice to the owner or hirer of the slave. The magistrate is forthwith to impose a fine, or, in his discretion, order the slave to jail until the next sitting of the court. The court is then authorized to impose a much larger fine than the magistrate could; or it may, in its discretion, order the slave to be sold, and the entire proceeds of sale to be divided in the manner already indicated. The court need not fine the party, but may

at once forfeit the slave out and out, and divide the spoils between the informer and the commonwealth; and that too (if the statute is to be literally construed) without giving the owner any notice, and upon testimony entirely ex parte. It is not my purpose to object to this statute because of its peculiar harshness; sound principles of public policy may have rendered it necessary, and it may be the duty of the courts to enforce it: but it is my purpose to shew that the legislature did not design, by the passage of that statute, to deprive the citizen of his constitutional right to demand the cause and nature of his accusation, to be confronted with the accusers and witnesses, and to have a trial by jury. I do not mean to contend that the legislature have not a right to do so in cases like the present; that question does not necessarily arise here: but I mean to contend that according to the usual rules laid down for the construction of the statute laws of the land, the legislature did not intend to preclude parties falling within the operation of this particular statute, from having their rights decided according to the forms of proceeding known to the common law, and provided for by the constitution. I have already remarked that the statute contains no provision that the party who is to be subject to its operation shall have notice of any proceeding against him; nor does it provide for any form of trial whatever: and if its literal terms are alone to furnish the rule of proceeding, it will follow that a slave worth 500 dollars may be absolutely taken from the owner, and sold without any right of redemption; and that too without any notice to him, and without a jury of the vicinage to interpose their shield for his protection. I think, with due deference to the opinion of others, and especially of this court, all of whom differ from me on this question, that in a

country where the fundamental law declares "that in all capital or criminal prosecutions a man hath a right to be confronted with the accusers and witnesses, and to a speedy trial by an impartial jury of his vicinage," surprise may well be

created by the suggestion that under the form of law a citizen may be convicted of a criminal offence, and absolutely forfeit his property, however valuable, without being confronted with his accusers and the witnesses against him, and without having a trial by an impartial jury of his vicinage. I know that the legislature in its wisdom has provided, that in a presentment to a county court, where the penalty does not exceed 5 dollars, or to the superior court where it does not exceed 20 dollars, these courts respectively may proceed to judgment without a jury: and the same statute carefully provides that the party shall be first served with process. Whether the party would in such case have a right to demand a jury, it is not necessary to decide; but it is very clear that in no case where there is presentment, and where the fine may exceed 20 dollars, can the superior court give judgment without the intervention of a jury, although the defendant does not appear. So under the gaming laws, the fine does not exceed 20 dollars for unlawful gaming, and the court may, on default, render judgment for the fine; but if the defendant appear and plead, he has a right to a trial by jury. Horton's case, 1 Va. Cas. 335. Although the reasoning of the court in that case is not given, it may be inferred that the right to a jury was adjudged to be a constitutional right; because the general law, before noticed, expressly gives to the court, in all cases where the penalty does not exceed 20 dollars, the right to pronounce judgment without a jury. But it may be said that the general court were influenced, in their decision of Horton's case, by the circumstance that upon conviction the party shall be held to give security for his good behaviour. With this, however, the jury have nothing to do: it is an additional punishment fixed by the law, and attaches to the conviction; and if the court be substituted for the jury, and determine the fact of guilt, the law attaches

the additional punishment of giving security, in the same manner as if a jury had determined the fact of guilt. There is nothing, therefore, in that argument; and the general court in Horton's case must have intended, that in criminal cases, although the penalty did not exceed 20 dollars, a party had a right to a trial by jury. And as I have before stated, in all cases where there is a presentment by a grand jury, and the fine may exceed 20 dollars, though it may be but one cent, the courts never give judgment without obtaining the verdict of a jury, although the defendant does not appear and plead. If this is necessary where a grand jury has found a presentment, in order to the protection of the citizen, how much stronger is the necessity where there has been no grand

jury, and the proceeding has perhaps been commenced by an irresponsible individual, who chooses to seize upon the property of a citizen without the protection even of a warrant from a justice of the peace; where the fine may be upwards of 20 dollars (in this case one fine was for 35 dollars), and where the property so seized may be actually forfeited and sold without redemption. My argument therefore is, that the legislature did not intend that the court should try a case under this statute without a jury; that in all cases where the fine may exceed 20 dollars, the court are bound, under the existing law, to impanel a jury, whether the defendant be in default or not, unless, by the plain import of the statute, the right to a jury trial is taken away. When the legislature shall pass a law of that kind, there may be some found to question its power to do so. It has not done so in this case; nor can I anticipate the time when it will pass a law that shall in terms subject a citizen to a heavy penalty, like the present law, and say to him that he shall not be confronted with the accusers and witnesses, nor have a speedy trial by an impartial jury of his vicinage. And I lay down this proposition, which seems to me incontrovertible; that where a statute creates an offence, and no mode is pointed out for the prosecution of it, the ancient proceeding by indictment or information is the appropriate mode, and the only mode that can be adopted. As the statute in question does not indicate the mode of prosecution when the case gets into court, an indictment or information is the proper course. At any rate, the party should have been summoned, and a jury impaneled to ascertain the facts and determine the amount of the fine. In the case under consideration the party was summoned, it is true; but by what authority? The statute did not require it. It was, I suppose, because it was a constitutional right; and the same article of the constitution shews that he had an equal right to a trial by jury.

It is said that the defendant did not demand a jury. But where a man indicted for a common misdemeanour does not appear, his cause must nevertheless be tried by a jury, because he may be fined more than 20 dollars, although he may be fined less; and this court would reverse any judgment rendered by an inferior court in such a case without having a jury impaneled, although the fine were but one cent, and the defendant had never appeared or demanded a trial by jury. And why? Because it was a right under the constitution to have his cause so tried. In this case one of the fines was 35 dollars, and the slave is held in custody for the payment of it. I can see no reason for the difference, and I think there is none.

But the defendant in this case did appear; and for aught that appears in the record, he may have claimed all his rights. The pleadings were ore tenus; he defended himself against the prosecution; and even if he had not done so, the amount of the fine

being above 20 dollars, he was entitled to a trial by jury.

I think that a writ of error ought to be awarded in this case. Not that I would certainly reverse the judgment: 691 *for, always diffident of my own opinions, I am the more so in this case, because I find all the judges differing from me. Perhaps my mind has been misled by a too jealous regard for the trial by jury.

Writs of error denied.

ARRESTS.

I. IN CIVIL CASES.

Persons Exempt from Arrest.—Judges, attorneys, witnesses, and suitors are exempt from arrest in civil suits during their attendance at court. *Com. v. Ronald*, 4 Call 97; *Richards v. Goodson*, 3 Va. Cas. 381.

Length of Time Debtor Can Be Held without Execution.—A debtor, being surrendered to the sheriff by his special bail, after judgment against him in a county court, cannot legally be detained in jail, or within the prison bounds, on a bond given for that purpose, more than twenty days from the time of such surrender. If the creditor, his agent, or attorney, do not, within that time, charge him in execution in writing. *Green v. Garrett*, 3 Munf. 330.

Effect of Escape of Debtor Arrested upon a Writ of Ca. Sa.—If a debtor in custody under a writ of *ca. sa.* be permitted to escape, the creditor is entitled to another execution against the debtor as well as to an action against the sheriff for the escape. *Windrum v. Parker*, 2 Leigh 361.

Effect of Discharge of Debtor Arrested upon a Writ of Ca. Sa.—But if a debtor, arrested on a writ of *ca. sa.*, is discharged by order of the creditor or his agent, no other execution can be had on the judgment or decree. *Windrum v. Parker*, 2 Leigh 361.

II. IN CRIMINAL CASES.

What Arrests May Be Made without Warrant.—For felonies, or upon reasonable suspicion of felony, and for misdemeanors committed in their presence, constables or police officers may arrest the offender without a warrant and take him before a magistrate to be dealt with according to law. But, in general, in cases of misdemeanor a constable or other peace officer cannot, any more than a private person, justify the arrest of the offender without a warrant, when the offense was not committed in his presence. *Muscoe v. Com.*, 86 Va. 443, 10 S. E. Rep. 534.

So a justice of the peace, or a mayor of a city or town having similar power, may himself apprehend or cause to be apprehended, by word only, any person committing a felony or breach of the peace in his presence; but this power extends no further. In all other cases he must issue his warrant in writing to apprehend the offender. *Muscoe v. Com.*, 86 Va. 443, 10 S. E. Rep. 534.

Not only must there be a warrant in order to justify an arrest for a misdemeanor not committed in the presence of the officer, but, to justify the arrest the officer must have the warrant with him at the time. *Muscoe v. Com.*, 86 Va. 443, 10 S. E. Rep. 534.

Issuance and Execution of Warrant of Arrest.—A warrant, to arrest a person of whom surety for the peace is demanded, being executed neither by a

sworn officer, nor the person to whom it was directed by the magistrate, but by an individual selected by the prosecutor, who erased the name of the person appointed by the magistrate, and substituted that of the person selected by himself, is thereby rendered altogether illegal and void as a justification, but may be given in evidence in mitigation of damages. *Wells v. Jackson*, 8 Munf. 458.

Although an escape warrant ought regularly to show on its face that the person who issues it, is a justice of the peace, yet on a *habeas corpus* sued out by the person arrested on it, if it is proved that he is a justice, the prisoner ought not to be discharged. *Jones v. Timberlake*, 6 Rand. 678.

Warrant to Arrest Unnamed Persons is Void.—A warrant directing the "associates" of persons named to be arrested, without mentioning the name of such associates, is illegal and void. *Wells v. Jackson*, 8 Munf. 458.

Policeman Making Arrest May Use Force Necessary to Take the Offender.—A policeman who does not use more force than is necessary to arrest a person who is engaged in riotous and disorderly conduct, and who resists the arrest, is not guilty of an assault and battery. *Mesmer v. Com.*, 36 Gratt. 976.

Question as to Legality of Arrest is One of Fact.—The question as to what constitutes a legal arrest is a mixed question of law and fact, and must therefore be determined by the jury upon the facts of the particular case, under suitable instructions from the court as to the law. The court should explain to the jury what constitutes a legal arrest, and then leave it to them to say whether upon the evidence before them the arrest in question is legal or not. *Muscoe v. Com.*, 86 Va. 443, 10 S. E. Rep. 534.

Killing Officer in Resisting Illegal Arrest.—If one, even an officer, undertakes to arrest another unlawfully, the latter may resist him. He has no protection from the offense, or from the fact that the other is an offender. The true view of the law when the mere fact of an illegal arrest, attempted or consummated, appears, is that if the one suffering it kills the officer or other arresting person, whether with a deadly weapon or with other means, he may rely on the presumption that his mind was beclouded by passion; but if actual malice is affirmatively proved the homicide will be murder. *Briggs v. Com.*, 82 Va. 554; *Muscoe v. Com.*, 86 Va. 443, 10 S. E. Rep. 534. Thus in a case where the circumstances did not justify an arrest by the constable without a warrant, but which gave the accused the right to resist the arrest, it appeared that the deceased told the accused he would arrest him, and against his protest did arrest him. The accused jerked loose, and then retreating a short distance, turned and fired at the back of the deceased, who was unarmed. It was held that the grade of the offense depended on whether the homicide was committed through actual malice, or through sudden passion, which could only be ascertained from the circumstances, and the jury, with all those circumstances before them, having found that the offense was murder, their finding should not be disturbed, as it was neither against, nor without, evidence. *Briggs v. Com.*, 82 Va. 554.

Boyd v. The Commonwealth.

June, 1842.

Larceny*—Indictment—Bank Notes.—Indictment for

*See monographic note on "Larceny" appended to *Johnson v. Com.*, 24 Gratt. 555.

larceny of checks, bank notes, and United States treasury notes.

Same—Examining Court—Warrant Convening Court—Sufficiency of—Sunday.—By warrant dated the 17th, which is thursday, a court for the examination of a prisoner charged with felony is appointed to be held on the 22d, and is held accordingly; the court being thus held on the fifth day after the date of the warrant, and one of the intervening days being sunday: HELD, the warrant and examination are sufficient.

Same—Same—Same—Same.—Warrant directs a court to be summoned for the examination of a prisoner charged with feloniously stealing "sundry checks drawn by sundry individuals upon the Exchange bank at N., and sundry other checks drawn in like manner upon the Farmers bank at N., also treasury notes and other bank notes, the whole of which checks, treasury notes and bank notes amount to 2324 dollars, of the value of 2324 dollars, the property of J. S. M.;" record of examining court states, that prisoner was examined upon a charge of feloniously stealing "divers goods and chattels, the property of J. S. M."—HELD, the warrant and examination are sufficient, and an indictment for the larceny of divers checks, bank notes, and United States treasury notes, the property of J. S. M., is well supported thereby.

By warrant under the hand and seal of a justice of the peace for Elizabeth City county, dated the 17th of March 1842, reciting that William Boyd was that day committed to the jail of the county by warrant from the said justice, for having, on the 16th day of March 1842, feloniously taken, stolen and carried away from the 692 *house of John S. Moody, within the jurisdiction of the county court, "sundry checks drawn by sundry individuals upon the Exchange bank at Norfolk, and sundry other checks drawn in like manner upon the Farmers bank at Norfolk, for sundry other sums of money, also treasury notes and other bank notes, the whole of which checks, treasury notes and bank notes amount to the sum of 2324 dollars and 14 cents, of the value of 2324 dollars and 14 cents, the property of John S. Moody,"—the sheriff was required to summon the justice of the county to hold a court, on the 22d of March 1842, for the examination of the fact with which the said William Boyd stood charged.

A court was accordingly held on the 22d of March, for the examination of the said William Boyd, "charged" (the record states) "with the felonious stealing of divers goods and chattels, the property of John S. Moody." The examining court remanded him to be tried, "for the said supposed fact," before the circuit superior court of the county.

In the circuit superior court, at April term 1842, the grand jury found a bill of indictment against Boyd, for the larceny of divers checks, bank notes, and United States treasury notes, the property of John S. Moody. The indictment contained twenty counts. In several of them, charging the larceny of different checks, the instrument was merely described as a check

for the payment of a certain sum, and of the value of that sum. Other counts, in addition to the amount and value of the check, set forth the date and number of it, by whom drawn and in whose favour, the particular bank (Exchange of Farmers bank at Norfolk) on which drawn, and, where made payable to order, the endorsement by the payee. One count charged the larceny of three checks, another of two, and another of two paper bills of credit issued under the authority of the United

States, commonly called treasury 693 notes; the court in each of *these cases stating the aggregate amount and value of all the checks or treasury notes therein mentioned, but not the separate amount or value of each, or of any one. The 17th count charged the larceny of a promissory note for the payment, and of the value, of 50 dollars, commonly called a treasury note: to which description the 18th count added, that the note was "made by the United States." The 19th count differed from the 17th, and the 20th from the 18th, only in terming the instrument charged to be stolen a note, instead of a promissory note.

Before pleading, the prisoner produced the record of the examining court, including the warrant for convening the same, and moved the circuit court to quash the indictment for the following reasons: 1. It does not sufficiently appear from the proceedings of the examining court, that the prisoner was examined according to law for the offence specified in the said indictment or any count thereof. 2. The court of the justice was held for the examination of the prisoner for feloniously stealing "divers goods and chattels," the property of John S. Moody; and no such offence is charged in the indictment. 3. There were not five days between the date of the warrant, and the day on which the court of examination was thereby appointed to be held, and was actually held. In connexion with this ground of the motion to quash the indictment, it was proved to the circuit court that the 17th of March 1842, the date of the warrant, was thursday, and consequently that a sunday intervened between that day and the day of holding the court of examination. 4. For other reasons apparent on the face of the indictment and the proceedings of the examining court.

The circuit court overruled the motion to quash the indictment, and the prisoner excepted, setting forth in his bill of exceptions the warrant for convening the court of examination, the proceedings of 694 that court, and *the grounds of his motion as above detailed. He then moved to quash the 17th, 18th, 19th and 20th counts of the indictment; which motion was also overruled. Whereupon he pleaded not guilty, and a jury being impanelled for the trial, found him "guilty of the charges preferred against him in the indictment," and ascertained the term of his imprisonment in the penitentiary to be two years. The circuit court rendered

judgment accordingly. And now he applied by petition to this court for a writ of error to the judgment.

R. H. Armistead, for the petitioner, relied upon the second and third grounds above assigned for quashing the indictment. He adverted to the terms of the act 1 Rev. Code, ch. 169, § 1, p. 598, providing that the day to be appointed in the warrant, for holding the court of examination, shall be "not less than five nor more than ten days after the date thereof;" and suggested that the court, in *Thompson v. Commonwealth*, 2 Va. Cas. 135, must have overlooked the language of the enactment.

On the question whether an intervening sunday is to be reckoned in the computation of the five days, he referred to the cases cited in *Tate's Dig.*, 2d ed., p. 250, note 4.

PER CURIAM. Writ of error denied.

695 *The Commonwealth v. Scott.

June, 1842.

Counterfeiting*—Indictment—Sufficiency of.—An indictment on the statute of 1834-5, ch. 66, charging that the prisoner did knowingly have in his custody, without lawful authority or excuse, "one die or instrument" for the purpose of producing and impressing the stamp and similitude of the current silver coin called a half dollar, (no further describing the die or instrument) is insufficient.

In the circuit superior court of Ohio county, at October term 1841, an indictment was found against Thomas Scott, charging that he, on &c. at &c. "one die or instrument for the purpose of making, producing and impressing the figure, stamp, resemblance and similitude of the lawful silver coin current within this commonwealth, called a half dollar, did falsely, feloniously, without lawful authority and without lawful excuse, knowingly have in his custody and possession, against the form of the act of the general assembly," &c. The indictment was founded upon the statute of March 10, 1835, Acts of 1834-5, 696 ch. 66, p. 47.* After a verdict *finding the prisoner guilty, and ascertaining

*See monographic note on "Forgery and Counterfeiting" appended to *Coleman v. Com.*, 25 Gratt 866, and monographic note on "Indictments, Informations and Presentments" appended to *Boyle v. Com.*, 14 Gratt. 674.

"If any person or persons, without lawful authority, such as is hereinafter mentioned, shall engrave, cut, etch, scrape, or by any other art, means or device make, or shall cause or procure to be engraved &c. or shall knowingly aid or assist in the engraving &c. in or upon any plate of copper, brass, steel, iron, pewter, or upon any other metal or mixture of metal, or upon wood or other material, or any plate whatsoever, for the purpose of producing a print or impression of all or any part or parts of any bank note &c. or of any coin current within this commonwealth, whether made current by law or usage, or shall use any such plate so engraved &c. or shall use any other instrument or com-

the term of his imprisonment in the penitentiary to be five years, he moved the court to arrest the judgment, because of the insufficiency of the indictment; and the court, with his assent, adjourned to this court the question, Ought the judgment to be arrested for insufficiency of the indictment?

PER CURIAM. The judgment ought to be arrested for the insufficiency of the indictment.

The Commonwealth v. Dabney.*

June, 1842.

Criminal Law—Witnesses—Accomplice—Right to Pardon.—Though a particeps criminis, called as a witness for the commonwealth on the trial of his accomplice, voluntarily give evidence, and fully, candidly and impartially disclose all the circumstances attending the transaction, as well those which involve his own guilt as those which involve the guilt of others, he will yet have no right to a pardon for his own guilt, and therefore no right to demand a continuance of his cause until he can have an opportunity to apply to the executive for such pardon.

Case adjourned from the circuit superior court for the county of Henrico and city of Richmond.

William B. Dabney, late the first teller of the bank of Virginia, was indicted in the said circuit court, upon the statute of February 24, 1820 (Suppl. to Rev. Code, ch. 223, § 2, p. 278), for felony in embezzling and fraudulently converting to his own use 4000 dollars of the money and bank notes of the bank, placed under his care and management by virtue of his office aforesaid. Having been admitted to bail, he appeared in court at May term 1842 in discharge of his recognizance; and the attorney for the commonwealth desiring to put him on trial on the said indictment, he moved *the court to postpone the trial, in order that he might have an opportunity, at the proper time, to

apply to the executive for a pardon, being advised that such application could not properly be made to the executive until certain indictments depending in the same court against Benjamin W. Green were finally disposed of. The record sent to the general court contained the following statement of the grounds upon which this motion was made.

While the prisoner acted as first teller of the bank of Virginia, during the years 1838, 1839, and 1840, a defalcation to a large amount, between 500,000 and 600,000 dollars, had taken place in his department of the bank, and the prisoner apprehending prosecution for the default had left his situation in the bank on the — day of April 1840, and fled from the commonwealth to places beyond the limits of the United States, leaving his wife and children at their residence in Richmond. Having borne a high character for integrity during his whole life, and having seen a publication in the Richmond Whig, written a few days after his flight, and purporting to have been made by his friends and connexions, inviting him to return, to surrender himself to the law, and to make a full disclosure of all the circumstances attending the default, and approving that advice, he resolved to follow it, and thereupon wrote to John H. Pleasants the editor of the Whig, from Lewiston in the state of New York, a letter dated the 27th of April 1840, indicating that intention. About the same time a letter was written to the prisoner by John Brockenbrough the president of the bank of Virginia, urging his return, recommending a full and fair disclosure of all the transactions connected with the default, and suggesting that such a course would lead to favour towards him. This letter, accompanied by one from John Wight to the prisoner, strongly advising the same course, was despatched by a special messenger, R. C. Williamson, *and delivered to the prisoner at Lewiston in New York.* Whereupon the prisoner immediately and voluntarily returned with Williamson to Richmond, went before the officers of the bank, voluntarily explained to them the transactions connected with the default, and surrendered himself to the officers of the law. He was thereupon arrested, and gave bail to appear before the mayor of the city of Richmond, to undergo his examination on the — day of May. He accordingly appeared, but the examination was postponed from time to time, and his recognizances renewed, until the 17th of June 1840, when he underwent his examination before the mayor, and was committed for trial before the magistrates of the city at a called court to be held on the 22d of June, for his examination, first, on the charge of embezzling and fraudulently converting to his own use, while

trivance, for the making or printing any such note &c. or any such current coin, or if any person or persons shall, without lawful authority as aforesaid and without lawful excuse, knowingly have in his, her or their custody any such plate or instrument, every person so offending in any of the cases aforesaid, and being thereof convicted according to law, shall be adjudged a felon, and, if a free person, shall be punished by confinement in the public jail and penitentiary for not less than five nor more than twenty years."—Note in Original Edition.

*For monographic note on Pardons, see end of case.

†**Criminal Law—Witnesses—Approvers.**—In *Oliver v. Com.*, 77 Va. 502, the court said: "The English doctrines relating to the admission of approvers seem never to have become incorporated into the laws of this state, and the ancient practice in England, which was confined to capital cases, has been long disused. 4 Bl. Comm. 330; 1 Bishop on Crim. Procedure, sec. 1073 *et seq.*; *Dabney's Case*, 1 Rob. Rep. 684."

See foot-note to *Byrd v. Com.*, 2 Va. Cas. 490.

697
698

*The three letters above mentioned were inserted in the record, but it is considered unnecessary to introduce them in this report.—Note in Original Edition.

teller of the bank, the money and bank notes belonging to the bank and entrusted to his keeping; secondly, for permitting Benjamin W. Green fraudulently to embezzle and convert to his use the money and bank notes of the bank; and thirdly, for stealing the money and bank notes of the bank. The prisoner was accordingly brought before the called court, and that court, having heard the evidence, remanded him for trial before the circuit court upon the first two charges, and a nolle prosequi was entered by the attorney for the commonwealth, by the advice of the court, as to the third charge, that is, the charge of larceny.

Before the prisoner returned to Richmond as aforesaid, an examination of the first teller's vault and drawers at the bank had ascertained the amount of the deficiency of the money of the bank entrusted to the prisoner, and that checks of B. W. Green and others, to an amount nearly equal to the amount of said deficiency, were found in the said vault

699 and drawers; and the said *Benjamin W. Green had been arrested upon a charge of felony, as the party who had fraudulently and feloniously obtained and converted to his own use the greater part of the money and notes aforesaid, and was under trial for these charges before an examining court for the city of Richmond, during the period that Dabney's examination was postponed from time to time as aforesaid before the mayor. Upon this examination of Green, Dabney was called upon as a witness to give evidence on the part of the commonwealth. Before he was sworn, he was informed by the court, at the request of the attorney for the commonwealth, that he was not bound to give any evidence in that case that would criminate himself, and that if he did give evidence, he must do so without any expectation of favour or that he would thereupon acquire any right to pardon. The prisoner thereupon declared he had been advised by his counsel, that though he was not bound to give evidence in the cause, yet if he did give it, he should tell the whole truth; and he was willing to give evidence and to tell the whole truth, whether it involved his own guilt or the guilt of others. He was thereupon sworn as a witness to give evidence on behalf of the commonwealth, and gave evidence in detail as to all the circumstances which had come to his knowledge touching the default aforesaid, from the period when an overdraft of Green & Merrill had been made known to him about the — day of October 1838, till the said Dabney finally left the bank on the — day of April 1840. Among other things, he gave evidence in much detail of a great variety of occasions on which he had permitted B. W. Green to withdraw from the bank, upon checks which were not good, and which both he (Dabney) and Green knew were not good, first smaller and afterwards much larger sums of money, till Green's overdraft amounted to the whole sum defi-

cient, except about 4900 dollars. That Green's first overdrafts were made

700 *without Dabney's knowledge, and were afterwards concealed by him under the supposition that they had arisen from the mistake of an absent officer, and would be explained when he returned to the bank. That Green's earlier overdrafts made with Dabney's knowledge were made under a promise by Green, and an expectation by Dabney, that they would be soon returned: that all Green's overdrafts made with Dabney's knowledge were made under strong assurances that they should be repaid; and towards the latter part of the overdrawing, he repeatedly assured Dabney that the repayment should be secured by a lien on property, and made some progress in preparing the securities. Dabney testified that in relation to these overdrafts permitted by him to Green, he had no interest whatever, no part of them being intended from him or for his use: that he never received from Green any consideration whatsoever for the indulgence: that it is true he received from him some small presents, but never regarded them as given in consideration of services rendered: and that when he had been ruined by the long course of indulgence in favour of Green, and found himself obliged to leave the bank, he informed Green that he had nothing to pay a debt which he owed to his two sisters, of about 1000 dollars each, and that Green promised him he would transfer to each of his sisters ten shares of the stock of the Dover coal mining company, which he afterwards did accordingly, though they have since surrendered it, after they knew the source from which it came. As to the sum of 4000 dollars mentioned in this indictment, Dabney testified, that holding certain valid securities which he had obtained from the sale of his farm, on which he expected to raise money enough to serve his immediate demands, but having been disappointed in the efforts which he had made for that purpose, and being afraid to remain longer in Richmond lest his default should be discovered before he

701 left *it, he took out of his department of the bank, of the money entrusted to his care, about the sum of 4000 dollars in bank notes and specie, and left at the same time in the place of it the valid securities aforesaid, to a greater amount than the money so taken, duly endorsed by him, with the intent that the bank should take possession of them, collect them, and indemnify itself for the money so taken. (These securities have been since actually collected, and the money received, by the bank.) The money so taken by Dabney was intended to be applied to his own use. And as to the sum of 900 dollars, the residue of the sum of 4900 dollars referred to in the preceding part of this statement, Dabney testified that it arose from a check drawn by the mother bank at Richmond on the branch bank at Lynchburg, by mistake for 1000 dollars, when it should have been drawn for 100 dollars.

When Dabney was remanded for trial before the circuit court, the called court refused him bail. But upon a writ of habeas corpus returnable to the general court, and upon proof of the facts herein before stated, that court admitted him to bail.* He has since been on bail from time to time until the present time, and has uniformly appeared in discharge of his recognizance. He has been indicted upon six indictments in this court, viz. that which has this day been called for trial, and five others; to all of which he is now willing to admit upon the record the facts such as he has testified to them, and he does so admit them.

Benjamin W. Green was also indicted upon 23 indictments, for imputed offences in obtaining the money aforesaid, which he had been permitted by Dabney to draw out of the bank. On one of them he was tried at the last fall term of this court, upon which trial Dabney was called on behalf of the commonwealth to give evidence, and

702 after a charge in relation to his testimony *similar to that given by the called court on his examination as a witness there, did give evidence substantially similar to that which was given by him before the examining court. Upon that trial Green was acquitted, and he was afterwards admitted to bail by the general court.† All the rest of the indictments against Green yet remain undisposed of.

The prisoner proposes to shew to this court, that his evidence before Green's called court, where he was examined and cross-examined for about a fortnight, was full, impartial, and perfectly satisfactory both to the court and to the attorney for the commonwealth prosecuting there: and when it shall be proper for him to present his case before the executive, he will ask this court, and the attorney for the commonwealth here, to certify their opinions of the fulness, the fairness, the integrity and the impartiality of his testimony here.

Whereupon the arguments of counsel on behalf of the prisoner and of the commonwealth having been heard, and the court being of opinion that the questions of law upon which this motion turns are novel and difficult, doth, with the consent of the prisoner, adjourn this case to the general court, and ask their opinion upon the following questions:

1. If a particeps criminis, on the trial of one of the parties to the crime, called as a witness on the part of the commonwealth, voluntarily give evidence, and fully, candidly and impartially disclose all the circumstances attending the transaction, as well those which involve his own guilt as those which involve the guilt of others, will he have an equitable title, or any title, to pardon for his own guilt, and will he have a right to demand from this court a continuance of his cause until he can have a fair opportunity to apply to the executive for that pardon?

*At June term 1840.

†At December term 1841. See *Green v. Commonwealth*, 11 Leigh 677.—Note in Original Edition.

703 *2. Is the english law, such as it is expounded by the twelve judges of England in the case of *The king v. Rudd* (reported in *Cowper* p. 332, and *Leach's C. L.* p. 115), law in Virginia?

3. When an accomplice is examined as a witness on behalf of the commonwealth against a particeps criminis, and in the course of a full and fair narrative of his evidence, and as an appropriate explanation thereof, he discloses a felony committed by himself in which the prisoner has not participated, such for example as may be the embezzling of 4000 dollars here charged upon Dabney, in which he does not allege that Green had any participation, has the witness so disclosing a felony any equitable claim to pardon under the law of England, or the law of this state? or any claim to have his trial postponed in order that he may apply for a pardon?

4. What judgment should be rendered on the motion now submitted? Ought the case to be continued until after the other indictments against Green are disposed of, or until the attorney prosecuting for the commonwealth shall dismiss Dabney as a witness, or until the prisoner shall have an opportunity to apply to the executive for a pardon prior to the trial of Green upon the other indictments? or ought the motion to be overruled?

The cause was argued here by the attorney general for the commonwealth, and Johnson, Scott and Stanard for the accused.

LEIGH, J. The counsel for Dabney in this court have contended that according to *Rudd's* case, 1 *Leach's Cro. Ca.* 115, an accomplice, who has been received by the court to give evidence against his associates, and who has fully and fairly given testimony against them, has a right to the recommendation of the court to the mercy of the executive, and a right to the pardon of the executive.

704 *In the case above referred to, lord Mansfield uses this language—"There is, besides, a practice which does not give a legal right; and that is, where an accomplice, having made a full and fair confession of the whole truth, is in consequence thereof admitted as a witness for the crown, and his evidence is afterwards made use of to convict the other offenders. If in that case he acts fairly and openly and discovers the whole truth, though he is not entitled of right to a pardon, yet the usage, the lenity and the practice of the court is to stop the prosecution against him, he having an equitable title to the recommendation of the court to the king's mercy." By this opinion the right to the pardon is denied to be a legal right, and is said to be a mere equitable one. It would seem then, that even in England this right to the recommendation of the court can hardly be said to be a right secured by the common law, but is a mere favour which the crown had determined to extend to accomplices. And we are the more inclined to consider this the correct view of the ques-

tion, as this doctrine of the right of an accomplice to the recommendation of the court is to be found in none of the older writers on the common law. If this be the correct opinion, then this right of an accomplice never was introduced into the laws of this state.

But if it were established that this right of an accomplice was a part of the common law, we should still be of opinion that it never was a part of the law of this state: for no accomplice can, according to the constitution of our courts, be so received to give evidence as to entitle him to this right of pardon. According to the authorities, he must make a full confession of the whole truth. And according to the same authorities, neither the committing justice nor the prosecutor, nor even the attorney general, can so receive him; the power to receive him being given to the court alone.

In England the accused is always examined by the committing magistrate, who reduces this examination to writing, together with the testimony of the witnesses. In this examination an accomplice may make a full and fair confession of the whole truth, before a person authorized to receive it. But in this state the accused is never examined, and we do not see in what manner this previous confession of the whole truth is to be made. The committing magistrate and the prosecutor are unauthorized by any law to take it; nor has the court any such authority. But admitting that the court has the right, where and in what manner is the confession to be made? Is the judge to go to the jail, or to send for the accomplice to his private room, and receive his confession in secret? This would be contrary to our practice, which has always been to administer justice openly and in public. Or is the accomplice to be brought into court to make his full confession openly and publicly? This would be unjust to him: for the court may not receive him as a witness, and his confession in open court, perhaps in the presence of those who may afterwards be called upon to try him, might greatly prejudice his case. It would therefore seem that no mode is provided by our laws, in which the full confession, required of an accomplice by the practice of the courts in England before he will be permitted to give evidence against his associates, can be made. But if this difficulty were removed, no mode is pointed out by our laws, for procuring the testimony to enable the court to determine whether the accomplice ought or ought not to be received as a witness. According to the authorities cited, the admission in England of an accomplice to give evidence puts it in his power to entitle himself to a pardon. The permission, then, to give testimony is in effect the grant of the pardon. And surely the court ought to have all the evidence in the case, as well in respect to the accomplice as his associates, to enable it to decide whether it would be proper, in the particular case, to exer-

cise the power of pardoning: otherwise it would often happen that the most guilty would secure his pardon, simply by giving evidence against others who had been led into guilt by the witness himself. It is probable that in England all the evidence is before the court, which may thus have the means of ascertaining the propriety of receiving the accomplice as a witness. But in this state, according to our present mode of proceeding, the evidence never is and never can be before the court. Therefore, if the right of an accomplice to a pardon were fully established in England, we should yet deny that the same right existed here.

We think, too, that the legislature, by enacting that "approvers shall never be admitted in any case whatsoever," (1 Rev. Code, ch. 169, § 59, p. 614,) has manifested its disapprobation of holding out impunity to an accomplice, as an inducement to him to become a witness against his associates. Indeed, some of the judges are of opinion that this law prohibits the offering of any such indemnity to an accomplice. But others of them think that the conditional right to pardon now contended for would not have been taken away by that law, if such right had existed at the time of the enactment. A majority of the court, however, are of opinion that the act in question evinces the legislative disapprobation of the principle now contended for in behalf of the accomplice. What was the objection to permitting an accomplice to become an approver? Certainly, that thereby he might be tempted to screen himself by giving false testimony against others. The right to pardon now insisted on holds out the same sort of temptation, though in a less objectionable manner. And as the legislature has manifested its disapprobation of holding out such a temptation in case the witness appeared in the character of an approver, we think it may fairly be inferred that it would equally disapprove of

holding out a temptation of a like kind where the witness appeared in the character of an accomplice. We think, too, that the act which prohibits the using against any person facts stated by him in his examination as a witness against another, furnishes some evidence, though perhaps not very strong evidence, that the legislature did not, at the passage of that act, regard the right, now contended for in behalf of the accomplice, as existing under our law. And we are of opinion that our law acknowledges no such right.

We are the better satisfied with this opinion, from the fact that the right has been established by no decision in our courts; and also from the fact that it has, as we firmly believe, never before been asserted or even heard of in our courts. Indeed, we regard Byrd's case, 2 Va. Cas. 490, as a pretty strong authority against the supposed right. We willingly admit that the point directly decided in that case was, that an accomplice is a competent witness. But the opinion declares also, that the accomplice is not exonerated from punish-

ment; that he is not entitled to a pardon in case he succeed in convicting a fellow prisoner, nor is he subjected to punishment in consequence of his failure; that in both cases his acquittal or conviction will depend upon the evidence adduced on his own trial. We cannot believe that this broad denial of an exoneration from punishment, and of the right to pardon, would have been thus unconditionally stated, if the court had not been satisfied that the right now asserted had no existence; especially as Rudd's case appears to have been before the court. It is the daily practice to receive accomplices as witnesses; in many instances they have been put upon their trial after giving evidence against their associates, and in some instances they have been convicted: yet in no one instance have counsel claimed, or the court extended to the witness, the right now asserted. How is this to be accounted

708 for? Not from *ignorance in the profession, (for Rudd's case has been for a long time generally known,) but from the universal opinion of the bench and bar that no such right existed. And we cannot readily admit that the whole profession has been, for such a length of time, in error in respect to a question which so frequently required their consideration.

It is said, that policy requires that this right should be secured to accomplices. We doubt this. We readily admit that accomplices would more frequently consent to give testimony against their associates, if by doing so they would secure a pardon for themselves. But even now, when the right claimed for them is denied, they are not very often believed by juries; and we think that if the right claimed were admitted, they would rarely be credited at all.

We have not considered, and we mean to express no opinion whatever on the general power of the courts of this commonwealth to recommend persons accused to the mercy of the executive. All we mean to say is, that an accomplice has no right to demand such a recommendation, merely because he has given evidence on the part of the commonwealth, fully, candidly and impartially.

DUNCAN, J. The majority of the court not resting its decision on the same precise grounds on which some of the judges are inclined to place it, I shall very briefly assign the grounds of my opinion.

The point on which all the questions adjourned in this case turn, is, whether an accomplice, who gives testimony against his associates fairly and openly, has a right to demand from the court in which he is tried for the same offence, a recommendation to the executive for a pardon; and whether the doctrine of the english courts upon this subject, as expounded in Rudd's case, is in force in this state.

709 *Rudd's case was decided in 1775, and it was there for the first time distinctly adjudged, that an accomplice giving testimony fully and fairly against his

associates in crime has an equitable right to a pardon, and that the court will recommend him to mercy, and will stay the proceedings against him to enable him to apply for a pardon. The doctrine, as settled in Rudd's case, undoubtedly sprang out of the ancient law of approvement, and was merely a modification thereof. That law, as it anciently existed, had, long before the decision of Rudd's case, become obsolete. Sir Matthew Hale, a century before, had stated (2 Hale's P. C. 226), that "the admitting of approvers had long been disused." But in his time accomplices were admitted as witnesses, and it became a part of the policy of that country, in order to aid in discovery and punishment of crimes, to encourage accomplices to give evidence against their fellows, by holding out to them the promise of a pardon if they made full and fair disclosures; and the english courts, in furtherance of this policy, so moulded the common law doctrine of approvement, as to get rid of some of the objectionable features of the law as anciently practised and understood, and at the same time to carry out the public policy. Such seems to me to have been the foundation of the decision in Rudd's case.

Thus the law stood in England, and of course in the colonies, until the revolution. Soon thereafter, in 1789, the legislature of Virginia, with a knowledge that the ancient law of approvement had been obsolete for more than a century, and with a knowledge of its modification by the english courts in Rudd's case, passed a statute declaring that "approvers shall never be admitted in any case whatsoever." Now, as the ancient law of approvers, as technically understood, had long been obsolete, there was no necessity for the legislature

710 to repeal it; but as Rudd's case had been but recently *decided, modifying the law of approvement, it is clear to my mind that the legislature had a special view to that modification of it by the english courts; and this seems to me to be the more probable, from the fact that the reason assigned by sir Matthew Hale for the law of approvement as anciently practised having become obsolete, applied with almost equal strength to the modification of the rule as settled in Rudd's case. The reason assigned by him is, that "more mischief hath come to good men by these kinds of approvements, by false accusation of desperate villains, than benefit to the public by the discovery and convicting of real offenders." The only difference between the ancient law of approvement and its modern modification is, that in the former the approver must confess his crime, and if he fails to effect a conviction of his confederate, he is to be punished, but if there is a conviction, then he is entitled to a pardon unconditionally. The modern doctrine does not require that the accomplice shall confess his guilt, or that his associate shall be convicted; but if he gives his testimony fully and fairly, the court is pledged to recommend, and the executive

to grant, a pardon. Can there be any material difference in the degree of evil that would be likely to arise "to good men by false accusations of desperate villains?" In either case, the price held out to the accomplice for his evidence is a pardon for his own crime: in either case, he is an approver. So, I infer, the legislature supposed. And such was undoubtedly the interpretation by the courts of the country, of the statute passed in 1789, abrogating approvements; as is proved by the opinion of the elder judge Tucker, contained in a note to 4 Tucker's Blackstone p. 331. This able jurist states expressly, that the virginian statute repealing the law of approvement was understood to exclude the adoption of the principle settled by the english courts in Rudd's case; although

he seems to regret that accomplices
711 *in this county were not placed upon the footing of accomplices in England. And I think it may be fairly inferred that the suggestion of judge Tucker, in his note referred to, gave rise to the passage of the subsequent statute of 1811, 1 Rev. Code, ch. 131, § 6, p. 517, in which the legislature (for the purpose, no doubt, of holding out to accomplices an inducement to give evidence against their associates) provided that the testimony of a witness should not be used as evidence in any trial against himself. If the law of approvement, as modified in Rudd's case, were in force, then it became unnecessary to hold out to accomplices any such inducements as were held out by the statute of 1811; for the principle of Rudd's case placed them in a better situation; they became entitled to a pardon under the implied faith of the government, whilst under the statute they might be tried and convicted without any claim to pardon. And we find that the general court, in Byrd's case, decided in 1826, expressly say (although in this respect the opinion was obiter) that the accomplice who gives evidence against his associates is not entitled to a pardon. In New York, it is true, it has been decided in Whipple's case, 9 Cowen 707, that the law of England as settled in Rudd's case was the law of that state: and under different circumstances that decision ought to have great weight here. But in New York there was no statute such as that passed in Virginia in 1789, abrogating approvements, nor any such as that passed in 1811. The reason assigned by the court of New York in Whipple's case, while it was in strict conformity with the principles of the common law of approvements as modified by the english courts in Rudd's case, is wholly inapplicable to this state.

I am of opinion, therefore, that although the judge who shall try the prisoner in this case may recommend him to the executive for a pardon, it is not his official duty to do so; that it is only an act of favour,
712 which *the judge, the jury, or any person may extend. I am of opinion, also, that the court ought not to continue the prisoner's case, merely to enable him to apply for a pardon.

DOUGLASS and NICHOLAS, J., dissented from both the foregoing opinions, and from the judgment of the court, which was as follows—

This court is of opinion, and doth decide, First, That if a particeps criminis, on the trial of one of the parties to the crime, called as a witness on the part of the commonwealth, voluntarily give evidence, and fully, candidly and impartially disclose all the circumstances attending the transaction, as well those which involve his own guilt as those which involve the guilt of others, he will yet have no right, which a court of law will recognize, to a pardon for his own guilt, and therefore he will have no right to demand from the court a continuance of his cause, until he can have an opportunity to apply to the executive for such pardon.

Secondly, That the court ought in this case to overrule the motion.

PARDONS.

- I. What Pardoning Power Includes.
- II. Conditional Pardons.
- III. Effect of Pardon.
- IV. The Doctrine of Approvers.
- V. Plea of Pardon.

I. WHAT PARDONING POWER INCLUDES.

Nature and Effect of Power.—By the constitution of Virginia, the governor is empowered to grant reprieves and pardons *after conviction*, except when the prosecution has been carried on by the house of delegates, and to remit fines and penalties in such cases and under such rules and regulations as may be prescribed by law. He is also empowered to remove political disabilities consequent upon conviction for offences, and to commute capital punishment. Va. Const., art. 4, sec. 5; *Edwards v. Com.*, 78 Va. 89.

So in West Virginia, power to reprieve is vested in the governor by the constitution, in all cases of felony, where the necessity therefor exists. He is sole judge of such necessity, and his conclusions are not reviewable by the courts, but are binding on the other departments of the government. *State v. Hawk*, 47 W. Va. 424, 34 S. E. Rep. 918. See art. 7, sec. 11, W. Va. Const.

Governor May Pardon before Prisoner is Sentenced.

—Though the Virginia constitution provides that the governor shall have power to pardon only after conviction, it has been held that the governor has authority to pardon a person convicted of a felony by the verdict of a jury, before sentence is passed upon him by the court. *Blair v. Com.*, 25 Gratt. 850.

Governor Has No Power to Commute Except in Capital Case.

—In Virginia the governor can only commute the punishment in capital cases. But in a case, other than a capital case, in which the warrant of the governor spoke as commuting the punishment, it was held that, as it substituted a less for a greater punishment, and was intended to be done, and was done, with the consent of the prisoner, it would be considered a pardon, and not a commutation of the punishment. *Lee v. Murphy*, 22 Gratt. 789.

Where Person is Fined and Imprisoned the Fine Cannot Be Remitted.—Where a person is convicted of a

misdeemeanor and a fine is imposed upon him, and the court sentences him to be imprisoned until the fine is paid, the governor has no authority to remit the fine, though he may remit the imprisonment. *Wilkerson v. Allan*, 23 Gratt. 10.

Pardon Granted by Legislature.—In *Com. v. Caton*, 4 Call 5, the supreme court held void a resolution adopted by the state senate, but not concurred in by the lower house, whereby a pardon was sought to be granted to certain parties convicted of treason.

II. CONDITIONAL PARDONS.

The governor has authority under the constitution to grant a conditional pardon to a prisoner convicted of a felony. But the condition annexed to the pardon must not be impossible, immoral or illegal; but it may, with the consent of the prisoner, be any punishment recognized by statute, or by the common law as enforced in this state. *Lee v. Murphy*, 22 Gratt. 780. See also, *Com. v. Fowler*, 4 Call 85; *Ball v. Com.*, 8 Leigh 780.

III. EFFECT OF PARDON.

Relieves of Punishment and Consequences of Conviction.—The governor's pardon relieves the offender not only of the punishment annexed to the offense whereof he was convicted, but of all penalties and consequences, including the additional punishment imposed, not by reason of the sentence for the second offense alone, but in consequence of that sentence and the sentence in the former case. There is, however, this limitation to the rule: it does not remove political disabilities growing out of his conviction and sentence, nor does it restore an office forfeited, or rights become vested in others by reason of the conviction and sentence. *Edwards v. Com.*, 78 Va. 39. See *Puryear v. Com.*, 83 Va. 51. 1 S. E. Rep. 512.

Distinction between Pardon and Acquittal.—The distinction between a pardon and an acquittal is that a pardon discharges from punishment only, while an acquittal discharges from guilt. *Ball v. Com.*, 8 Leigh 726.

Does Not Release Prisoner from Liability for Costs.—Where, previous to obtaining a pardon, a prisoner is liable for the costs incurred in prosecution, the mere grant of the pardon by the governor does not release him from liability for these costs. *Anglea v. Com.*, 10 Gratt. 606.

For Participating in Rebellion.—A pardon granted by the federal government to rebels, restores the parties to the rights and privileges held or derived from it only. Hence the fact that an attorney, who participated in the rebellion, has been pardoned by the federal government, does not entitle him to be admitted to practice his profession in the state courts without complying with the terms of the act in relation thereto. *Ex parte Hunter*, 2 W. Va. 122.

Where one person has a right of action against another for trespass committed during the rebellion, and the latter is pardoned by the federal government for participating in the rebellion, this does not bar the former's right of action. *Hedges v. Price*, 2 W. Va. 192.

So where a party is sued for false arrest and imprisonment, committed by him during the war, and while he was in the service of a so-called confederate state, a pardon granted to him by the president of the United States, granting amnesty for all offenses committed by him, arising from participation in the rebellion, is not proper or competent evidence. *Caperton v. Martin*, 4 W. Va. 138; *Caperton v. Bowyer*, 4 W. Va. 176.

IV. THE DOCTRINE OF APPROVERS.

The English doctrine relating to the admission of approvers seems never to have been incorporated into the law of this state. And though a *particeps criminis*, called as a witness for the commonwealth on the trial of his accomplice, voluntarily gives evidence, and fully, candidly and impartially discloses all the circumstances attending the transaction, as well those which involve his own guilt as those which involve the guilt of others, he will yet have no right to a pardon for his own guilt. *Com. v. Dabney*, 1 Rob. 606; *Oliver v. Com.*, 77 Va. 590.

V. PLEA OF PARDON.

The plea of pardon may be made after conviction in response to the question whether the accused has anything to say why sentence should not be pronounced. *Blair v. Com.*, 26 Gratt. 850.

713 *Phalen v. The Commonwealth.*

June, 1842.

Lotteries—Privilege of Conducting—Constitutional Law†—Obligation of Contracts.—On the 30th of January 1829, a statute is passed appointing commissioners to superintend the raising by way of lottery the sum of 80,000 dollars, to be paid to the president and directors of a turnpike company for the improvement and repair of their road, and authorizing the commissioners to contract with some proper person for managing and conducting the lottery. The turnpike company, relying on the benefit of the statute, contract debts for the erection and completion of their road, expecting and intending to raise money for the payment thereof by a lottery; such debts being contracted prior to the 25th of February 1834, on which day a statute is passed enacting that it shall not be lawful to draw any lottery within the commonwealth, or to sell any ticket in a lottery to be drawn therein, after the 1st of January 1837, but providing that nothing in the statute contained shall interfere with contracts already made for the drawing of lotteries to extend beyond the 1st of January 1837, or with contracts to be thereafter made, under existing laws, for the drawing of lotteries not to extend beyond the 1st of January 1840. On the 11th of March 1834, a statute is passed appointing two persons commissioners, in place of two of the commissioners appointed by the act of January 1829 (who had resigned), to carry into effect the last mentioned act. No contract for the drawing of the lottery is made by the commissioners until the 19th of December 1839, when they make a contract for that purpose with J. P. who, after the 1st of January 1840, sells a ticket in the lottery, which is proposed to be drawn within the commonwealth. On presentment against J. P. for selling the ticket, *Held*, 1. The act of February 1834 did not impair the obligation of any contract, expressly or impliedly made by the commonwealth with the turnpike company, nor contravene any right of private property vested in the company. 2. The act of March 1834 appointing new commissioners, had not the effect of exempting the lottery authorized by the act of January 1829, from the operation of the act of February 1834.

*For monographic note on Lotteries, see end of case.

†See monographic note on "Constitutional Law" appended to *Com. v. Adcock*, 8 Gratt. 661.

A presentment was made in the circuit superior court for the county of Henrico and city of Richmond, at October term 1840, against James Phalen, charging that he, since the 1st of January 1837, to wit, on the 1st of June 1840, at the city aforesaid, unlawfully did sell and *cause to be sold one certain lottery ticket in a certain lottery to be drawn in this commonwealth, to wit, in a lottery called Alexandria and Fauquier turnpike lottery, and then and there advertised to be drawn at —, the said lottery not being a lottery authorized to be drawn by any contract made with this commonwealth prior to the 25th day of February 1834, or by any contract made since in pursuance of any law of this commonwealth passed prior to the said 25th of February 1834, the drawing of which lottery was not to extend by virtue of said last mentioned contract beyond the 1st day of January 1840; contrary to the act of assembly in such case made. The defendant pleaded not guilty, and the jury impaneled for the trial returned special verdict, in which the following facts were found.

In November 1828, the president and directors of the Fauquier and Alexandria turnpike road presented a petition to the legislature, calling their attention to the importance of that road to the public, and to the fact that the state had an interest in it; stating that the directors and a few of the stockholders, upon their own responsibility, had raised money by which the road was then in excellent condition, except about three miles, which required much repair; and for that object, and the repayment of the money borrowed, praying the passage of a law authorizing a lottery to raise the sum of 30,000 dollars.

In consequence of this petition, a law was passed on the 30th of January 1829, (Acts of 1828-9, ch. 101, p. 99,) by the first section whereof it was enacted "that Hugh Smith, Jacob Morgan, John Loyd, William Dean and Jacob Douglass be and they are hereby appointed commissioners, whose duty it shall be to superintend the raising, by way of lottery or lotteries, the sum of thirty thousand dollars, for the purpose of improving the Fauquier and Alexandria turnpike road." The 2d section enacted "that the said commissioners,

715 or a majority *of them, shall be and they are hereby authorized to contract and agree with some fit and proper person or persons for managing and conducting the said lottery or lotteries." And the 4th section enacted "that the sum hereby authorized to be raised by the said lottery or lotteries, so soon as the whole or any part thereof shall be received by the said commissioners, shall be paid over to the president and directors of the said Fauquier and Alexandria turnpike road company, and by them appropriated in the improvement and repair of the said road."

By an act passed the 25th of February 1834, (Acts of 1833-4, ch. 69, p. 81,) it was enacted, "That it shall not be lawful for any person or persons to draw or cause to

be drawn any lottery or lotteries, or any scheme or schemes in any lottery, within this commonwealth, after the first day of January eighteen hundred and thirty-seven, or to sell or cause to be sold any lottery ticket, or part of any lottery ticket, in any lottery to be drawn therein. And if any person or persons shall, after that day, set up or draw, or cause to be set up or drawn, at any place within the limits of this commonwealth, any lottery whatsoever, every person concerned directly or indirectly as a manager or conductor of such lottery shall be liable to a fine, at the discretion of a jury, of not less than one hundred dollars nor more than one thousand dollars for each offence; and every person who shall be concerned directly or indirectly in setting up or drawing any lottery in any other character than as a manager or conductor thereof, shall be liable to a fine of not less than twenty dollars nor more than one hundred dollars for each offence, at the discretion of a jury. And if any person shall, after the period aforesaid, sell any lottery ticket or any part or share thereof, either in person or by proxy, or shall act as agent, attorney or proxy in making sale of any lottery ticket, or any part or share thereof,

716 in any such lottery, he shall forfeit and *pay for every such offence the sum of twenty dollars. And the several penalties in this act provided shall be recovered by action of debt, presentment, indictment or information in any court of record having jurisdiction of the offence, one half to the informer or person who may sue for the same, and the other half to the commonwealth. Provided, that nothing herein contained shall be construed to extend to or interfere with contracts already made for the drawing of any lottery or lotteries, the drawing whereof, by the provisions of such contract, shall extend to a period beyond the said first day of January eighteen hundred and thirty-seven: And provided also, that nothing herein contained shall be construed to extend to or interfere with any contract which may hereafter be made under and by virtue of any existing law authorizing the same, for the drawing of any lottery the drawing whereof shall not extend beyond the first day of January eighteen hundred and forty."

By an act passed the 11th of March 1834, (Acts of 1833-4, ch. 137, p. 171,) it was enacted (§ 1), "that William L. Hodgson and Bernard Hooe be and they are hereby appointed commissioners, instead of Hugh Smith and John Loyd, resigned, to carry into effect the act passed on the thirtieth day of January eighteen hundred and twenty-nine, 'to authorize the raising by way of lottery a sum of money for improving the Fauquier and Alexandria turnpike road.'" And (§ 2), "That whenever any vacancy or vacancies shall hereafter occur in the commissioners appointed for the purpose aforesaid, by death, resignation, or refusal to act, the same shall be filled by the executive of this commonwealth."

The Fauquier and Alexandria turnpike

company, relying upon the benefit and advantages of the act of January 1829, did, prior to the 25th of February 1834, enter into contracts and incur debts for the erection and completion of their road, ex-

717 pecting and intending to *raise by a lottery, for the payment thereof, the money authorized by the said act of 1829. And the commissioners of the said company did, under the acts of 1829 and March 1834, for the purposes specified in the act of 1829, enter into a contract with the said James Phalen and a certain Francis Morris on the 19th of December 1839, whereby, after reciting the provisions of the said act of 1829, it was witnessed that the said commissioners, parties of the first part, in consideration of the sums of money thereafter agreed to be paid to them by the said Phalen and Morris, parties of the second part, did appoint the said parties of the second part the sole and exclusive managers and conductors of the lotteries aforesaid, and did covenant and agree that such appointment should not be revoked by them or any of them, and that the sole and exclusive right of drawing the said lottery or lotteries, so far as the parties of the first part were by the law aforesaid authorized to contract for the same, should be and remain vested in the parties of the second part, until the payments thereafter stipulated to be made by them should amount to the sum of 30,000 dollars authorized to be made by the said act; to be used and exercised by the parties of the second part, by drawing so many lotteries as they might think proper, under such scheme or schemes as they might devise. And the parties of the second part agreed to take on themselves the management of the lottery and lotteries aforesaid, and to pay to the parties of the first part, as the consideration of the said contract or agency, the sum of 1500 dollars per annum, to be computed from the 2d of December 1839, and in that proportion for any part of a year. It was further agreed, That if, during the then session of the general assembly, an act should be procured exempting the lottery and lotteries authorized by the act of 1829 from the operation of the act

718 of February 25, 1834, the parties of the second part would pay to the *parties of the first part an additional compensation at the rate of 1000 dollars per annum, the payment of the said additional sum to date from the passage of such act. That whereas the constitutionality of the act of February 25, 1834 had been doubted, the parties of the second part, in case no act should be passed during the then session of the general assembly, exempting the lotteries authorized by the act of 1829 from the operation of the act of 1834, would, at their own proper expense, use all ways and means which might be expedient and necessary, to have settled and determined the constitutionality of the last mentioned act, and would, by appeal, or in such other way as should be legal and necessary, obtain on that point the sentence,

judgment or decree of the highest legal tribunals of the state of Virginia and of the United States, to which the question could be taken. That if, before a final decision of the said question should be obtained, and after the end of the then session of the general assembly, an act of that assembly should be procured suspending the operation of the act of February 1834 in regard to the lottery and lotteries aforesaid, the parties of the second part would, in lieu of the payments before provided, pay to the parties of the first part, during the period of such suspension, the sum of 2000 dollars per annum, and at that rate for any portion of a year, to date from the passage of such act; till which time, the payments before agreed on were to be made. That the payments aforesaid, and all rights and powers of the parties of the second part to continue to act under the contract, or to draw any lottery or lotteries under the same, should cease as soon as, from the payments to be made under the foregoing provisions, the parties of the first part should have received the said sum of 30,000 dollars. That if, by any legal proceedings, the parties of the second part should be prevented from drawing the lottery or lotteries aforesaid, then the payments 719 before *stipulated to be made by them should cease and determine during the time they should be so prevented, and their liability to make any such payments should only recommence on the decision of the highest judicial tribunal to which the question could be taken, that the act of February 1834 is unconstitutional, or on the removal of such legal impediments.*

The defendant James Phalen was, at the time of the presentment against him, one of the managers of the said lottery authorized by the aforesaid acts of January 1829 and March 1834; and under the said acts, and by virtue of the said contract, acting for the said James Phalen and Francis Morris, he sold the ticket in the presentment mentioned, at the city of Richmond and within the jurisdiction of this court. The said lottery was to be drawn in the commonwealth of Virginia.

If, upon the foregoing state of facts, the law should be for the commonwealth, then the jury found the defendant guilty; but if the law should be for the defendant, then they found him not guilty.

The matters of law arising upon the special verdict being argued, the circuit court held that the law was for the commonwealth, and rendered judgment that the defendant forfeit and pay to the commonwealth 20 dollars, and that he pay the costs of the prosecution. A writ of error to the judgment was awarded by this court, upon a petition of the defendant alleging that the same was erroneous for the reasons follow-

*The petition to the legislature, the several acts of assembly, and the contract for drawing the lottery, mentioned in this report, were fully set forth in hæc verba in the special verdict.—Note in Original Edition.

ing: 1. Because the act of February 1834 does not profess to repeal, and does not repeal, the act of January 1829 which conferred the right to draw the lottery, and therefore the petitioner had lawful authority to sell the lottery ticket in the presentment mentioned. 2. Because the
720 *act of March 1834 is to be regarded as reenacting the law of January 1829, and being posterior in date to the law of February 1834, if there be any inconsistency between the two laws, the posterior must prevail. 3. Because the right to draw the lottery, conferred by the act of January 1829, was a valuable franchise and vested right, which it was not competent to the legislature to revoke; therefore if the act of February 1834 is to be regarded as revoking the right, it is unconstitutional and void, and whether it be so regarded or not, the petitioner ought to have been acquitted.

The cause was argued here by Lyons, Stanard and Robinson for the plaintiff in error, and Scott and Brooke for the commonwealth.

SUMMERS, J., delivered the opinion of the majority of the court.—This cause has been fully and ably discussed, and under other circumstances the judges would have adverted more fully to the reasonings and illustrations which have been submitted to them, and to the authorities to which their consideration has been directed. The time necessarily occupied in a careful examination of the leading principles relied on, has, however, left them but a limited space for embodying their decision, with some of the prominent considerations by which they have been governed; and they therefore content themselves with shortly announcing the conclusions at which they have arrived after a very careful examination of the whole case.

The Fauquier and Alexandria turnpike company, even with the aid of the government subscription to their capital, found their road incomplete, and their resources inadequate to the repayment of money borrowed and expended in the construction of the work; and in the winter of 1828-9 applied to the general assembly for permission to raise 30,000 dollars by a lottery.

721 *This application resulted in the act of the 30th January 1829, authorizing certain commissioners therein named to contract with fit and proper persons for managing and conducting the lottery or lotteries, and for raising thereby the sum of money before mentioned, to be applied to the improvement and repair of the road.

The expediency and moral propriety of raising money for public purposes by means of lotteries, at all times questionable, seems to have attracted legislative consideration in 1834, and to have resulted in a change of the course of our public policy in relation to lotteries, giving rise to the act of the 25th of February 1834. By this act, the drawing of lotteries and the selling of lottery tickets within the state, after the 1st of January 1837, are prohibited under heavy

penalties; with a proviso in favour of lotteries for the drawing of which contracts had been previously made, leaving all such lotteries and the drawings thereof to be governed by the preexisting laws; and a second proviso, declaring that nothing contained in the act should be construed to extend to or interfere with any contract subsequently made for the drawing of any previously authorized lottery, if the drawing thereof should not extend beyond the first of January 1840. The lottery authorized on behalf of the Fauquier and Alexandria turnpike company, falling within the terms of the latter proviso, might, according to the provisions of the act, be contracted for and drawn in one or more lotteries or classes, until the sum of 30,000 dollars was raised by the commissioners for the improvement and repair of the road; provided these operations did not extend beyond the 1st of January 1840.

From the resignation of two of the commissioners, no measures were taken for the execution of the act of the 30th January 1829, until the 11th of March 1834, fourteen days after the passage of the prohibitory act; when the same legislature, by
722 an act of that date, appointed *commissioners in place of those who had resigned, and authorized the executive to fill any vacancies that might subsequently occur.

It is earnestly and ingeniously contended that the provisions of the act of March 1834 are repugnant to those contained in the act of the 25th of the previous month, in this, that the appointment of the new commissioners, and the power given to the executive to fill subsequent vacancies in their number, are equivalent to the reenactment of the act of 1829 with the new provisions incorporated therein; which, forming a grant of the lottery right without limitation of time as to the exercise of it, are repugnant to and operate a repeal of the provisions in the act of February 1834, limiting the exercise of the right to the first of January 1840.

The constructive repeal of statutes is in all cases to be avoided, where the legislative intentment may be otherwise satisfied, and the supposed repugnancy reconciled by a construction giving effect to both. These two statutes, enacted by the same lawgivers within two weeks of each other, present a case which strikingly imposes this duty upon the court. We think the duty performed by regarding the last statute as reviving, under the limitation as to time prescribed by the former, the original statute of 1829; thus giving to the turnpike company the full benefit of their lottery privilege for nearly six years, and forbidding its exercise beyond that period. This restriction of the right in point of time is, we think, no more than an application of the ordinary legislative power of limiting the exercise of even vested and ascertained rights, where the public weal or the safety of society may require it. If this construction reconciling the provisions of those acts

were doubtful, we should find a strong motive for its adoption, in the necessity of recognizing in the legislature the power to correct improvident and sometimes injurious enactments, where they may not have ripened into contracts, *or resulted in the investment of rights which cannot be invaded without perfidy or bad faith.

The contemporaneous and subsequent acts regulating the licensing of the venders of lottery tickets, and imposing taxes upon them, cannot, as contended, operate a repeal of the act of February 1834, as the sale of tickets in lotteries the drawing of which had been contracted for before that date, and of tickets in foreign lotteries, was and yet is authorized by law, and the sale of other descriptions of lottery tickets only became unlawful after the 1st of January 1840; leaving to the keepers of lottery offices a field of operation to which the license and tax laws applied. And the increased rates of taxation on such licenses, instead of furnishing any implication of the legislative intent to abandon the policy of the restraining act of February 1834, evince an increased solicitude to repress this immoral and sometimes ruinous pursuit of gain, by the requisition of heavier contributions to the treasury from the lottery offices.

The judgment of the circuit court is, however, impugned on a graver ground. It is contended that the act of the 30th of January 1829 conferred on the turnpike company a franchise under which expenditures of money were made, and formed an implied contract between the government and the company, that the latter should enjoy, unimpaired, all the rights and advantages ensuing to them under the act, until they should realize under its provisions the sum of 30,000 dollars: that the act of February 1834, limiting and restraining the exercise of the rights of the company to the 1st of January 1840, impairs the obligation of this contract, and is therefore void: and that the franchise with which the company was thus invested, entered into and became a part of the property of the corporation, of which, under the constitution of Virginia, they could not be deprived without just compensation. This argument submits

724 "to this court the solemn duty of comparing the provisions of the act of February 1834 with the paramount law, and of pronouncing whether those provisions are void or valid. This important judicial function, which results from the structure of our government, is, happily for the country, not often called into action; but when demanded by the occasion, it will be exercised with firmness, and the question considered with the care and deliberation called for by its importance.

In deciding this case, it becomes necessary to consider the nature and quality of the franchise, if it be one, which is granted to the turnpike company by the act of January 1829.

A franchise may consist in personal privilege or exemption, or in rights or privileges connected with personal or real estate; and

in the latter aspect it is a species of incorporeal hereditament. The one under consideration may be properly characterized as a liberty or license to effect a particular purpose by prescribed means; which may or may not, at particular periods of its existence, and by reason of the rights and immunities which have sprung from its exercise, give rise to an implied contract or obligation for preserving it, and guarding it from injurious modifications, or become an element of private property, beyond the reach of the power of government, without due compensation. In looking into the inception and qualities of this privilege or license, it is found that the company had borrowed money for the construction and repair of the road, which circumstance formed, among others, an inducement to apply for a lottery; yet the act directs that the funds to be raised thereby shall be appropriated to the improvement and repair of the road. It is stated in the verdict, that the company, relying on the benefit and advantages of the act of January 1829, did, prior to the 25th of February 1834,

725 enter into contracts and incur *debts for the erection and completion of their road, expecting and intending to raise money for the payment thereof by the lottery: but whether these are inconsiderable amounts referred to for the purpose of giving colour, or amounts of sufficient magnitude necessarily to couple the lottery privilege with their security and payment, does not appear. Be this as it may, however, about five years elapsed without any successful attempt to render the lottery effective; and then the only measure was the act appointing two new commissioners, by which the company was again placed in a situation to render its privilege available. Five years more rolled on, when, within eleven days of the time at which the act of February 1834 went into operation, the contract of the 19th of December 1839, between the commissioners and Phalen and Morris, was entered into. Throughout this whole period, the franchise, liberty, license or privilege remained, as on the day of its enactment, a naked authority to contract for and draw a lottery, and, in the opinion of the court, at no time took the form of a contract, either express or implied, or that of private property, over which the legislative power was restrained. As to the power of the general assembly to limit, change or abolish a lottery privilege whenever the preservation and inculcation of sound morals may require it, we do not find it necessary to express any opinion; being satisfied, without reference to the general power, committed to that body, of guarding the public weal, that the act of the 25th February 1834 was not in contravention of any legal right, vested in the turnpike company, and coming within the constitutional provisions on which the argument of the case has placed this question.

Separating the question from the general powers claimed on behalf of the commonwealth to reside in the legislative depart-

ment of the government, to our minds it is manifest that this dormant right to draw *the lottery, which was revived by the act of March 1834, must be taken as subordinate to and limited by the act of the 25th of the previous month; that those statutes must be taken as in pari materia, and receive the same construction as if embodied in one act; that there is nothing repugnant in the provisions of the one to those of the other, when the first is taken as limiting the time within which the right under the second is to be exercised; and that the well ascertained principles governing the construction of statutes not only authorize but require the interpretation which we have given to these contemporary acts.

There are provisions in the contract of the 19th December 1839, fully contemplating the questions now discussed, and indicating the submission of them to this court as an experiment in reference to the before mentioned statutes; but we have examined those questions without regard to the motives which may have brought this cause here, or which may carry it further; leaving our decision to be reviewed, if that power exists elsewhere.

CHRISTIAN, J., dissented.

Judgment affirmed with costs.

LOTTERIES.

What Amounts to Lottery.—A guarantee, or written assurance or promise, whereby the warrantor binds himself that he will pay the prize which may be drawn to a certain number in a lottery, when sold by the proprietor of a lottery, or a duly authorized agent of the proprietor, is strictly a lottery ticket, although it is not written in the usual form of lottery tickets; and the sale of such guarantee by such proprietor or his agent, is forbidden by the act of 1825. *Com. v. Chubb*, 5 Rand. 715.

But taking a chance in a raffle is not the same offence as the purchase of foreign lottery tickets, and is not punishable under the act prohibiting that offence. *Com. v. Garland*, 5 Rand. 652.

Repeal of Privilege of Conducting Lottery.—The privilege of conducting a lottery is not a contract. Any one, therefore, who accepts a lottery charter does so with the implied understanding that the people in their sovereign capacity, and through their properly constituted agencies, may repeal it at any time when the public good shall require, whether it be paid for or not. *Justice v. Com.*, 81 Va. 209; *Dismal Swamp Canal Co. v. Com.*, 81 Va. 220; *Phalen v. Com.*, 1 Rob. 713.

Applying this rule, it was held that the act of Feb. 25, 1834, for suppressing after a certain period, the drawing of lotteries within the state and the sale of tickets in lotteries to be drawn therein, except as to lotteries already authorized, did not impair the obligation of any contract for any franchise already made. *Phalen v. Com.*, 1 Rob. 713.

Party Indicted Not Entitled to Continuance.—Under sec. 4010, Va. Code, where a person is indicted for conducting a lottery, process may issue immediately, and if the accused appears and pleads to the charge the trial shall proceed without delay.

Hence where the accused appears and pleads to the charge and moves for a continuance it is no error for the trial court to refuse a continuance. *Lawrence v. Com.*, 86 Va. 573, 10 S. E. Rep. 840.

Self-Crimination by Party Indicted for Conducting a Lottery.—The statute (Code 1873, ch. 196, sec. 20) which provides that a witness giving evidence in a prosecution for unlawful gaming shall never be proceeded against for any offence of unlawful gaming committed by him at the time and place indicated in such prosecution, does not apply to a prosecution for managing and conducting a lottery; and a witness cannot be required to testify in such case if he will thereby criminate himself. *Temple v. Com.*, 75 Va. 892.

Effect of Mistake in Drawing a Lottery.—A mistake in the drawing of a lottery is fatal, and a redrawing must take place. *Madison v. Vaughan*, 5 Call 562.

Liability of Subscriber to Creditors of Concern Who Conduct the Lottery.—In *Cardwell v. Kelly*, 95 Va. 572, 28 S. E. Rep. 958, a subscriber to the stock of a corporation, who was allured to make the subscription by the chance of being allotted a lot or lots in a drawing for distribution of lots of unequal value, was held liable for the money due on his subscription to the creditors of the corporation, whose debts were contracted upon the faith of his and other subscriptions. See, in connection with the general subject, *Lyons v. Brown*, *Gilmer* 105.

727 *M'Clintic v. The Commonwealth.

June, 1842.

Indictment—**Building Fence across Road.**—Indictment on statute of 1834-5, ch. 77, § 20, against owner and tenant of land through which a public road passes, for building a fence across a portion of the road, and continuing the fence so built across said road for three days, *Held* sufficient on demurrer.

Same—Same—Evidence.—On trial of such indictment, court refuses an instruction asked by defendant, that the jury must be satisfied from the evidence that the fence was built across the road: *Held*, the instruction was properly refused.

Same—Same—Verdict—Judgment.—Verdict on such indictment finds defendant guilty, and assesses his amercement to five dollars; and judgment is rendered for the amercement and costs: *Held*, there is no error in such proceeding.

An indictment was found in the county court of Greenbrier against Thomas M'Clintic, charging that he did, on the 22d of November 1839, "build a fence across a portion of the public road in the county aforesaid, leading from &c. being then and there owner and tenant of the lands through which said public road runs, and did then and there continue the said fence so built as aforesaid across said public road, from the said 22d day of November 1839 to the 25th day of November 1839, contrary to the form of the statute in such case made"

*See monographic note on "Indictments, Informations and Presentments" appended to *Boyle v. Com.*, 14 Gratt. 674.

†The statute of March 3, 1835 (Acts of 1834-5, ch. 77, § 20, p. 66, 7), enacts, that if any person shall obstruct a public road by fencing or otherwise, he shall for-

&c. The defendant demurred to the indictment, and the court overruled the demurrer. He then pleaded not guilty. At the trial, he moved the court to instruct the jury, that, under this indictment, they must be satisfied from the evidence,

that the fence in the indictment
728 *mentioned was built across the public road therein mentioned: which instruction the court refused to give; and he excepted to the refusal. The jury found him guilty, and assessed his amercement to five dollars, and the court rendered judgment against him for the said amercement and the costs of the prosecution. That judgment was affirmed in the circuit court of Greenbrier, upon a writ of error thereto sued out by the defendant: and the general court awarded a writ of error to the judgment of affirmance, upon a petition of the defendant assigning for error, 1. that his demurrer to the indictment was improperly overruled, the charge of building a fence across a portion of the road being insufficient; 2. that the instruction he asked for at the trial was improperly refused; 3. that it was improper for the jury to assess an amercement by their verdict, instead of merely finding how long the fence had been continued across the road, and leaving the court to render judgment for the fine ascertained by law.*

BROWN, J. I am of opinion that the indictment in this case is bad, and ought to have been so adjudged on the demurrer thereto: I should therefore be for reversing the judgment of the county court sustaining the indictment, and of the circuit court affirming the same, and for giving a judgment here in favour of the defendant. But a majority of the court being of opinion that the indictment is good, and that the judgment ought not to be reversed on that ground, I can see no error in the refusal of the county court to give the instruction set out in the bill of exceptions, and am therefore for affirming the judgment.

Judgment affirmed with costs.

729 *DECEMBER TERM 1842.

JUDGES PRESENT.

<i>Smith,</i>	<i>Baker,</i>
<i>Lomax,</i>	<i>Christian,</i>
<i>Scott,</i>	<i>Douglass,</i>
<i>Leigh,</i>	<i>Wilson,</i>
<i>Duncan,</i>	<i>Johnston,</i>
<i>Fry,</i>	<i>Robertson,</i>
<i>Clopton,</i>	<i>Bayly.</i>

felt and pay a sum not less than five nor more than thirty dollars for every offence; "and when any fence shall be made across a public road, the owner or tenant of the land shall pay one dollar and sixty-six cents for every twenty-four hours the same shall remain." The last clause is nearly a transcript from 2 Rev. Code of 1819, ch. 286, § 11, p. 288.—Note in Original Edition.

*See House's case, 8 Leigh 755, where an objection of a similar kind was made to the verdict, and overruled. (Note by reporter.)

The Commonwealth v. Cook.

December, 1842.

Indictment*—Perjury—Insolvents Swearing to Schedule.—Indictment against an insolvent debtor for perjury in swearing to a schedule which did not discover certain debts owing to him, held bad on demurrer, for not averring that he well knew and remembered that the omitted debts were then justly due and owing to him.

John Cook was indicted in the circuit superior court of Pendleton county, at May term 1841, for perjury in falsely swearing to a schedule delivered in by him under the act for the relief of insolvent debtors, 1 Rev. Code, ch. 134, § 31, p. 536, 7. The indictment charged that the defendant did wilfully, corruptly and falsely swear that the schedule contained to the best of his knowledge and remembrance, a full account of all his estate and such debts as were owing to him, when in truth certain debts owing to him (which were described in the indictment) "were not embraced or included in *the said schedule so subscribed and delivered by the said Cook, and the said Cook then and there well knew and remembered that the said schedule did not contain the said debts." But there was no averment that the defendant knew or remembered that the debts omitted in the schedule were owing to him.

The defendant demurred to the indictment: whereupon, with his consent, the court adjourned to this court the question, What judgment ought to be given upon the demurrer?

A written argument of the case was submitted by R. Gray for the defendant.

SMITH, J., delivered the resolution of the court.—Without deciding, or meaning to express an opinion, upon any other question raised or arising in this cause, we are all of opinion that the indictment is fatally defective in not averring that the defendant, at the time of giving in the schedule and taking the oath, well knew and remembered that the debts charged to be improperly omitted in the said schedule were then justly due and owing to him. The court is therefore of opinion and doth decide, that the demurrer to the indictment ought to be sustained.

731 *Green v. The Commonwealth.

December, 1842.

Criminal Law—Right to Speedy Trial—Delay for Five Terms.—A prisoner charged with felony being in-

*See monographic note on "Indictments, Informations and Presentments" appended to Boyle v. Com., 14 Gratt. 674.

+Criminal Law—Right to Speedy Trial—Delay for Five Terms.—The principal case is cited in Com. v. Adcock, 8 Gratt. 686, 693; Archer v. Com., 10 Gratt. 684 et seq.

See also, State v. Newsom, 13 W. Va. 869. See

dicted at the first term of the circuit court after his examination, the case is continued at that term for the want of time to try it. At the second term, the case is continued on the motion of the prisoner, upon the ground of the absence of a material witness for him. At each of the three succeeding terms, the case is again continued for the want of time to try it. **HOLD.** that upon the expiration of the last of the five terms, the prisoner became entitled, under the statute 1 Rev. Code, ch. 169, § 28, to be forever discharged of the crime imputed to him.

In the circuit superior court for the county of Henrico and city of Richmond, at October term 1840, twenty-four indictments were found against Benjamin W. Green, for several felonies, for which he had been duly examined before the court of hustings for the city of Richmond, and, on the 15th of June 1840, remanded by that court for trial in the said circuit court. The indictments were found at the term of the circuit court next following the examination. The prisoner was arraigned at the same term, on one of the indictments; whereupon various motions and points of law were made in the cause, the discussion of which occupied the time of the court till the 12th of November 1840, the last day of the term, when the attorney for the commonwealth and the prisoner stated that they were ready to go to trial; but it being then six o'clock in the evening, the court, for want of time to proceed with the trial, ordered that the cause be continued till the next term.

At April term 1841, all of the said prosecutions were again continued, on the motion of the prisoner, and on his oath that B. W. Mallory was a material witness for him, and was then absent.

At October term 1841, Green was tried upon the indictment on which he had been formerly arraigned. The trial lasted from the 30th of October to the 12th of November, when the jury returned into court with a verdict of not guilty, and the prisoner was acquitted of the felony charged in that indictment, but continued in custody to answer the other indictments. On the same 12th of November, the last day of that term, an order was entered containing all criminal causes which had not been already tried or continued.

On the last day of the ensuing term, to wit, on the 4th of May 1842, Green appeared in court, in discharge of his recognizance entered into before the general court,* to

answer the commonwealth of the felonies laid to his charge in the 23 remaining indictments; and for reasons appearing to the court, he was permitted to give bail for his appearance on the 6th of July† ensuing, to answer the said indictments, and thereupon entered into a recognizance accordingly.

On the 20th of July† 1842, Green appeared in discharge of his recognizance last mentioned; and on the motion of the attorney for the commonwealth, who stated as his opinion that there was not then sufficient time at that term for the trial of said Green upon any one of the indictments against him, it was ordered that the said trials be postponed until the next term.

733 Whereupon *Green entered into a new recognizance to appear accordingly.

On the last day of the following term, to wit, the 12th of November 1842, Green appeared according to the condition of his recognizance entered into on the 20th of July; and the court, being of opinion that there was not then sufficient time at that term to try him upon any one of the indictments, permitted him to give bail for his appearance at the next term: whereupon he entered into a recognizance accordingly, with sureties, one of whom was Dabney M. Miller.

And now Green presented a petition to the general court, stating that he had been arrested and was detained in custody by Miller, one of his bail in the recognizance last aforesaid, under pretence of authority derived therefrom: setting forth the proceedings had against him in the circuit court upon the several indictments aforesaid: insisting, that, as he had not been tried within the time prescribed by the statute, 1 Rev. Code, ch. 169, § 28, p. 607,‡ he

ber term 1841. See *Green v. Commonwealth*, 11 Leigh 677.—Note in Original Edition.

†The court held in July 1842 was held in pursuance of an act passed the 26th of March 1842, (Acts of 1841-2, ch. 69, § 2, p. 43,) which enacts, that the judge of the circuit superior court of law and chancery for the twenty-first circuit on the common law side thereof, "at the end of any term of the said court now appointed by law to be holden" for the trial of criminal causes, "when the same may be necessary, may and he is hereby authorized and required to adjourn such court to such day in the recess as to him may seem most convenient; and agreeably to such adjournment, an intermediate term, not exceeding fifteen judicial days, shall be held by the said judge for the trial of all criminal causes which were depending and could lawfully have been tried, but had not been tried, at the term from which such intermediate term had adjourned."—Note in Original Edition.

‡"Every person charged with treason or felony, who shall not be indicted before or at the second term after he shall have been committed, unless the attendance of the witnesses against him appears to have been prevented by himself, shall be discharged from his imprisonment, if he be detained for that cause only; and if he be not tried at or before the third term after his examination before the justices, he shall be forever discharged of the crime, unless

monographic note on "Constitutional Law" appended to *Com. v. Adcock*, 8 Gratt. 661.

In *McCann v. Com.*, 14 Gratt. 577, the court said: "Upon the supposition that the law intends a discharge to flow from a continuance beyond the third term, a prisoner, if still held in custody after the expiration of such term, would be illegally detained, and would be discharged upon a *habeas corpus*. *Green's Case*, 1 Rob. R. 731."

Right of Bail to Custody of His Principal.—The principal case is cited in *Levy v. Arnsthall*, 10 Gratt. 645.

*He was bailed by the general court at its Decem-

was entitled, by virtue of that statute, to be forever discharged of all the crimes imputed to him by the several indictments pending against him in the circuit court; that the said court had therefore no power to require from him, at October term 1842, a recognizance for his further appearance to answer those indictments, and such recognizance could not confer upon the bail therein any legal authority to take or detain him in custody: and praying
734 *a writ of habeas corpus to bring him before the court, to the end that he might be discharged from the custody in which he was illegally held by Miller.

The general court awarded the habeas corpus; to which Miller made return, that he had taken Green into his custody, and now detained him therein, by virtue of his authority as one of Green's bail in the recognizance entered into before the circuit court on the 12th of November 1842, and for no other cause.

The cause was argued here by Taylor and Lyons for the petitioner, and the attorney general for the commonwealth.

LOMAX, J., delivered the opinion of the court.—The court is of opinion that by the terms of the act of assembly, 1 Rev. Code, ch. 169, § 28, the prisoner not having been tried at or before the third term after his examination, and this case not falling within the exception stated in the same law, he was entitled to be forever discharged of the crimes with which he stood charged. His right to this discharge, upon the adjournment of the circuit court at its last term, became complete and was consummated. That court, however, upon its adjournment, ceased to have a capacity to pronounce by its order the discharge to which the prisoner was entitled by the law. As the right of the prisoner to his discharge from the crimes imputed to him was given him by law, under the circumstances provided for, as a paramount right controlling and terminating all the proceedings by which he had been held in custody before the end of the term of the circuit court, the majority of this court are of opinion that the prisoner is entitled, upon this proceeding, to be now discharged from the custody of his bail, which ought no longer to be allowed after the law has forever discharged him of *the crimes with
735 which he was charged in the circuit court.

From the foregoing opinion, LOMAX and LEIGH, J., dissented.

Petitioner discharged from the custody of his bail.

Heath v. The Commonwealth.

December, 1842.

Criminal Law—Jurors—Right of Prisoner to Examine on Voir Dire.—A person called as a juror upon a trial for felony and sworn to answer questions

such failure proceed from any continuance granted on the motion of the prisoner, or from the inability of the jury to agree on their verdict."—Note in Original Edition.

touching his competency, having deposed that he has formed no opinion nor come to any conclusion on the case, prisoner's counsel is about to interrogate him farther, and asks whether he has not conversed much about the case?—when court arrests the examination, and decides that no farther question shall be put to the juror by prisoner's counsel, and that he is a competent juror: **HOLD**, such proceeding and decision of the court are erroneous, and judgment against prisoner must be reversed therefor.

Same—Same—Competency—Preconceived Opinions.*—The doctrine laid down in Oslander's case, 3 Leigh 780, and Armistead's case, 11 Leigh 687, as to the disqualification of jurors by preconceived opinions respecting the case of the accused, reaffirmed.

Same—Same—Same—Same.—A person is not rendered incompetent as a juror in a criminal case, by the formation of a legal opinion upon facts previously presented to his mind, as he would be by formation of previous convictions in respect to the facts themselves.

Same—Murder—Evidence—Proof of Distinct Felony.—On a trial for murder, evidence that the prisoner, on the same day the deceased was killed, and shortly before the killing, shot a third person, **HOLD** admissible under the circumstances of the case, notwithstanding the evidence tends to prove a distinct felony committed by the prisoner; such shooting, and the killing of the deceased, appearing to be connected as parts of one entire transaction.

Same—New Trial—Perjury of Jurors on Voir Dire—Discovery after Verdict.†—After a verdict of conviction for murder in the first degree, prisoner adduces testimony that two of the jurors who tried the case, and who on the voir dire declared that they had not formed or expressed any opinion as to the guilt or innocence of the
736 prisoner, *had in fact, previous to the trial, expressed decided opinions that the prisoner

***Criminal Law—Jurors—Preconceived Opinion.**—See foot-notes to Com. v. Hallstock, 2 Gratt. 564, and Shinn v. Com., 32 Gratt. 901.

The principal case is cited in State v. Baker, 33 W. Va. 324, 10 S. E. Rep. 641.

See monographic note on "Juries" appended to Chahoon v. Com., 20 Gratt. 733.

†**Same—Same—Challenging Jurors.**—A new trial will not be granted in a criminal case for matter that is a principal cause of challenge to a juror, which existed before he was elected and sworn as such juror, but which was unknown to the prisoner until after the verdict, and which could not have been discovered before the juror was so sworn by the exercise of ordinary diligence; unless it appears that the prisoner suffered injustice from the fact that such juror served upon the case. State v. Greer, 22 W. Va. 824; State v. McDonald, 9 W. Va. 466; State v. Hobbs, 37 W. Va. 833, 17 S. E. Rep. 385; Sweeney v. Baker, 13 W. Va. 228; Dilworth v. Com., 12 Gratt. 698; Bristow v. Com., 15 Gratt. 646. All the above cases cite the principal case for this proposition.

See foot-notes to Dilworth v. Com., 12 Gratt. 698, Com. v. Hallstock, 2 Gratt. 564, and Bristow v. Com., 15 Gratt. 634.

See also, Beck v. Thomson, 31 W. Va. 459, 7 S. E. Rep. 447; State v. Strander, 11 W. Va. 745; Zickfoose v. Kuykendall, 12 W. Va. 23; Jones' Case, 1 Leigh 598.

was guilty and ought to be hung; of which circumstances prisoner alleges he had no knowledge until since the verdict was rendered: and on this ground he moves to set aside the verdict. HELD, 1. Such enquiry was open, and the evidence admissible, for the purpose of shewing perjury and corruption in the jurors. But, 2. It belonged exclusively to the judge who presided at the trial, to weigh the conflicting credibility of the witnesses adduced by the prisoner and of the jurors, and to decide whether, in justice to the prisoner, and upon all the circumstances of the case, a new trial ought or ought not to be awarded.

Fletcher Heath was indicted, in the circuit superior court for the county for Henrico and city of Richmond, of the wilful murder of Delia Harris. At October term 1842, a jury being impaneled for his trial found him guilty of murder in the first degree, and the court passed sentence of death upon him.

In the course of the proceedings, the court gave opinions upon several points against the prisoner, to which he excepted.

I. Upon the trial of the cause, Richard Malone was called as a juror from among the bystanders, and being sworn to answer questions touching his competency as a juror, deposed, that he has formed no opinion or come to any conclusion upon the case of the prisoner; what he has heard was rumour, and he does not know that he has heard all the circumstances. Whereupon the counsel for the prisoner being about to interrogate the juror farther, for the purpose of shewing farther the state of his information and opinion of the case, and having asked the juror whether he had not conversed much about the case? the court arrested him, and decided, that after the answer above stated by the juror, no farther question should be put to him by the counsel for the prisoner, and that the juror was a competent juror. To which opinion of the court, the prisoner excepted.

737 *II. Several other persons, namely, A. L. Royster, N. Q. Crow, D. A. Fisher and Walker Haxall, being called as jurors upon the trial, and examined on oath touching their competency, were thereupon challenged by the prisoner for cause; but the court in each case overruled the challenge; and the prisoner in each case filed a bill of exceptions. The purport of those exceptions need not be farther stated.

III. Upon the trial of the cause, the attorney for the commonwealth, having introduced evidence that Delia Harris was, some 10 or 15 minutes before 12 o'clock of the night of Friday the 28th of January 1842, killed by several severe blows or wounds inflicted with a large knife or some other sharp instrument, and having offered further evidence for the purpose of identifying the prisoner as the person who inflicted the mortal blows, and for the purpose also of shewing the weapon wherewith they were inflicted, and (inter alia) having produced a leathern scabbard of a bowie knife, which was proved to have been found in the room of the deceased, lying partly under

a bureau there, on the evening after her death,—then introduced Bennett Scott as a witness, who testified, That on the night on which the said Delia Harris was killed as aforesaid, before the fact occurred, namely, about 8 o'clock in the evening, he the witness went to the house where the prisoner and one Carter Wells lived, and there he played a game of cards with the prisoner, Wells being absent at the time. That the prisoner shortly left off playing, and went to mending a pair of pantaloons. That during this time, witness asked the prisoner where Wells was? and the prisoner said he had gone to the theatre. That when the prisoner had done mending the pantaloons, he took from the pocket of those he had on, a pistol, which he laid on the corner of the sideboard, and then pulled off the pantaloons he had on, and put on those he had mended, and put the same pistol in the pocket or waistband thereof. That the witness told the prisoner he had best not carry the pistol; and prisoner said, he always carried it. That the prisoner then said to the witness, "Do you know that I would kill two persons this night if I came across them? If I had had a half pint of brandy, I would have done what I intended to do, at Bradley's, and it would have been all over with them." That the prisoner had before been talking of Carter Wells and Delia Harris, and said they had been together at Bradley's that evening; he said that Wells and himself had rode out together that evening, and stopped at Bradley's, where Delia Harris then was. That the prisoner said, he would not mind killing any person; that he had once before shot a woman at a ball in Petersburg, and shot at a man in a bar room. That the witness, on the same evening, before this conversation between himself and the prisoner, had seen Delia Harris and Martha Gilliam going to the theatre, and had mentioned this to the prisoner, which he supposed was the reason the prisoner came to speak of Delia Harris.

And then the attorney for the commonwealth introduced the above named Carter Wells as a witness, who testified, That on the night the said Delia Harris was killed, and before she was killed, namely, about 8 o'clock in the evening, the witness being about to go to the theatre, the prisoner desired him to tell Delia Harris, she must not let him in if he came there the next day; if she did, he would kill her. That the witness did see Delia Harris at the theatre, and told her what the prisoner had said; which she seemed to pay no regard to. That the witness and Delia Harris came from the theatre together, and parted near the witness's house; he went home, and she towards her own house—

And the witness was proceeding, when he was stopped by the prisoner's counsel; who, apprehending that the witness was about to detail the circumstances attending the shooting of himself (the witness) by the *prisoner on the same night

and shortly before the said Delia Harris was killed, objected that, on the trial of this indictment, it was not competent for the commonwealth to offer any evidence for the purpose of proving any other felony or crime committed by the prisoner on another person, at another place, and at another time, though on the same night; much more, evidence of the substantive distinct felony of shooting the witness Wells, for which there was another indictment now pending against the prisoner. The attorney for the commonwealth avowed his purpose to be, to prove that the prisoner shot the said Wells with a pistol very shortly before the said Delia Harris was killed, and at the house where the prisoner and Wells both lived, and to prove all the circumstances attending that shooting, and especially to prove that after the shooting of Wells, the prisoner got a bowie knife in a scabbard, which was the same scabbard found in Delia Harris's room as above mentioned; and that he offered evidence of the shooting of Wells by the prisoner, because that shooting and the killing of Delia Harris were parts of one entire transaction, and the fact of the shooting and the circumstances attending it were parts of the same chain of evidence, indissolubly linked with the other evidence in this case, especially with the bowie knife and the scabbard found and identified as aforesaid, and necessary as well to identify the prisoner as the person who inflicted the mortal blow on the said Delia Harris, as to shew the deliberation and the animus with which the prisoner inflicted the said mortal blow on her. The prisoner's counsel still objected to the admission of any testimony touching the shooting of Wells by the prisoner, without, however, objecting to any evidence about the bowie knife and the scabbard thereof: but the court overruled the objection and declared the evidence admissible; to which opinion the prisoner excepted.

740 *IV. After the verdict had been rendered, the prisoner moved the court to set the same aside and award him a new trial, upon the ground that Martha Gilliam, who had been examined as a witness for the commonwealth, was a mulatto, incompetent by law to testify against a white man; and he introduced evidence to prove that fact. But the court overruled the motion; being of opinion that at this stage of the case, and under the circumstances thereof, (detailed in the record, but unnecessary to be mentioned here) it would be improper to receive an exception to the competency of Martha Gilliam; and not being satisfied upon the evidence, if proper now to be introduced, that the said Martha Gilliam is thereby proved to be a mulatto. To which opinion the prisoner excepted.

V. After the verdict had been rendered, the prisoner moved the court to set the same aside and grant him a new trial, upon the ground that Charles Bates and Daniel P. Howle, two of the jurors who tried the cause, had formed and expressed decided

opinions against the prisoner, of which he had no knowledge until since the verdict was rendered. The said jurors, when called as such, were sworn to answer questions touching their competency as jurors, and severally deposed that they had not formed or expressed any opinion as to the guilt or innocence of the prisoner, and were accepted by him. And now the prisoner introduced two witnesses, James Williams and William Morris, against whose respectability no imputation was made, whose testimony was as follows, 1. James Williams deposed that he was at the house of the juror Bates before the trial of this cause, and Bates told him that "he had been to the scene of the alleged murder the day after the death of Delia Harris, and there saw her mangled corpse, and if Heath was guilty of the murder he ought to be hung, as ought any other man who would commit such a murder;" and also said

741 that "from the statements which *he had heard at the place" (where he saw the body of Delia Harris) "he believed that Heath" (the prisoner) "was guilty of the murder;" and in the same conversation Bates said that Heath ought to be hung. This conversation occurred on the Sunday after the murder, which was committed Friday night. 2. William Morris deposed, that a day or two before the trial of this cause, he heard the juror Daniel P. Howle say to Benjamin W. Green, near the courthouse, (which said Benjamin W. Green stood indicted in this court for embezzling the money of the bank of Virginia)—"Green, I would take your place for eighteen pence, but as to that fellow Heath, he ought to be hung, and, damn him! if I was on his jury I would hang him;" and the said Howle then left the witness, and came up the steps into the courtroom.

The court overruled the said motion, and refused to grant the prisoner a new trial; and he excepted.

And now, on his petition, the general court awarded a writ of error to the judgment of the circuit court.

The cause was argued here by Leigh and Lyons for the plaintiff in error, and the attorney general for the commonwealth.

LOMAX, J., delivered the opinion of the court.—The court deems it unnecessary to express the results of its deliberation upon all the numerous points suggested as errors in this record, the majority of the court being well satisfied that upon one of those errors, without deciding upon the others, a new trial must be awarded. The total interdiction on the part of the circuit court, after the answer which had been given by the juror Richard Malone touching his competency, of all further question to be put by the prisoner's counsel to the said juror, and the peremptory decision, excluding all further enquiry, that the juror was competent, are deemed by a majority of this court to be clearly erroneous.

742 *Whilst the court refrains from expressing an opinion upon the ques-

tions as to the competency of the jurors Royster, Fisher and Haxall, it unanimously reaffirms the doctrine laid down in Osiander's case, 3 Leigh 780, and Armistead's case, 11 Leigh 657. The court cannot now attempt to give greater precision to the principles there laid down. The application of the rules which are to be deduced from those principles must be left to the discretion of the judge, according to the varying circumstances of each particular case.

This court, however, does not intend to countenance a deduction which was attempted to be drawn from those cases by the prisoner's counsel, and much insisted on in argument; namely, that the formation of legal opinions upon facts which have previously been presented to the juror's mind, renders him equally as incompetent as the formation of previous convictions upon his mind in respect to the facts of the case. On the contrary, the court thinks that a knowledge of the law, instead of disqualification, would be a recommendation of the fitness of the juror. And although a juror may have taken up some misconception of the law of the case, the instruction of the court can be resorted to for correcting his error, and affording him a standard by which the law may be ascertained; whereas in regard to facts, there is no other standard but the opinions of the juror himself.

In regard to the evidence filed after the verdict, to fix disqualification upon two of the jurors who had rendered that verdict; whilst this court is of opinion that an enquiry was open, and such evidence was admissible, for the purpose of shewing perjury and corruption in those jurors, it is farther of opinion, that it belonged properly to the judge who presided at the trial to decide upon that evidence, and that it was for him exclusively to weigh the conflicting credibility of the witnesses and of the jurors, and to determine whether, in

743 *justice to the prisoner, and upon all the circumstances of the case, a new trial ought or ought not to be awarded. Upon this point, reference may be had to the doctrine stated in Jones's case, 1 Leigh 617.

In regard to the judgment of the court overruling the prisoner's objection to Carter Wells's testimony touching the shooting of Wells by the prisoner; the court is of opinion that the bill of exceptions in this particular is defective, in not proceeding to state what was the evidence which was given by the witness upon the subject. But without resting the judgment of the court upon the defectiveness of the bill of exceptions in this respect, this court is of opinion that the objection which was made is unsustainable, and that the fact of the shooting, as being a part of the circumstances and of the *res gestæ*, ought not to have been precluded from being given in evidence to the jury, although such evidence might itself have tended to prove a distinct felony committed by the prisoner.

The court deems it unnecessary to ex-

press any opinion upon the matters stated in the record as to the evidence which was given by Martha Gilliam; because the same matters are not likely to be presented in any future trial of the case.

Judgment reversed, and new trial awarded.

744

*Young v. The Commonwealth.

December, 1842.

Criminal Law—Commitment—Offense Insufficiently Specified.—On trial of indictment against W. Y. for felony in stealing a slave, prisoner is acquitted; whereupon court makes the following order: "It appearing to the court, by the testimony of witnesses this day examined on the trial of W. Y. that he is guilty of a misdemeanour. It is ordered that he be remanded to jail, and continued in the custody of the jailor of this court till the next term to answer an indictment then to be preferred against him." In a bill of exceptions to this order filed by the prisoner, the offence for which he was so remanded is further described as "a misdemeanour under the statute Suppl. to Rev. Code, ch. 184, § 1, p. 34." On writ of habeas corpus sued out by W. Y. the general court holds the commitment illegal, as not sufficiently specifying the offence, and discharges the prisoner out of custody under the same.

Same—Same—Remand after Discharge from Illegal Commitment.*—A party being acquitted of felony, and thereupon committed by the circuit court to take his trial for a misdemeanour, this court discharges him on habeas corpus, because the order of commitment does not sufficiently specify the offence; but it appearing, from the record of the proceedings in the circuit court, that there is reasonable ground to suspect the party of having committed a violation of the criminal law (other than the specific crime of which he was acquitted) proper to be made the subject of judicial enquiry, this court orders the sheriff to take him again into custody and carry him forthwith before a justice of the peace, to be dealt with according to law.

William Young was indicted in the circuit superior court for the county of Henrico and city of Richmond, for felony in stealing a negro woman slave named Eliza, the property of Sarah C. Atkinson. Before pleading to the indictment, he moved the court to quash the same; which motion being overruled, he filed a bill of exceptions, shewing as the ground of the motion, that "the prisoner had not been examined for the offence with which he is charged in the indictment, as appears by the warrant

***Criminal Law—Commitment—Remand after Discharge from Illegal Commitment.**—In *Ex parte Marx*, 88 Va. 47, 9 S. E. Rep. 476. Marx v. Milstead (Va.), 9 S. E. Rep. 620, the court said: "The petitioner is, therefore, entitled to be discharged from custody under the commitment of the justice; but an order will be entered commanding the officer in whose custody he is, to again take him into custody, and forthwith carry him before the justice by whom he was committed, to be further dealt with according to law. Authority for such procedure, if any thing were needed, may be found in *Young's Case*, 1 Rob. 308."

summoning the examining court, and the proceedings thereof." He was then tried upon the indictment, and the jury having found him not guilty, the court gave judgment that he be acquitted and discharged of the larceny aforesaid. "Whereupon" (the record proceeds) "on the motion of the attorney for the commonwealth, and it appearing to the court, by the testimony of witnesses this day examined on the trial of the said William Young, that he is guilty of a misdemeanour, it is ordered that he be remanded to jail, and continued in the custody of the jailor of this court till the next regular term to be holden for the trial of criminal causes, to answer an indictment then to be preferred against him." To this order of the circuit court the prisoner excepted. The statement in the bill of exceptions was, that "the court ordered the prisoner to be remanded to jail to await the session of the next grand jury, then to be presented for a misdemeanour under the statute, Suppl. to Rev. Code, ch. 184, § 1,* p. 243,—being of opinion that, upon the evidence adduced at the trial, he was liable to be presented under that statute."

The trial and acquittal of Young, and his recommitment to prison, took place on the 11th of November 1842. And now he presented a petition to the general court, setting forth the order of the circuit court remanding him to jail, insisting that his imprisonment under that order was illegal, and praying that a writ of habeas corpus might be awarded to bring him before the court, and that he might thereupon be discharged out of custody.

The court awarded the habeas corpus, and at the same time, by subpoena duces tecum, caused the clerk of the circuit court to bring before them the indictment against Young, with the other original papers filed in the cause, and the order book containing the entries of the proceedings had therein. From those papers and the order book, the foregoing state of the case has been collected. What was the testimony given against Young on his trial in the circuit court, did not in any wise appear. The depositions of the witnesses for the commonwealth upon his examination before the county court of Henrico, were to the following effect:

R. C. Page deposed that Eliza, the slave which the prisoner is accused of taking away, is the property of Mrs. Sarah C. Atkinson; that the said slave disappeared on the Thursday before she was taken up and this charge preferred, and the witness next saw her at the mayor's office. She carried away a trunk with clothing belonging to her. The prisoner was apprehended near Fredericksburg.

*Acts of 1828-9, ch. 21, § 1, p. 25. This statute makes it a misdemeanour punishable with imprisonment and fine, to procure or furnish to a slave any pass or other writing, or in any other manner to aid him in escaping from his owner, with intent in so doing to deprive the owner of the use and service of the slave.—Note in Original Edition.

John Moscow deposed that Young the prisoner came to his house on the 17th day of March last, about two o'clock, and asked permission for a lady to remain all night. He said he wanted to go to a public house in the neighbourhood to look for his partner, and accordingly went away. After some time he returned, and said he could not find his partner. He and the woman remained all night. The next morning he went off again, and after some time returned and said that they could not get in the mail train, and that they must return to Richmond. He and the woman left the house of the witness together on that morning, and the next time the witness saw them was in the mayor's office.

Archibald Pae deposed that he saw Young and the girl together near the water station on the Richmond and Fredericksburg rail road, coming towards Richmond. Afterward he saw Young lower down the rail road, lying in a bush. The witness asked him if he was going to Richmond? He replied, no. Near Sinton's turnout the witness saw the girl, who said that she was free, but that she had no pass or free papers. The witness and some others then returned in pursuit of Young: they found him, and charged him with kidnapping; when Young said he had got into a pretty fix, and that he was a ruined man.

A. S. Lewelling deposed that on the 18th day of March last he saw Young and the girl coming down the rail road. Afterwards, lower down the rail road, he saw Young lying in a bush. Near Sinton's turnout he saw the girl, who said she was free. The witness and others then went in pursuit of Young, and he was taken into custody. Young asked witness what the law was? Witness replied, that if it could be proved he was guilty, he would be sent to the penitentiary. Young then remarked that he had got himself into a fix, that he was a ruined man; and asked witness to let him go, saying he had a wife and child, and that he saw the girl only the day before, who represented herself to be a free indian girl.

Daniel Garrison deposed that he is the conductor of a freight train on the rail road; that near the water station, Young the prisoner asked witness to give him passage for himself and a lady to the Junction, which the witness refused. Young and the girl came from the direction of Moscow's house, the girl about fifteen steps behind Young.

The cause was argued by W. Crump for the petitioner, and the attorney general for the commonwealth.

The judgment of the general court was as follows:

It seems to the court here, that the order made by the circuit superior court, committing the said William Young to the custody of the sheriff, is illegal and improper, because it does not sufficiently specify the offence with which he was charged and for

which he was so committed. It is therefore ordered that the said William Young be discharged out of the custody of the sheriff under the said order of commitment.

748 *But it further appearing to this court, from testimony contained in the record of the proceedings against the said William Young in the said circuit court, that there is reasonable ground to suspect him of having committed a violation of the criminal law of this commonwealth, proper to be made the subject of judicial enquiry and proceeding, it is further ordered that the said sheriff do take the said William Young again into his custody, and carry him forthwith before some justice of the peace having jurisdiction of any offence involved in the act for which he was lately tried before the said circuit court (other than the specific crime of which he was acquitted upon that trial), to be dealt with by such justice of the peace according to law.

From so much of the foregoing judgment as directs the said William Young to be taken again into custody by the sheriff of Henrico, and carried before a justice of the peace, judges Lomax, Leigh, Duncan, Fry and Clopton dissent; considering the present case not a proper one for the exercise of the power of this court to make such order.

Jones and Others v. The Commonwealth.*

December, 1842.

Assault and Imprisonment—Under Color of Warrant.

—Case of an information against a justice of the peace, an informer, and a constable, for assaulting and imprisoning a party, under colour of a warrant of arrest for perjury, issued against him by the justice on the oath of the informer, and executed by the constable; wherein it was held by the general court, upon the evidence, that the information was not sustained as to the justice, but that the informer and constable were properly convicted and fined.

On the 15th of April of 1840, the circuit superior court of Scott county ordered that Samuel E. Jones, Philip

749 *Counts and Archibald Forgay be summoned to appear before the court on the first day of the next term, to shew cause why an information should not be filed against them for assaulting and arresting William Sons on the 9th day of April 1840, and imprisoning him from that day until the 14th of the same month. The summons was ordered on the motion of the attorney for the commonwealth, "and for reasons appearing to the court upon the trial of the writ of habeas corpus, returned to this court on yesterday, in favour of William Sons against Samuel E. Jones, a constable of this county."

*For monographic note on False Imprisonment, see end of case.

†See monographic note on "Assault and Battery" appended to Roadcap v. Sipe, 6 Gratt. 218.

The summons having been issued and duly served upon the defendants, and they not appearing, an information was ordered by the court, and accordingly filed, charging that the said defendants, on the 9th of April 1840, at the county of Scott, "did make a violent assault upon William Sons, and did then and there arrest the body of the said William Sons, and then and there imprison him the said Sons from the said 9th day of April until the 14th day of the same month." A trial being had upon the plea of not guilty put in by the defendants, the jury returned a verdict finding all of them guilty, and assessing upon Jones and Forgay a fine of 16 dollars 66 cents each, and upon Counts a fine of 20 dollars. Whereupon the defendants severally moved the court to set aside the verdict and to grant them a new trial, upon the ground that the verdict was not supported by the evidence; which motion the court overruled, and proceeded to enter judgment against the defendants, for the fines severally assessed as aforesaid, and the costs of the prosecution. To the opinion of the court overruling their motion for a new trial, the defendants filed a bill of exceptions; from which it appeared that the proof before the jury was as follows.

I. The attorney for the commonwealth gave in evidence the record of the proceedings had upon the writ of habeas corpus before mentioned; which were the following:—"The writ being awarded and duly served upon Jones, he made return thereto, that he arrested Sons on the 9th of April 1840, and had since detained him in custody, pursuant to a warrant against the said Sons for the crime of perjury, issued by Archibald Forgay a justice of the peace for Scott county, and directed to him the said Jones as constable of the said county; which warrant he annexed to his return, as a part thereof. Whereupon, it appearing to the court that the said warrant had been illegally issued, and that Sons was illegally detained in custody thereon, it was ordered that he be discharged out of the custody of Jones, and that the said Jones pay the costs in that behalf expended.

II. The warrant of arrest aforesaid was given in evidence by the attorney for the commonwealth. It was in the following terms:

"Scott county, to wit: To Samuel E. Jones const. Whereas Philip Counts has this day given information upon oath to me Archibald Forgay, a justice of the peace for the county aforesaid, that on the 8th day of February last past, in the county aforesaid, a certain William Sons, of said county, willingly and maliciously and corruptly did swear a false oath against him the said Counts; these are therefore, in the name of the commonwealth, to require you to apprehend the said Sons, and to bring him before me or some other justice of the peace of the county aforesaid, to answer the premises, and further to be dealt with according to law. Given under my

hand this 7th day of April 1840." (Signed) "A. Forgay."

III. The said William Sons, being introduced as a witness for the commonwealth, proved the following facts.

The defendant Jones, who is a constable for Scott county, arrested the witness on the 9th of April 1840, by virtue of the warrant aforesaid, and held him in
751 *custody until the 14th of the same month, when he was discharged on a writ of habeas corpus by the order of this court. While the witness was in the custody of Jones, he was taken by said Jones to the house of Philip Counts another of the defendants, where he remained one night; after which he was taken by Jones, accompanied by Counts, before Jonathan Hale a justice of the peace for Scott county, for the purpose of qualifying, and he was there urged by Counts to qualify, to a paper or instrument of writing which Counts had prepared, in relation to a note or due bill on which he (Sons) had been warranted by Counts. The warrant had been returned for trial before the defendant Forgay, and the note or due bill on which it was founded was for 75 cents. On the trial of the warrant, Sons was sworn to testify about the matter, and did testify that he had given to Counts no note or due bill for 75 cents, but had given him one for 50 cents, and that the note had been altered from 50 to 75 cents. Witness was told by Counts, that if he would swear to the truth of the paper to which he wished him to qualify before justice Hale, he should be set at liberty. This paper was to contradict the oath which witness had taken on the trial of the warrant aforesaid. This the witness refused to do; and thereupon he was taken before the defendant Forgay, for examination or trial, as he was told; but he objected to said Forgay's having anything more to do with his case, and accordingly Forgay did not take it up. From Forgay's, witness was taken back to the house of defendant Counts, where he remained all night; and on Monday the 13th of the month, he was brought by Jones and some other persons to the courthouse, where the circuit superior court for the county was in session, and there he remained until the next day, when he was discharged from custody. When the witness was first arrested, he requested Jones

to summon several witnesses for him,
752 which was done. Whilst he was *in custody, he was not tied, or in any manner harshly treated, except that on Monday evening, while he was in custody at the courthouse, he started home without the consent of Jones, and was overtaken by Jones, who jerked him a little, and brought him back. Jones and Counts were brothers in law. Forgay lived about 8 miles from Counts, about 5 from justice Hale, and about 4 from justice Robert Spur. This witness (who is quite a youth, and very ignorant) further proved that although Jones and Counts had him in custody from the 9th to the 14th of April, inclusive, and took him before two justices of the peace,

yet they never explained to him what they were going to do with him, only that they were going to try him for perjury, and never required from him security for his appearance before any court competent to indict him for perjury, which security, if they had required it, he would have been able to give; nor did they take him before any justice except the said Forgay, for the trial of the warrant on which he was apprehended.

IV. Jonathan Hale, another witness for the commonwealth, proved, that at the time mentioned by the witness Sons, he the said Sons was brought before this witness by the defendant Jones, in company with the defendant Counts, and Jones and Counts endeavoured to induce Sons to make oath before this witness to the truth of the paper or instrument of which Sons speaks in his testimony, and promised to release him on his doing so: but this he refused to do. That Sons, in presence of this witness, requested Jones to summon, as a witness for him, a person who lived about 6 miles distant: but that neither Jones nor Counts proposed to this witness to act in the case in which Sons was arrested.

V. Robert Spur, another witness, proved, that he saw Sons in the custody of Jones on two court days of the term held at Scott courthouse, (as mentioned by Jones in his testimony) and that Sons and his
753 friends frequently *complained to the witness that Jones and Counts would not bring him to trial. This witness further proved that Counts frequently took his cases before the defendant Forgay for trial.

VI. Jesse Roberts, another witness, proved, that he also saw Sons in the custody of Jones at Scott courthouse on Monday and Tuesday, and that he saw no effort made by the constable to have his case disposed of. That it was common for Counts to bring his cases before Forgay for adjudication; and that in a case in which Counts had warranted the witness before Forgay, Forgay had taken some strange, and, as the witness thought, illegal proceedings.

And the foregoing were all the facts proved in the cause.

On the petition of Jones, Counts and Forgay, the general court awarded a writ of error to the judgment of the circuit court.

John W. C. Watson for the plaintiffs in error: the attorney general for the commonwealth.

The judgment of the general court was as follows:

"It seems to a majority of the court here, that the judgment of the circuit superior court is erroneous as to the plaintiff in error Archibald Forgay, but that there is no error therein as to the plaintiffs in error Samuel E. Jones and Philip Counts: Therefore it is considered that the said judgment, as to the said Archibald Forgay,

be reversed and annulled; that the verdict, as to him, be set aside; and that the cause, as to him, be remanded to the said circuit superior court, for a new trial to be had therein upon the information according to law: and it is further considered that as to the said Samuel E. Jones and Philip Counts, the said judgment be affirmed, and that the commonwealth recover against them her costs about her defence in this court expended."

FALSE IMPRISONMENT

- I. Definition.
- II. What Constitutes.
 1. Arrest on Illegal Warrant.
 2. Illegal Arrest on Valid Warrant.
 3. Arrest for Debt after Payment.
 4. Continuation of Illegal Detention.
 5. Detention by Carrier.
 6. Arrest by Judicial Officers.
 7. Arrest by Confederate Agents.
 8. Want of Authority in Party Making Arrest.
- III. Malice and Probable Cause.
- IV. Damages.
 1. Compensatory Damages.
 2. Punitive Damages.
- V. Declaration.
- VI. Evidence.

I. DEFINITION.

False imprisonment is any unlawful physical restraint by one of another's liberty, whether in prison or elsewhere. *Gillingham v. Ohio River R. Co.*, 35 W. Va. 588, 14 S. E. Rep. 243, 29 Am. St. Rep. 827.

False imprisonment is a wrong akin to the wrongs of assault and battery, and consists in imposing, by force or threats, an unlawful restraint upon a man's freedom of locomotion. *Prima facie*, any restraint put by fear or force upon the actions of another is unlawful, and constitutes false imprisonment, unless a showing of justification makes it a true or legal imprisonment. *Gillingham v. Ohio River R. Co.*, 35 W. Va. 588, 14 S. E. Rep. 243, 29 Am. St. Rep. 827.

II. WHAT CONSTITUTES.

1. **ARREST ON ILLEGAL WARRANT.**—If the defendant has lawfully sued out the process of arrest against the plaintiff, and has caused him to be imprisoned upon it, and the process has been afterwards set aside because illegally issued, it constitutes no defence, but the plaintiff is entitled to recover damages for the wrong done him, without regard to the motives of the defendant, or the circumstances attending the doing of the wrongful and unlawful act. *Parsons v. Harper*, 16 Gratt. 64.

In one case it was said that the gist of the action for false imprisonment is the illegal detention of the person without lawful process, or the unlawful execution of lawful process. *Tavener v. Morehead*, 41 W. Va. 116, 23 S. E. Rep. 673.

2. **ILLEGAL ARREST ON VALID WARRANT.**—A warrant, to arrest a person of whom surety for the peace is demanded, being executed neither by a sworn officer, nor the person to whom it was directed by the magistrate, but by an individual selected by the prosecutor, who erased the name of the person appointed by the magistrate, and substituted that of the person selected by himself, is thereby rendered altogether illegal and void as a

justification, but may be given in evidence in mitigation of damages. *Wells v. Jackson*, 3 Munf. 68.

3. **ARREST FOR DEBT AFTER PAYMENT.**—Trespass for false imprisonment will not lie against a party for suing out an execution, and causing a debtor to be taken in execution, while he was attending the court as a witness, under the protection of a subpoena, although the debt for which the execution had been issued had been previously paid. *Moore v. Chapman*, 3 H. & M. 360.

4. **CONTINUATION OF ILLEGAL DETENTION.**—Every continuation of an illegal imprisonment constitutes a new trespass, for which an action for malicious arrest can be maintained. Accordingly, where a rebel in 1861, finding that a loyal man had been wrongfully arrested, joined the gang of independent scouts who were taking him to prison, and encouraged their acts and abused him, he was held to be guilty of false imprisonment. *Ruffner v. Williams*, 8 W. Va. 245.

5. **DETENTION BY CARRIER.**—A carrier of passengers is liable for the false imprisonment of a passenger, made or caused to be made by its conductor in charge of the train, during his execution of the carrier's contract to treat properly and convey safely. This liability is not affected by sec. 31, ch. 145, W. Va. Code, which enacts, among other things, that "the conductor of every train of railroad cars shall have all the powers of a conservator of the peace while in charge of the train." *Gillingham v. Ohio River R. Co.*, 35 W. Va. 588, 14 S. E. Rep. 243. See also, *Norfolk, etc., R. Co. v. Galliher*, 89 Va. 639, 16 S. E. Rep. 935.

6. ARREST BY JUDICIAL OFFICERS.

Generally.—Judicial officers are not answerable for mistakes of law, or errors of judgment, in cases where they have jurisdiction of the subject-matter and the parties, and the judgment is one which they are authorized by law to render. *Bolton v. Vellines*, 94 Va. 393, 26 S. E. Rep. 847.

On Rule for Contempt.—So a rule for contempt, being the judicial act of the court issuing it, cannot be a foundation for an action for false imprisonment, however erroneously issued, but it may be for malicious prosecution, provided the application for the same is without probable cause, actuated by improper and malicious motives, and founded on falsehood or misrepresentation. *Tavener v. Morehead*, 41 W. Va. 116, 23 S. E. Rep. 673. See monographic note on "Malicious Prosecution."

By Mayor of Town.—Since the mayor of a town has the right to judge whether or not sufficient grounds for an arrest exist; in an action against the mayor for maliciously causing the plaintiff to be arrested and imprisoned for a breach or threatened breach of peace committed in his presence, it is error to submit to the jury the question of the reasonableness of the grounds of the arrest. *Johnston v. Moorman*, 80 Va. 131.

7. **ARREST BY CONFEDERATE AGENTS.**—In an action for false imprisonment, the fact that the acts complained of were committed by the defendant under the authority and while in the service of the so-called confederate states is no defence. *Caperton v. Martin*, 4 W. Va. 138; *Caperton v. Nickel*, 4 W. Va. 173; *Caperton v. Bowyer*, 4 W. Va. 176; *Caperton v. Ballard*, 4 W. Va. 420. See also, *French v. White*, 4 W. Va. 170.

8. WANT OF AUTHORITY IN PARTY MAKING ARREST.

Municipalities.—Unless the power to imprison be plainly given it does not exist; and, when given,

there must be a judicial ascertainment of the guilt of the party accused, by a competent tribunal, before it can be exercised. A power conferred on a municipal corporation to adopt ordinances and to enforce compliance with them by prescribed fines, does not confer the power of imprisonment before trial for a violation of the ordinances, nor after trial for failure to pay the fines. *Bolton v. Vellines*, 94 Va. 393, 26 S. E. Rep. 847.

Unauthorized Officers.—The mere fact that a night watchman in the employ and pay of a railroad company was sworn in as a special policeman by a city mayor at the request of the company, where the mayor was not authorized by law to appoint a special policeman for the company, gave the policeman no authority to make arrests as an officer of the law, and the company is liable in damages for false imprisonment and assault on a passenger, committed by such special policeman in the discharge of his duties as watchman. *Norfolk, etc., R. Co. v. Gallher*, 89 Va. 639, 16 S. E. Rep. 985.

III. MALICE AND PROBABLE CAUSE.

Inference of Malice.—In an action for false imprisonment malice may be inferred from the want of probable cause, but it is not a necessary inference. It is always a question for the jury under all the circumstances of the case. Malice is not to be considered in the sense of spite or hatred against the individual but only as denoting that the party is actuated by improper and indirect motives. The improper motive, or want of proper motive, inferable from a wrongful act, based upon no reasonable ground, constitutes of itself all the malice deemed essential in law to the maintenance of the action. *Forbes v. Hagman*, 75 Va. 168; *Bolton v. Vellines*, 94 Va. 393, 26 S. E. Rep. 847; *Parsons v. Harper*, 16 Gratt. 64.

When Malice Will Be Presumed.—The law presumes that an arrest and imprisonment, made by one engaged in the attempt to subvert the government, in pursuance of that purpose and as a means to its accomplishment, was made with malice; and this presumption cannot be rebutted. *French v. White*, 4 W. Va. 170.

Probable Cause.—Probable cause for a proceeding under Code 1873, ch. 148, sec. 33, holding a defendant to bail, and arresting and detaining him until the bond required by law has been given, or until he is otherwise legally discharged, is a *bona fide* belief by the plaintiff, or his agent acting for him, in the existence of the facts essential under the law for such proceeding, founded on such circumstances, within his knowledge at the time the proceeding is taken, as would warrant a man of ordinary caution, prudence and judgment, under the same circumstances, in entertaining such belief. *Forbes v. Hagman*, 75 Va. 168.

Where the facts and grounds actually exist, or the plaintiff has probable cause to believe that they exist, on which an order for the arrest of the defendant is authorized by sec. 37, ch. 136, W. Va. Code, the plaintiff, who causes an arrest to be made under said statute, cannot be made liable in an action of trespass for such arrest, merely because the affidavit and order of arrest are not regular and in proper legal form. But, as the order of arrest is authorized only in a pending action or suit, if a party makes an affidavit and causes an arrest, without the pendency of an action, the proceedings will be void for want of jurisdiction to

issue the order of arrest, and he will be held liable for damages. *Ogg v. Murdock*, 25 W. Va. 139.

IV. DAMAGES.

1. COMPENSATORY DAMAGES.

General Rule.—The rule, in cases where the malice necessary to sustain the action is such only as results from a groundless act, and there is no actual malice or design to oppress, is to allow compensatory damages; that is, damages to indemnify the plaintiff, including injury to property, loss of time and necessary expenses, counsel fees, and other actual loss; but not to allow vindictive or punitive damages to punish the defendant. *Ogg v. Murdock*, 25 W. Va. 139; *Parsons v. Harper*, 16 Gratt. 64.

Loss of Time.—Where the false imprisonment complained of was done without malice the plaintiff can only recover compensatory damages. One of the most important elements of recovery in such case is for his loss of time and for the interruption to his business. *Parsons v. Harper*, 16 Gratt. 64; *Bolton v. Vellines*, 94 Va. 393, 26 S. E. Rep. 847; *Burruss v. Hines*, 94 Va. 413, 26 S. E. Rep. 875; *Ogg v. Murdock*, 25 W. Va. 139.

Mental and Physical Suffering.—Another element of damages for which the plaintiff may recover is the bodily or mental suffering sustained by him in consequence of the wrongful act. But, as there is no precise measure of damages for mental or physical pain, where they are elements of damages to be estimated by the jury, the verdict will not be set aside unless the damages are so great as to suggest that the jury have been influenced by passion or prejudice. *Bolton v. Vellines*, 94 Va. 393, 26 S. E. Rep. 847. See also, *Parsons v. Harper*, 16 Gratt. 64.

Costs Incurred in General.—The plaintiff is also entitled to recover the costs and expenses incurred in defending the original suit or proceeding. *Parsons v. Harper*, 16 Gratt. 64; *Bolton v. Vellines*, 94 Va. 393, 26 S. E. Rep. 847; *Burruss v. Hines*, 94 Va. 413, 26 S. E. Rep. 875; *Ogg v. Murdock*, 25 W. Va. 139.

Counsel Fees.—While the general rule is that counsel fees are not recoverable as damages, yet on a trial for malicious prosecution or false imprisonment, where exemplary damages are recoverable, the fees paid or incurred to counsel for defending the original suit or proceeding may be proved, and, if reasonable and necessarily incurred, may be taken into consideration by the jury in the assessment of damages. *Burruss v. Hines*, 94 Va. 413, 26 S. E. Rep. 875; *Parsons v. Harper*, 16 Gratt. 64; *Ogg v. Murdock*, 25 W. Va. 139; *Bolton v. Vellines*, 94 Va. 393, 26 S. E. Rep. 847.

2. PUNITIVE DAMAGES.

Where Defendant Was Actuated by Malice.—Where the defendant, in an action for false imprisonment, was actuated by malice, punitive damages may be given to the plaintiff. *Bolton v. Vellines*, 94 Va. 393, 26 S. E. Rep. 847; *Ogg v. Murdock*, 25 W. Va. 139.

Detention of Passenger by Carrier.—A carrier of passengers is liable in exemplary damages for the arrest or false imprisonment of a passenger, without reasonable and probable cause, made, or caused to be made, by its conductor in charge of a train during the execution of a contract to carry, although such act on the part of the conductor was entirely unauthorized by the company, and was purely personal to himself. *Gillingham v. Ohio River R. Co.*, 35 W. Va. 588, 14 S. E. Rep. 243, 29 Am. St. Rep. 827.

Where There is No Malice Punitive Damages Cannot Be Given.—In a case in which the plaintiff had been kept under an illegal restraint for three days, but

in which there was no proof of malice on the part of the defendant, it was held that a verdict for \$475 would be set aside as plainly excessive. *Ogg v. Murdock*, 25 W. Va. 189; *Bolton v. Vellines*, 94 Va. 303, 25 S. E. Rep. 847.

V. DECLARATION.

Generally.—In an action for false imprisonment, the declaration need not charge in express terms that the imprisonment was "against the will of the plaintiff." It is sufficient if it appears that the imprisonment was against his will, and was without collusion on his part. And an averment that the plaintiff was charged with an offence, and that the prosecution therefor had been abandoned and fully ended, is all that is required on the subject of charge and acquittal. *Bolton v. Vellines*, 94 Va. 303, 25 S. E. Rep. 847.

Not Necessary to Aver Malice.—In an action on the case for suing out a capias and imprisoning the plaintiff, in an action of slander in which he was defendant, it is not necessary to aver malice or want of probable cause in suing out the capias. *Parsons v. Harper*, 16 Gratt. 64.

VI. EVIDENCE.

Record of Cases Competent Evidence.—In an action for false imprisonment the whole of the case in which the imprisonment occurred is competent evidence for the plaintiff. *Parsons v. Harper*, 16 Gratt. 64.

Sufficiency.—Evidence that the defendant, the informer and constable, arrested the plaintiff, who was young and ignorant, and kept him in custody for four days, refusing to bring him to trial, and neglecting to give him an opportunity to furnish security, and that they endeavored to get him sign an acknowledgment of a due bill, is sufficient to warrant a verdict against the defendants. *Jones v. Com.*, 1 Rob. 748.

But evidence that the defendant, a justice of the peace, issued a warrant for the plaintiff's arrest; that the informer and constable kept him in custody for four days, and neglected to bring him to trial, but endeavored to get him to sign an acknowledgment of a due bill; and that the informer often took his cases before the defendant, was insufficient to support a verdict against the defendant. *Jones v. Com.*, 1 Rob. 748.

754 **Stroup v. The Commonwealth*.

December, 1842.

Larceny—Indictment—Second Offence—Omissions—Arrest of Judgment.—Indictment against S. S. for second offence of petit larceny alleges former conviction and punishment of S. S. for a like offence, but does not in terms allege that the court in which the first offence was tried had competent authority to try the same; nor that the former conviction remains in force; nor that such conviction appears by the record; nor that S. S. formerly convicted is the same person who is charged with the subsequent offence. Verdict, guilty. **Held**, none of the omissions aforesaid in

*See monographic note on "Larceny" appended to *Johnson v. Com.*, 24 Gratt. 555, and monographic note on "Indictments, Informations and Presentments" appended to *Boyle v. Com.*, 14 Gratt. 674. The principal case is cited in *Pryor v. Com.*, 2 Va. Dec. 483.

the indictments is a ground for arresting the judgment.

Same—Same—Same—Verdict.—One count of indictment charges petit larceny in the usual form; another, petit larceny committed after party had been convicted of a like offence: verdict finds prisoner guilty on both counts, and fixes imprisonment at five years: **Held**, no objection lies to the verdict.

An indictment against Susanna Stroup for petit larceny, containing two counts, was found in the circuit superior court of Wythe county at September term 1842. In the first count, which was in the usual form, the defendant was charged with the larceny of a heifer, the property of John Catron, of the value of six dollars. In the second count it was alleged, that, in the year 1821, Susanna Stroup was duly examined upon a charge of petit larceny, before a called court of five justices of the peace for Wythe county, having full authority in that behalf; was sent on by the examining court to be further tried in the county court of Wythe; and was accordingly indicted, tried and convicted in the said county court and actually punished, for the said offence. All the proceedings had in the examining court and in the court of trial were set forth with much minuteness of detail. And then the count proceeded to charge, "that after the said Susanna Stroup was convicted and punished for the petit larceny above set forth, in manner and form as before stated, she the said Susanna Stroup, on the 28th day of June 1842, at

the county aforesaid and within the 755 jurisdiction of the circuit superior court aforesaid, with force and arms, one small yearling heifer, red and white spotted, marked &c. of the value of six dollars, of the goods and chattels of one John Catron, then and there being found, feloniously did steal, take and carry away; so the grand jury aforesaid do say that the said Susanna Stroup hath committed the offence of petit larceny the second time, in manner and form aforesaid, contrary to the act of the general assembly" &c. But the count did not in terms allege any of the following matters: 1. That the court in which the first offence was tried had competent power and authority to try the same. 2. That the judgment of former conviction remains in force and unreversed. 3. That the proceedings and conviction for the former offence appear by the record thereof. 4. That Susanna Stroup who was convicted for the former offence is the same person who is charged with the subsequent offence.

A trial being had on the plea of not guilty, the jury found the prisoner guilty on both counts, and ascertained the term of her imprisonment in the penitentiary to be five years. She thereupon moved the court to arrest the judgment, upon the ground that in the indictment the first three of the allegations above noticed were omitted, and also because the verdict found her guilty on both counts of the indictment. The court overruled the motion, and gave judgment that she be imprisoned in the

penitentiary for the term ascertained by the jury.

And now she applied by petition to this court for a writ of error, assigning for error the matters before relied upon for arresting the judgment, and also the omission in the indictment of the fourth allegation above mentioned.

Lyons for the petitioner.

PER CURIAM. Writ of error denied.

756 *Overbee v. The Commonwealth.

December, 1842.

Criminal Law—Jurors—Separation—New Trial*—

Pending a trial for felony and before the testimony is closed, five of the jury having received permission to retire from the courtroom accompanied by the sheriff, another juror thereupon leaves the jury box without the knowledge of the court, passes out of the courthouse through a crowd of persons collected about the door, and remains absent a few minutes, after which he returns into court: having (as he deposes) held no communication whatever with any person during his absence; but not having been, during that period, in charge of the sheriff, or even seen by him. The trial proceeds and the prisoner is convicted. HELD, such separation of the juror from his fellows is sufficient cause for setting aside the verdict.

Alexander H. Overbee was tried and convicted, in the circuit superior court of Lee county, at September term 1842, upon an indictment for forgery, and sentenced by the court to imprisonment in the penitentiary for two years, the term ascertained by the jury. After the verdict was rendered, he moved the court to set it aside and award him a new trial, upon the ground that Samuel V. Hargis, one of the jury which tried the cause, had improperly separated from his fellows pending the trial. This motion being overruled, he filed a bill of exceptions to the opinion of the court, wherein the facts of the case were set forth as follows.

On the trial of the cause, before the testimony was closed, five of the jury obtained leave to retire for a brief space from the courtroom, the court directing a deputy sheriff to accompany them, and neither suffer any person to converse with them, nor converse with them himself on the subject of the trial. When these jurors had got ten or twelve feet from the jury box, Samuel V. Hargis, another juror, set off in apparent hurry after them, and it was supposed he would overtake them be-

fore they reached the door. The court did not observe his leaving the jury box.

There was at the time a considerable crowd of persons in the courtroom, about the door, and on the pavement outside, extending to the end of the courthouse. The five jurors were conducted by the deputy sheriff beyond the crowd, and around the end of the courthouse, where they stopped for the purpose for which they had retired (to obey a call of nature), and immediately afterwards were conducted back into court. The clerk thereupon proceeded to call over the panel of the jury, when Hargis, who was tenth on the panel, not having answered to his name, the court forthwith ordered the deputy sheriff to go in pursuit of him, which he did, and about a minute afterwards returned with Hargis into court. The deputy sheriff deposed, that he did not see Hargis at any time during his absence from the jury box, until despatched in pursuit of him by the court; when he met him between the door of the courthouse and the end thereof, alone, and walking briskly towards the door. Hargis himself deposed, that on seeing the other jurors leaving the courthouse, he set off after them, and passed round the end of the courthouse to the back thereof, (for the like purpose with the others;) after which, seeing that his horse, hitched to the fence about 60 yards off, was about to break loose, he walked quickly to him, refastened him, and returned as soon as he could to the courthouse, meeting the deputy sheriff at the door. That as he passed out through the crowd, a drunken man took hold of him, wishing to converse with him, (though not on the subject of the trial,) but deponent shook him off, refusing to converse with him: that no other person made a like attempt, and that no communication of any kind passed between any person and himself, while he was out. That he did not know, or suppose, that he was in charge of the sheriff, or that his conduct was in any degree improper.

On the petition of Overbee, this court awarded a writ of error to the judgment of the circuit court.

758 *H. S. and D. R. Kane for the plaintiff in error: the attorney general for the commonwealth.

"The judgment of the general court was as follows:

It seems to the court here, that the separation of the jury impaneled for the trial of this case, as set forth in the bill of exceptions, was sufficient cause for setting aside the verdict, and the circuit court ought accordingly to have set aside the same and granted a new trial: Therefore," judgment reversed, verdict set aside, and cause remanded to circuit court for a new trial to be had therein upon the indictment.

LEIGH, FRY and WILSON, J., dissented.

*Criminal Law—Jurors—Separation.—See foot-note to Com. v. McCaul, 1 Va. Cas. 272; Thompson v. Com., 8 Gratt. 638.

The principal case is cited in State v. Harrison, 36 W. Va. 753, 15 S. E. Rep. 983; State v. Cartright, 20 W. Va. 43; Younger v. State, 2 W. Va. 586; Thompson v. Com., 8 Gratt. 643; Phillips v. Com., 19 Gratt. 540.

INDEX.

ABATEMENT.

What appeal by corporation will not abate by the expiration of the charter. See Corporation No. 2, and

Bank of Alexandria *v.* Patton &c., 499

ABSENT DEFENDANTS.

1. Foreign attachment lies against corporation of another state. See Corporation No. 1, and

U. S. bank &c. *v.* Merchants bank, 573

2. What is not a *lis pendens* affecting purchaser from absent defendant. See Principal and surety No. 3, and

Stout *v.* Vause and others, 169

ACCOMPLICE.

Though a *particeps criminis*, called as a witness for the commonwealth on the trial of his accomplice, voluntarily give evidence, and fully, candidly and impartially disclose all the circumstances attending the transaction, as well those which involve his own guilt as those which involve the guilt of others, he will yet have no right to a pardon for his own guilt, and therefore no right to demand a continuance of his cause until he can have an opportunity to apply to the executive for such pardon.

Commonwealth *v.* Dabney, 696

ACCORD AND SATISFACTION.

What plea is insufficient.

In debt on a judgment the defendant pleads, that by an agreement in writing between the parties, the judgment was discharged and satisfied by a new contract, for the payment of a sum in cash, which was then paid, and for the payment of the balance by deferred instalments, whereby the said judgment was remitted and released, and accord and satisfaction thereof made. The plaintiff demurred to this plea, and the demurrer was sustained.

Harrington *v.* Harkins's adm'rs, 591

ACCOUNT.

1. Construction of clause excepting accounts between merchant and merchant out of the statute of limitations. See Merchants' accounts No. 1, 2, and

Coulter *v.* Coulter, 79

2. Limitation of suit by one partner against another for account. See Partnership No. 6, 7, and

S. C., 79

3. Account between vendor and vendee, where specific execution is refused. See Specific execution No. 1, and

Bryan *v.* Loftus's adm'rs, 12

ACQUITTAL.

Right of prisoner for treason or felony to discharge if not tried at or before third term

after examination. See Criminal jurisdiction and proceedings No. 11, and

Green *v.* Commonwealth, 731

AFFIRMANCE.

1. Amendment of decree in court of appeals, and affirmance thereupon. See Appellate jurisdiction No. 12, and

Blessing's adm'rs *v.* Beatty, 287

2. Affirmance of judgment for an amercement or fine. See Fine, and

Abrahams *v.* Commonwealth, 676, 7

AGENT.

See Principal and agent, and

Hewes *v.* Doddridge &c., 143

AGREEMENT.

See Contract.

760

*ALIEN.

A person of full age voluntarily enlisting in the army of the United States is not entitled to be discharged from the service upon the ground of his being an alien.

United States *v.* Cottingham, 615

ALIMONY.

See Husband and wife No. 1, and

Spencer *v.* Ford, 648, 9

AMENDMENT.

What irregularities in decree may be amended in appellate court, and decree thereupon affirmed. See Appellate jurisdiction No. 12, and

Blessing's adm'rs *v.* Beatty, 287

AMERCEMENT.

Affirmance of judgment for an amercement. See Fine, and

Abrahams *v.* Commonwealth, 676, 7

ANSWER.

No rule is better settled, than that an answer of an infant by guardian ad litem cannot be read against him at all, for any purpose. Per Baldwin, J.

Bank of Alexandria *v.* Patton &c., 500

APPEAL BOND.

That a surety for administration will not be subrogated to creditor's remedy against surety in appeal bond given by administrator, see Principal and surety No. 4, and

Brown *v.* Glascock's adm'r, 461

APPELLATE JURISDICTION.

I. What appeal is regularly before the court.

1. From what order of county court respecting road no appeal is demandable as of right. See Roads No. 2, and

Hill *v.* Salem turnpike co., 263

2. What appeal must be dismissed for insufficiency of amount in controversy. See Lunacy, and

Campbells *v.* Bowen's adm'rs &c., 241

3. What appeal by corporation will not abate by expiration of charter. See Corporation No. 2, and

Bank of Alexandria *v.* Patton &c., 499

4. What is an interlocutory decree. See Decree No. 1, 2, 3, and

Cocke's adm'r *v.* Gilpin, 20

II. What may be reviewed by appellate court.

5. What is no waiver of exception to admission of plea. See Waiver No. 1, and

Campbell's adm'r *v.* Montgomery, 392

6. Where a court refuses to give an instruction asked, and its opinion is excepted to, if the bill of exceptions does not state that evidence was offered tending to prove the case supposed by the instruction, and the court has simply declined to give the instruction, such refusal may perhaps be justified, on the ground that the case was merely hypothetical, and the instruction asked on an abstract question. But if the court not only declines to give the instruction asked, but proceeds to give another in lieu thereof, the inference is a reasonable one, that there was evidence tending to prove the case supposed, and the appellate court will not only enquire whether the law is correctly expounded in the instruction given, but will also enquire whether it is correctly stated in the instruction asked.

Chapman &c. *v.* Wilson & co., 269

7. In a suit by one partner against his copartner, for a settlement of the partnership accounts, and for a moiety of a tract of land purchased by the defendant in his own name, and paid for out of the partnership funds, the land having been sold under an interlocutory decree, and purchased by the defendant at a sacrifice; and then, after process of scire facias at the instance of the defendant to revive in the name of the plaintiff's administrator and heirs, and after taking an account of the administration, a final decree being rendered against the administrator personally for so much of the money decreed to the defendant as was not satisfied by the sale of the land; and upon an appeal by the administrator, the court being of opinion that the interlocutory decree was for too large an amount, and therefore erroneous: *held*, 1. That the sale of the land under the interlocutory decree, which had never been confirmed, ought to be set aside on the appeal by the administrator, although the heirs (who were infants) had not joined in the appeal. 2. That the

revival of the suit as to the administrator, *if regularly made, could only authorize a decree against him *de bonis testatoris*, and not a decree against him personally; for, if sought to be charged on the ground that he had wasted or failed to account for, or had in his hands, assets of the testator, he ought to have an opportunity of being heard on that subject, in answer to a bill with proper averments. 3. That upon the filing of such a bill, a sale of the land ought to be suspended, until the result of a settlement of the administration accounts should shew whether that property could not be relieved by the application of the per-

sonal assets to any balance in favour of the defendant.

Cocke's adm'r *v.* Gilpin, 21

III. What objection will not avail in appellate court.

8. What objection for misjoinder of plaintiffs will not avail in appellate court. See Will No. 2, and

Malone's adm'r & al. *v.* Hobbs & al., 346

9. The decision in *White v. Toncray*, 9 Leigh 347, that where pleas are rejected an appellate court will take it to have been rightly done unless the defendant has excepted, approved and acted on.

Herrington *v.* Harkins's adm'r's, 591

10. When objection that jury trial was not awarded in criminal cause is not available in appellate court. See *Slaves and free negroes* No. 10, and

Abrahams *v.* Commonwealth, 676

11. Affirmance of judgment for a fine, with damages according to law, (but giving no specific damages) will not be reversed. See *Fine*, and S. C., 676, 7

IV. Amendment of decree, and affirmance thereupon.

12. In the court below, there having been a clerical misprision in decreeing jointly against two defendants as administrators of a decedent, when the pleadings indicated that one of them was sole administrator, and the decree for costs having through oversight been entered against him, as well as against certain heirs of the deceased, *de bonis propriis*, the appellate court amended the decree in these particulars. The appellate court being farther of opinion that what was declared in the decree would, by necessary implication, relieve the heirs from responsibility for certain land, but that it would have been more regular to direct a release of that land, decreed such release accordingly. And the decree, being thus amended, was thereupon affirmed.

Blessing's adm'r's *v.* Beatty, 287

V. Reversal for defect in declaration.

13. There being a demurrer to a declaration, and an issue in fact, a verdict is found for the plaintiff, and it does not appear that any judgment was given on the demurrer, otherwise than by implication from the fact that final judgment was given for the plaintiff after the verdict. The court of appeals is of opinion that the demurrer ought to have been sustained: *held*, the judgment must be reversed, the verdict set aside, and the cause remanded to the circuit court, that it may proceed to judgment on the demurrer, unless the plaintiff shall, on leave obtained in that court, amend his declaration; and if the declaration be amended, for such further proceedings as may in that case be proper.

Creel *v.* Brown, 265

VI. Costs in appellate court.

14. A decree being reversed in consequence of an error committed against one of the appellees, costs decreed to be paid by the appellant to the appellees, as the parties substantially prevailing.

Ashby *v.* Smith & ux., 56

15. The court of appeals reversing a decree,

and there being three appellees, one of whom gets by the decision here what was sought by his bill and denied by the court below, and another of whom prevails here to the same extent that he prevailed in the court below, decreed that the third appellee pay to the appellant his costs.

Breckenridge *v.* Auld &c., 148

ARMY.

1. Construction of the eleventh section of the act of congress of March 16, 1802, fixing the military peace establishment of the United States.

United States *v.* Cottingham, 615

2. A person of full age voluntarily enlisting in the army of the United States is not entitled to be discharged from the service upon the ground of his being an alien.

S. C., 615

762

*ARREST.

1. No warrant is necessary for apprehending a slave going at large or hiring himself not contrary to law.

Abrahams *v.* Commonwealth, 675

2. See Commitment, and

Young *v.* Commonwealth, 744

ASSAULT.

Proof of charge.

Case of an information against a justice of the peace, an informer, and a constable, for assaulting and imprisoning a party, under colour of a warrant of arrest for perjury, issued against him by the justice on the oath of the informer, and executed by the constable; wherein it was held by the general court, upon the evidence, that the information was not sustained as to the justice, but that the informer and constable were properly convicted and fined.

Jones & al. *v.* Commonwealth, 748

ASSENT TO CONVEYANCE.

See Disclaimer, Mortgages and trusts No. 3, and

Bryan *v.* Hyre & al., 94

Spencer *v.* Ford, 648

ASSIGNMENT.

I. Of prison bounds bond.

1. Who may assign prison bounds bond.

See Prison bounds bond No. 3, 4, and

Vanmeter & al. *v.* Giles governor, 328

II. Rights of assignees of purchase money.

2. A bond for purchase money of land, executed by the vendee to one of the vendors, being assigned by the obligee to another of the vendors and a third person, the vendee brings a suit in equity against the vendors and assignees, and obtains relief against the payment of the bond; but *held* that in the condition of the cause there is nothing to justify a decree over in favour of the assignees.

Crawford & al. *v.* M'Daniel, 448

3. The vendee of land having paid a part of the purchase money to the assignee of his bond for the same, it turns out that the quantity of the land is deficient, and that the money already paid to the assignee is more than the vendee was bound to pay: *held*,

he has no equity to recover back the excess from the assignee. S. C., 448

4. The grantee in a deed for land, which is absolute on its face, but in truth a mortgage, having sold the land, and taken from the purchaser bonds for the purchase money, and a deed of trust to secure the same, and having then transferred the bonds to one who claims to be the assignee thereof for valuable consideration, but appears to have taken the assignment under circumstances calculated to throw strong suspicion on the transaction; *held*, it is incumbent on the assignee to prove that the assignment was for value.

Breckinridge *v.* Auld &c., 148

III. Rights of assignees of dissolved corporation.

5. Right of assignees of corporation appellant to prosecute appeal after expiration of charter. See Corporation No. 2, and

Bank of Alexandria *v.* Patton &c., 499

ASSIGNMENT OF BREACHES.

What assignment of breach in action on sheriff's official bond for an escape is defective. See Escape No. 1, and

Vanmeter & al. *v.* Giles governor, 328

ATTACHMENT.

1. Foreign attachment lies against corporation of another state. See Corporation No. 1, and

U. S. bank &c. *v.* Merchants bank, 573

2. What is not a *lis pendens* affecting purchaser from absent defendant. See Principal and surety No. 3, and

Stout *v.* Vause and others, 169

ATTORNEY.

Construction of powers of attorney. See Principal and agent, and

Hewes *v.* Doddridge &c., 143

BAIL.

What *ca. sa.* returned is sufficient to found *scire facias* against special bail. See *Capias ad satisfaciendum*, and

Turner *v.* Harris's ex'or &c., 475

763

*BANK NOTES.

1. Indictment for larceny of checks, bank notes, and United States treasury notes.

Boyd *v.* Commonwealth, 691

2. What examination will support such indictment. See Examining court No. 2, and

S. C., 691

BILL OF EXCEPTIONS.

See Exceptions.

BOUNDS BOND.

See Prison bounds bond, and

Vanmeter & al. *v.* Giles governor, 328

BREACHES.

What assignment of breach, in debt on sheriff's official bond for an escape, is defective. See Escape No. 1, and

Vanmeter & al. *v.* Giles governor, 328

CANCELLATION.

What destruction of codicil is no revocation of will. See Will No. 4, and

Malone's adm'r & al. *v.* Hobbs & al., 346, 7

CAPIAS AD SATISFACIENDUM.

What ca. sa. issued against insolvent will not be quashed.

After a ca. sa. against a judgment debtor has been returned non est inventus, and a scire facias sued out against the special bail, the debtor and the bail move to quash the ca. sa. upon the ground that before the same was issued, and since the judgment was rendered, the debtor took the oath of insolvency at the suit of another creditor, and that the said ca. sa. was issued without the direction of the court. The creditor, plaintiff in the execution and scire facias, resists the motion. It appears that the debtor, having been surrendered to the sheriff by his special bail at the suit of the other creditor, and brought before two justices of the peace, subscribed and delivered in a schedule of his estate, made oath thereto in due form of law, and was thereupon discharged by warrant from the justices, which recited that he had "complied with the directions of the general assembly for the relief of insolvent debtors." No other evidence is adduced to shew that the debtor was ever charged in execution by the creditor at whose suit he was surrendered: *held*, the motion to quash the ca. sa. must be overruled.

Turner v. Harris's ex'or &c., 475

CAVEAT.

The statute of May 1779, ch. 13, giving the remedy by caveat for determining the right to waste and unappropriated lands, did not extend to lands which, having been once granted by patent, had afterwards lapsed and become forfeited to the state.

Warwick & ux. & al. v. Norvell, 308

CIRCUIT SUPERIOR COURTS.

Concerning jurisdiction of injunction suits, see *Slaves and free negroes No. 3*, and

Brent &c. v. Peyton, 604

CLERICAL MISPRISION.

What may be amended as such by appellate court. See *Appellate jurisdiction No. 12*, and

Blessing's adm'rs v. Beatty, 287

CODEFENDANTS.

1. Decree of rescission between codefendants. See *Rescission No. 2*, and

Morriss v. Coleman &c., 478

2. Decree for costs where bill is dismissed as to one and sustained as to another defendant. See *Costs No. 1*, and

Spencer v. Ford, 649

CODICIL.

What destruction of codicil is no revocation of will. See *Will No. 4*, and

Malone's adm'r & al. v. Hobbs & al., 346, 7

COINING.

Indictment for having implement in possession.

An indictment on the statute of 1834-5, ch. 66, charging that the prisoner did knowingly have in his custody, without lawful authority or excuse, "one die or instru-

ment" *for the purpose of producing and impressing the stamp and similitude of the current silver coin called a half dollar, (no further describing the die or instrument) is insufficient.

Commonwealth v. Scott, 695

COMMITMENT.

I. What does not sufficiently specify offence.

1. On trial of indictment against W. Y. for felony in stealing a slave, prisoner is acquitted; whereupon court makes the following order: "It appearing to the court, by the testimony of witnesses this day examined on the trial of W. Y. that he is guilty of a misdemeanour, it is ordered that he be remanded to jail, and continued in the custody of the jailor of this court till the next term, to answer an indictment then to be preferred against him." In a bill of exceptions to this order filed by the prisoner, the offence for which he was so remanded is further described as "a misdemeanour under the statute Suppl. to Rev. Code, ch. 184, § 1, p. 243." On writ of habeas corpus sued out by W. Y. the general court holds the commitment illegal, as not sufficiently specifying the offence, and discharges the prisoner out of custody under the same.

Young v. Commonwealth, 744

II. When general court will remand before a justice after discharge from illegal commitment.

2. A party being acquitted of felony, and thereupon committed by the circuit court to take his trial for a misdemeanour, the general court discharges him on habeas corpus, because the order of commitment does not sufficiently specify the offence; but it appearing from the record of the proceedings in the circuit court, that there is reasonable ground to suspect the party of having committed a violation of the criminal law (other than the specific crime of which he was acquitted) proper to be made the subject of judicial inquiry, the general court orders the sheriff to take him again into custody and carry him forthwith before a justice of the peace, to be dealt with according to law.

S. C., 744

COMPENSATION.

For excess or deficiency in quantity of land sold. See *Vendor and vendee No. 8*, 9, 10, 11, 12, 13, and

Blessing's adm'rs v. Beatty, 287

Crawford & al. v. M'Daniel, 448, 9

CONFESSION OF JUDGMENT.

When plaintiff in equity is not compellable to confess judgment at law. See *Election No. 3*, and

Warwick & ux. & al. v. Norvell, 308

CONSTITUTIONALITY OF LAW.

See *Lottery, Slaves and free negroes No. 10*, and

Phalen v. Commonwealth, 713

Abrahams v. Commonwealth, 676

CONTINUANCE.

I. When defendant is not entitled to continuance.

1. Where an issue is made up in a cause at

the first term after the suit is brought, and the defendant, when the cause is called, moves for a continuance, he must, according to the act 1 R. C. 1819, p. 508, ch. 128, § 78, shew good cause for such continuance; otherwise the court, although it be the first term, will try the cause at that term.

Harrington v. Harkins's adm'r's, 591

2. What is not good cause for a continuance. S. C., 591

II. Right of prisoner to speedy trial.

3. Right of prisoner for treason or felony to be discharged of the crime if not tried at or before the third term after his examination. See Criminal jurisdiction and proceedings No. 11, and

Green v. Commonwealth, 731

CONTRACT.

I. Construction.

1. What contract is not in law a partnership. See Partnership No. 4, and Chapman &c. v. Wilson & co., 268

2. What constitutes a limited partnership. See Partnership No. 5, and S. C., 269

3. What is a mortgage. See Mortgages and trusts No. 1, and

Breckinridge v. Auld &c., 148

*4. Construction of contract between joint purchasers of land as to their interests in the subject. See Joint tenants No. 1, and

Cosby v. Lambert, 225

5. When vendee of land is entitled to compensation for deficiency in the quantity. See Vendor and vendee No. 8, 10, and

Crawford & al. v. M'Daniel, 448

Blessing's adm'r's v. Beatty, 287

6. Who is a cosurety entitled to contribution. See Principal and surety No. 2, and

Stout v. Vause and others, 169

II. Specific execution and rescission.

7. Correction of mistake in conveyance. See Mistake No. 1, and

Blessing's adm'r's v. Beatty, 287

8. When specific execution will be refused. See Specific execution, and

Bryan v. Loftus's adm'r's, 12

M'Cann v. Jones, 256

9. When rescission will be decreed. See Rescission No. 1, 2, and

Breckinridge v. Auld &c., 148

Morris v. Coleman &c., 478

III. Fraudulent alienations.

10. What conveyance is fraudulent as to creditors. See Fraud No. 3, 4, 5, and

Hutchison & al. v. Kelly, 123, 4

11. What voluntary settlement is not fraudulent as to a subsequent creditor. See Fraud No. 6, and

Bank of Alexandria v. Patton &c., 500

12. What voluntary settlement is not fraudulent as to a purchaser. See Fraud No. 7, and

S. C., 500

CONTRIBUTION.

Who is a cosurety entitled to contribution. See Principal and surety No. 2, and

Stout v. Vause and others, 169

CONVEYANCE.

1. See Fraud, Mistake, Mortgages and trusts, Vendor and vendee.

2. What conveyance of land by sheriff passes no title. See Fraud No. 4, and

Hutchison & al. v. Kelly, 124

CORPORATION.

I. Foreign attachment against corporation of another state.

1. Under the act in 1 R. C. 1819, p. 474, ch. 123, directing the method of proceeding in courts of equity against absent debtors, a creditor of a corporation created by another state may maintain a suit in equity against such corporation, as a defendant out of this commonwealth, where there are persons within the same who have in their hands effects of, or are indebted to, such absent defendant; or may maintain a suit in equity against such corporation as an absent defendant, where it has lands or tenements within the commonwealth.

U. S. bank &c. v. Merchants bank, 573

II. Expiration of charter of corporation appellant.

2. A bill in equity by a corporation being dismissed at the hearing, and an appeal taken from the decree, pending the appeal the charter of the corporation expires. A motion is made to the appellate court, upon the authority of Rider v. The Union Factory, 7 Leigh 154, that the appeal be entered as abated for that cause. In opposition to the motion it is suggested, that during the existence of the corporation, it made an assignment of its rights in the subject in controversy: *held*, the appellate court may inquire whether the fact of assignment exists, as a guide for its action on the motion to abate, and upon being satisfied of the fact, may permit the case to proceed, without noticing on the record the dissolution of the corporation.

Bank of Alexandria v. Patton &c., 499

COSTS.

1. Case in which a bill against two defendants being dismissed as to one, the costs decreed to be paid to him by the plaintiff, were decreed to be paid to the plaintiff by the other defendant.

Spencer v. Ford, 649

2. Recovery of costs against feme covert and her next friend. See Feme covert No. 2, and

S. C., 649

3. Costs of account shared between vendor and vendee, where specific execution denied to vendor. See Specific execution No. 1, and

Bryan v. Loftus's adm'r's, 12

4. Amendment by appellate court, of decree erroneous in giving costs de bonis propriis against the administrator. See Appellate jurisdiction No. 12, and

Blessing's adm'r's v. Beatty, 287

*5. Judgment in prosecution for suffering slave to go at large is properly rendered for costs as well as fine. See Slaves and free negroes No. 11, and

Abrahams v. Commonwealth, 676

6. Dismission of appeal because appellant has no interest except as to the costs. See Lunacy, and

Campbell's v. Bowen's adm'r's &c., 242

7. A decree being reversed in consequence

of an error committed against one of the appellees, costs agreed to be paid by the appellant to the appellees as the parties substantially prevailing.

Ashby v. Smith & ux., 56

8. The court of appeals reversing a decree, and there being three appellees, one of whom gets by the decision here what was sought by his bill and denied by the court below, and another of whom prevails here to the same extent that he prevailed in the court below, decreed that the third appellee pay to the appellant his costs.

Breckinridge v. Auld &c., 148

COUNTERFEITING.

See Coining, and

Commonwealth v. Scott, 695

COUNTY AND CORPORATION COURTS.

1. Jurisdiction where slave has been permitted to go at large or hire himself out contrary to law. See *Slaves and free negroes No. 7*, and

Abrahams v. Commonwealth, 675, 6

2. See Examining court, and

Boyd v. Commonwealth, 691

COVERTURE.

See Feme covert, and Husband and wife.

CRIMINAL JURISDICTION AND PROCEEDINGS.

I. Commitment.

1. What commitment does not sufficiently specify offence. See *Commitment No. 1*, and

Young v. Commonwealth, 744

2. When general court will remand before a justice, after discharging from illegal commitment by circuit court. See *Commitment No. 2*, and

S. C., 744

II. Where slaves have been suffered to go at large.

3. Concerning the jurisdiction and proceedings where slaves have been suffered to go at large and hire themselves out contrary to law, see *Slaves and free negroes No. 6, 7, 8, 9, 10, 11*, and

Abrahams v. Commonwealth, 675, 6

III. Examining court.

4. What warrant convening court of examination for felony, and examination accordingly had, are sufficient. See *Examining court No. 1*, and

Boyd v. Commonwealth, 691

5. What examination will support indictment for larceny of checks, bank notes, and United States treasury notes. See *Examining court No. 2*, and

S. C., 691

IV. Indictment.

6. What indictment for second offence of petit larceny is sufficient. See *Larceny No. 2*, and

Stroup v. Commonwealth, 754

7. Indictment for larceny of checks, bank notes, and United States treasury notes.

Boyd v. Commonwealth, 691

8. What indictment for building fence across road is sufficient. See *Roads No. 3*, and

M'Clintic v. Commonwealth, 727

9. What indictment for having in possession an instrument for coining is insufficient. See *Coining*, and

Commonwealth v. Scott, 695

10. What indictment for perjury committed by insolvent in swearing to schedule is insufficient. See *Perjury No. 1*, and

Commonwealth v. Cook, 729

V. Prisoner's right to speedy trial.

11. A prisoner charged with felony being indicted at the first term of the circuit court after his examination, the case is continued at that term for the want of time to try it. At the second term, the case is continued on the motion of the prisoner, upon the ground of the absence of a material witness for him. At each of the three succeeding terms, the case is again continued for the want of time to try it: *held*, that upon the expiration of the last of the five terms, the prisoner became entitled, under the statute 1 Rev. Code, ch. 169, § 28, to be forever discharged of the crime imputed to him.

Green v. Commonwealth, 731

767 *VI. Impanelling jury.

12. Prisoner's right to examine juror on voir dire. See *Jury No. 3*, and

Heath v. Commonwealth, 735

13. Competency of jurors. See *Jury No. 4, 5*, and

S. C., 735

VII. Evidence.

14. On a trial for murder, evidence that the prisoner, on the same day the deceased was killed, and shortly before the killing, shot a third person, *held* admissible under the circumstances of the case, notwithstanding the evidence tends to prove a distinct felony committed by the prisoner; such shooting, and the killing of the deceased, appearing to be connected as parts of one entire transaction.

Heath v. Commonwealth, 735

15. Proof of indictment for building fence across a road. See *Roads No. 4*, and

M'Clintic v. Commonwealth, 727

16. Concerning the proof to support information against justice of peace, informer, and constable, for assaulting and imprisoning a party under colour of a warrant of arrest for perjury, see *Assault*, and

Jones & al. v. Commonwealth, 748

17. Concerning the constitutionality and construction of law affecting a statutory privilege to raise money by lottery, see *Lottery*, and

Phalen v. Commonwealth, 713

VIII. Accomplices.

18. An accomplice giving evidence against his associate in crime does not thereby become entitled to pardon. See *Accomplice*, and

Commonwealth v. Dabney, 696

IX. Verdict.

19. What verdict on indictment for building fence across a road is sufficient. See *Roads No. 5*, and

M'Clintic v. Commonwealth, 727

20. What verdict on indictment for second offence of petit larceny is sufficient. See *Larceny No. 4*, and

Stroup v. Commonwealth, 754

X. New trial.

21. New trial in felony, for separation of juror from his fellows. See New trial No. 2, and

Overbee v. Commonwealth, 756

22. Concerning new trial in felony, for perjury of jurors on voir dire discovered after verdict, see New trial No. 3, and

Heath v. Commonwealth, 735, 6

DAMAGES.

1. What assessment of damages against railroad company is invalid. See Winchester and Potomac railroad company, and Winchester and Potomac railroad

co. v. Washington, 67

2. Measure of recovery in action on sheriff's official bond. See Sheriffs No. 4, and Garland &c. v. Lynch, 546

3. Damages for injunction judgment cannot be decreed by the court of chancery. See Injunction No. 6, and

Medley v. Pannill's adm'r, 63

4. Relief inequity against damages accrued on dissolution of former injunction. See Vendor and vendee No. 12, and

Crawford & al. v. M'Daniel, 448

5. Damages not allowed on affirmation of judgment for a fine. See Fine, and

Abrahams v. Commonwealth, 676, 7

DEBT.

1. What action of debt against railroad company by proprietor of condemned land cannot be sustained. See Winchester and Potomac railroad company, and

Winchester and Potomac railroad co. v. Washington, 67

2. Concerning declaration, plea and verdict, in action of debt on official bond of sheriff for escape of execution debtor, see Escape No. 1, 2, 4, and

Vanmeter & al. v. Giles governor, 328, 9

3. Measure of recovery in debt on sheriff's official bond. See Sheriffs No. 4, and

Garland &c. v. Lynch, 546

4. When action of debt on judgment is not barred by the statute of limitations. See Limitation of suits No. 3, and

Herrington v. Harkins's adm'r's, 591

5. What plea of accord and satisfaction is no bar to action of debt on judgment. See Accord and satisfaction, and S. C., 591

DECLARATION.

1. Where one of the counts in a declaration is in case for a tort, and another in assumption, a general demurrer to the declaration for such misjoinder ought to be sustained.

Creel v. Brown, 265

*2. What declaration against sheriff, for escape in taking defective bounds bond, is insufficient. See Escape No. 1, and

Vanmeter & al. v. Giles governor, 328

3. Statute of limitations cannot be taken advantage of by demurrer to declaration. See Limitation of suits No. 4, and

Herrington v. Harkins's adm'r's, 591

4. Practice on reversal for defect in declaration where no judgment on demurrer thereto had been given in court below. See Appellate jurisdiction No. 13, and

Creel v. Brown, 265

DECREE.

I. What decree is interlocutory.

1. Question whether a decree was final or interlocutory. Per Baldwin, J. Where the further action of the court in the cause is necessary to give completely the relief contemplated by the court, there the decree upon which the question arises is to be regarded not as final, but interlocutory.

Cocke's adm'r v. Gilpin, 20

2. The opinion of the supreme court of the United States in Ray v. Law, 3 Cranch 179, that a decree for a sale under a mortgage is a final decree, disapproved. S. C., 20

3. In a suit by one partner against his co-partner, for a settlement of the partnership accounts, and for a moiety of a tract of land purchased by the defendant in his own name, and paid for out of the partnership funds, a decree having been made declaring the land partnership property, and directing a settlement of the accounts, and the cause afterwards coming on to be further heard upon the report of the commissioner, the court decrees that the plaintiff pay to the defendant a sum of money appearing due by the report, and that the defendant thereupon convey to the plaintiff a moiety of the land; but if the plaintiff shall not, within six months from the date of the decree, pay the said money, that the marshal sell the moiety of the land, and out of the proceeds of sale, after defraying the expenses, pay to the defendant the money so decreed, and the residue, if any, to the plaintiff. And the court further decrees that the outstanding debts due to the firm be equally divided between the parties, and that the costs of the suit be equally borne by them: *held*, this decree is interlocutory, and it may be reviewed upon an appeal, although there has been such lapse of time between the rendition of the decree, and the appeal, as would preclude its being reviewed if the decree were final. S. C., 20

II. Amendment in appellate court.

4. Concerning amendment of decree in court of appeals, and affirmation thereupon, see Appellate jurisdiction No. 12, and

Blessing's adm'r's v. Beatty, 287

DEDICATION.

What is no dedication of land to public use.

Case of a town established on a river, by the plan of which there was an artificial line, leaving a strip of land between the lower range of lots and the river. An express dedication of the strip being claimed to have been made by the proprietor to the use of the citizens, and the proof of such dedication consisting of his declarations, the evidence of which was uncertain, the claim defeated by proving that subsequent acts of ownership, inconsistent with such claim, were exercised over the strip by the proprietor and his representatives, for a long period, and with the acquiescence of the citizens.

Skeen &c. v. Lynch &c., 186

DEED.

See Fraud, Mistake, Mortgages and trusts, Vendor and vendee.

DEMURRER.

1. Where one of the counts in a declaration is in case for a tort, and another in assumption, a general demurrer to the declaration for such misjoinder ought to be sustained.

Creel *v.* Brown, 265

2. Statute of limitations cannot be taken advantage of by demurrer to the declaration. See Limitation of suits No. 4, and

Herrington *v.* Harkins's adm'rs, 591

3. Practice on reversal for defect in declaration where no judgment on demurrer thereto had been given in *court below. See Appellate jurisdiction No. 13, and

Creel *v.* Brown, 265

DEVISE.

1. Disclaimer of estate devised. See Disclaimer, and

Bryan *v.* Hyre & al., 94

2. Construction and effect of devise. See Will.

DISCLAIMER.

Of freehold estate devised.

1. In ejectment by the heirs of the devisee of an estate in fee, the defendant introduced evidence tending to shew a parol disclaimer by the devisee, of the land devised to him, and moved the court to instruct the jury, that if they believed, from the facts proved, that there was such parol disclaimer of the land devised, they must find for the defendant. The court refused to give this instruction to the jury, and instructed them that the disclaimer must be by writing.

Bryan *v.* Hyre & al., 94

2. The opinion of Holroyd, J., in *Townson v. Tickell &c.*, 3 Barn. & Ald. 31; 5 Eng. Com. Law Rep. 219, that it is not necessary that a party "should be at the trouble or expense of executing a deed to shew that he did not assent to the devise" of a freehold estate, disapproved. S. C., 94

DISCOVERY.

Bill to recover female slave and her increase. See Slaves and free negroes No. 2, and

Armstrong *v.* Huntons, 323

DISSOLUTION OF INJUNCTION.

1. See Injunction No. 6, and

Medley *v.* Pannill's adm'r, 63

2. Relief in equity against damages accrued on dissolution of former injunction. See Vendor and vendee No. 12, and

Crawford & al. *v.* M'Daniel, 448

DISTRIBUTEE AND DISTRIBUTION.

Widow's interest in money received under treaty of Ghent as indemnity for deported slaves of decedent. See Slaves and free negroes No. 1, and

Foushee *v.* Blackwell & wife, 488

EASEMENT.

See Dedication, and

Skeen &c. *v.* Lynch &c., 186

EJECTMENT.

Judgment on special verdict in ejectment,

for plaintiff as to one tract and for defendant as to another. See Special verdict, and

Hutchinson & al. *v.* Kelly, 124, 5

ELECTION.

1. To take money directed to be laid out in land. See Trusts and trustees No. 2, and

Ashby *v.* Smith & wife, 55, 6

2. Right of making election to survey. See Vendor and vendee No. 7, and

Crawford & al. *v.* M'Daniel, 448

3. A defendant at law, having a legal defence to the action, and a distinct ground for equitable relief against the plaintiff's claim, may bring his suit in equity without waiting for the determination of the action at law, and may, without being compelled to waive his legal defence by confessing a judgment, have a hearing in the court of chancery on the merits of his case, and a decree for the proper relief.

Warwick & ux. & al. *v.* Norvell, 308

EMANCIPATION.

1. The decision in *Maria and others v. Surbaugh*, 2 Rand. 228, adhered to.

Henry *v.* Bradford, 53

2. A testator by his will directs that his negro girl Adah "shall only serve ten years, and then have her freedom." During the ten years Adah has a daughter named Ebby. A son of Ebby sues for his freedom: *held*, he is a slave. S. C., 53

3. Concerning suit by slave entitled to freedom in futuro, against his master, see Slaves and free negroes No. 5, and

Williams *v.* Manuel, 639

ENLISTMENT.

A person of full age voluntarily enlisting in the army of the United States is not entitled to be discharged from the service upon the ground of his being an alien.

United States *v.* Cottingham, 615

770 *EQUITABLE DEFENCE AT LAW.

In what actions admissible. See Setoff No. 1, and

Campbell's adm'r *v.* Montgomery, 392

EQUITABLE JURISDICTION.

1. Foreign attachment lies against corporation of another state. See Corporation No. 1, and

U. S. bank &c. *v.* Merchants bank, 573

2. When defendant at law may have relief in equity without being compelled to confess judgment. See Election No. 3, and

Warwick & ux. & al. *v.* Norvell, 308

3. What decree against party injoining judgment is irregular. See Injunction No. 6, and

Medley *v.* Pannill's adm'r, 63

4. What purchase by one joint tenant of the interest of another is subject to redemption. See Joint tenants No. 2, and

Cosby *v.* Lambert, 225

5. Dismission of bill filed after great lapse of time. See Laches, and

Page &c. *v.* Booth &c., 161

6. Mode of proceeding where lunacy of defendant is suggested. See Lunacy, and

Campbells *v.* Bowen's adm'rs &c., 241

7. Correction of mistake in conveyance. See Mistake No. 1, and
Blessing's adm'r's v. Beatty, 287
8. Concerning rights of sureties inter se, to contribution and subrogation, see Principal and surety No. 2, 4, and
Stout v. Vause and others, 169
Brown v. Glascock's adm'r, 461
9. When equity will decree rescission of contract for land. See Rescission No. 1, 2, and
Breckenridge v. Auld &c., 148
Morriss v. Coleman &c., 478
10. Setoff in equity to judgment at law. See Setoff No. 2, and
Shore v. Wares, 1
11. What suit for recovery of slaves will be dismissed for want of jurisdiction. See Slaves and free negroes No. 2, 3, and
Armstrong v. Huntons, 323
Brent &c. v. Peyton, 604
12. Concerning suit in forma pauperis by slave entitled to freedom in futuro, see Slaves and free negroes No. 5, and
Williams v. Manuel, 639
13. When specific execution of contract for land will be refused. See Specific execution, and
Bryan v. Lofftus's adm'r's, 12
M'Cann v. Janes, 256
14. Right of election by husband and wife to take money directed by will to be laid out in land for the wife. See Trusts and trustees No. 2, and
Ashby v. Smith & wife, 55, 6
15. Compensation for excess or deficiency in the quantity of land sold. See Vendor and vendee No. 8, 9, 10, 11, 12, 13, and
Blessing's adm'r's v. Beatty, 287
Crawford & al. v. M'Daniel, 448, 9
16. See Appellate jurisdiction.

ESCAPE.

I. Declaration for taking defective bounds bond.

1. In debt on official bond of sheriff, breach assigned is, that the sheriff permitted relator's debtor in execution to escape, by wrongfully accepting from him a defective bond, erroneously purporting to be a prison bounds bond, and that the relator, from the erroneous and defective form of the said bond, was unable to recover his debt by virtue thereof, but was cast in an action brought by him founded upon the same: but declaration makes no profert of such bond, nor vouches the record of the action alleged to have been brought thereon, nor gives any further description of the bond or of the action. On general demurrer to the declaration, *held*, the assignment of the breach is insufficient.

Vanmeter & al. v. Giles governor, 328

II. Plea that debtor was duly admitted to the bounds.

2. In debt on official bond of the sheriff of H. assigning for breach that the sheriff permitted the escape of a debtor in execution under a ca. sa. from the superior court of H. the defendants plead that the debtor gave bond according to law, with good security, to

keep the prison rules for the county of H. and thereupon betook himself to the prison rules for said county, without this that he escaped in any other manner. The bond (of which profert is made in the plea) is with condition that the debtor shall keep within the prison bounds prescribed by the superior court of H. Plaintiff takes oyer of the bond and demurs to the plea: *held*, as the bond, made part of the plea by oyer, shews that the debtor was admitted to the proper *bounds, the defect if any in the allegations of the plea is thereby cured.

S. C., 328, 9

III. Sufficiency of bounds bond and assignment.

3. Concerning sufficiency of bounds bond, and who may assign the same, see Prison bounds bond No. 1, 2, 3, 4, and

S. C., 328

IV. Verdict finding escape.

4. In debt on official bond of sheriff, assigning for breach the escape of a debtor in his custody, no judgment can be entered on verdict against defendants, unless it be expressly found (as prescribed by the statute 1 Rev. Code, ch. 136, § 3), that the debtor escaped with the consent or through the negligence of the sheriff, or that he might have been retaken and the sheriff neglected to make immediate pursuit.

S. C., 329

EVIDENCE.

I. Onus probandi.

1. When assignee of bond for purchase money must prove that the assignment was for value. See Assignment No. 4, and

Breckenridge v. Auld &c., 148

II. Competency.

2. What evidence is admissible on issue as to existence of partnership. See Partnership No. 1, and

Chapman &c. v. Wilson & co., 267

3. What evidence is admissible on such issue. See Partnership No. 2, 3, and

S. C., 267, 8

4. Whether declarations of legatee, one of several defendants to bill contesting validity of will, are admissible for plaintiff on issue *devisavit vel non*. See Will No. 3, and

Malone's adm'r & al. v. Hobbs & al., 346

5. No rule is better settled, than that an answer of an infant by guardian ad litem cannot be read against him at all, for any purpose. Per Baldwin, J.

Bank of Alexandria v. Patton &c., 500

6. Admissibility, on trial for felony, of evidence tending to prove a distinct felony. See Criminal jurisdiction &c. No. 14, and

Heath v. Commonwealth, 735

III. Sufficiency.

7. What does not amount to proof of partnership. See Partnership No. 4, and

Chapman &c. v. Wilson & co., 268

8. What amounts to proof of limited partnership. See Partnership No. 5, and

S. C., 269

9. What bill of injunction by slave entitled to freedom in futuro, against his master, is not supported by the evidence. See Slaves and free negroes No. 5, and

Williams v. Manuel, 639

10. Proof of indictment for building fence across a road. See Roads No. 4, and *M'Clintic v. Commonwealth*, 727

11. Proof of information against justice of peace, informer, and constable, for assaulting and imprisoning a party under colour of a warrant of arrest for perjury. See Assault, and

Jones & al. v. Commonwealth, 748

EXAMINING COURT.

I. Sufficiency of warrant convening court.

1. By warrant dated the 17th, which is thursday, a court for the examination of a prisoner charged with felony is appointed to be held on the 22d, and is held accordingly; the court being thus held on the fifth day after the date of the warrant, and one of the intervening days being sunday: *held*, the warrant and examination are sufficient.

Boyd v. Commonwealth, 691

II. Sufficiency of examination to support indictment.

2. Warrant directs a court to be summoned for the examination of a prisoner charged with feloniously stealing "sundry checks drawn by sundry individuals upon the Exchange bank at N., and sundry other checks drawn in like manner upon the Farmers bank at N., also treasury notes and other bank notes, the whole of which checks, treasury notes and bank notes amount to 2324 dollars, of the value of 2324 dollars, the property of J. S. M.;" record of examining court states, that prisoner was examined upon a charge of feloniously stealing "divers goods and chattels, the property of J. S. M.;" —*held*, the warrant and examination are sufficient, and an indictment for the larceny of divers checks, bank notes, and 772 *United States treasury notes, the property of J. S. M., is well supported thereby. S. C., 691

EXCEPTIONS.

1. The decision in *White v. Toncray*, 9 Leigh 347, that where pleas are rejected an appellate court will take it to have been rightly done unless the defendant has excepted, approved and acted on.

Herrington v. Harkins's adm'r, 591

2. What is no waiver of exception to admission of plea. See Waiver No. 1, and *Campbell's adm'r v. Montgomery*, 392

3. What bill of exceptions will enable appellate court to review opinion refusing instruction. See Appellate jurisdiction No. 6, and

Chapman & c. v. Wilson & Co., 269

EXECUTION.

What ca. sa. issued against insolvent debtor will not be quashed. See Capias ad satisfaciendum, and

Turner v. Harris's ex'or & c., 475

EXECUTORS AND ADMINISTRATORS.

1. As to powers of executor directed by will to receive and pay over legacy charged on devisee, see Will No. 6, and

Jackson & al. v. Updegraffe & al., 107

2. What is a fraudulent dealing with executor. See Trusts and trustees No. 5, and

S. C., 107

3. What personal decree against administrator is erroneous. See Appellate jurisdiction, No. 7, and

Cocke's adm'r v. Gilpin, 21

4. Amendment of decree erroneous in giving costs de bonis propriis against administrator, and affirmance thereupon. See Appellate jurisdiction No. 12, and

Blessing's adm'r v. Beatty, 287

5. That a surety for administration will not be subrogated to creditor's remedy against surety in appeal bond given by administrator, see Principal and surety No. 4, and

Brown v. Glascock's adm'r, 461

FALSE IMPRISONMENT.

Prosecution for false imprisonment. See Assault, and

Jones & al. v. Commonwealth, 746

FELONY.

1. Right of prisoner to be discharged of the crime if not tried at or before third term after his examination. See Criminal jurisdiction & c. No. 11, and

Green v. Commonwealth, 731

2. Admissibility, on trial for felony, of evidence tending to prove a distinct felony. See Criminal jurisdiction & c. No. 14, and

Heath v. Commonwealth, 735

3. New trial for separation of juror from his fellows. See New trial No. 2, and

Overbee v. Commonwealth, 756

4. Concerning new trial for perjury of jurors on voir dire, discovered after verdict, see New trial No. 3, and

Heath v. Commonwealth, 735, 6

FEME COVERT.

1. How rights of feme, in respect to money directed by will to be laid out in land for her, will be protected against husband, where she and her husband bring suit electing to take the money. See Trust and trustees No. 2, and

Ashby v. Smith and wife, 55, 6

2. In a suit brought in the name of a feme by her next friend, a decree in her favour being reversed, and the bill ordered to be dismissed as to the appellant, he will recover his costs, both in the appellate court and the court below, as well against the next friend as against the feme.

Spencer v. Ford, 649

FINE.

Affirmance of judgment for a fine.

The statute allowing damages on affirmance (Acts of 1830-31, ch. 11, § 32, Suppl. to R. C. p. 149,) does not apply to the affirmance of a judgment imposing an amercement or fine; the amercement or fine not being a debt or damages, within the meaning of that act. But though the judgment of affirmance in such case award damages according to law for retarding the execution, yet as no specific damages are thereby adjudged, and the law gives none, the error is merely formal, and the appellate court will disregard it.

Abrahams v. Commonwealth, 676, 7

FOREIGN ATTACHMENT.

1. Lies against corporation of another state. See Corporation No. 1, and U. S. bank &c. v. Merchants bank, 573 773
- *2. What is not a lis pendens affecting purchaser from absent defendant. See Principal and surety No. 3, and Stout v. Vause & others, 169

FORGERY.

- See Coining, and Commonwealth v. Scott, 695

FORTHCOMING BOND.

I. Effect of forfeited bond on original judgment.

1. The decisions in Randolph's adm'r v. Randolph, 3 Rand. 490, Taylor v. Dundass, 1 Wash. 92, and Downman v. Downman's ex'or, 2 Wash. 189, approved. In conformity with the principle of the first case, held, that if judgment be rendered against two, and one gives a forthcoming bond with security, which is forfeited, the other is not discharged from the original judgment, if the obligors in the forthcoming bond prove insolvent. But also held, according to the decisions in the last two cases, that the forfeited forthcoming bond will prevent any execution or other proceeding on the original judgment, until the same be quashed. Garland &c. v. Lynch, 545

II. Creditor's right to quash bond.

2. Even after execution has been awarded on a forthcoming bond, the bond may be quashed on the motion of the creditor, to enable him to have execution on the original judgment, if the case be one in which the execution on the forthcoming bond has proved unavailing, without any default of the creditor. S. C., 545

III. What surety is insufficient in law.

3. Where the sheriff takes from the owner of goods levied on under execution a forthcoming bond with security, and upon the same being forfeited and execution awarded thereon, the obligors prove insolvent, the sheriff will not generally be liable to the creditor on account of such insolvency, if he can establish that the security was sufficient at the time of taking the bond. But where execution against two is levied on the goods of one, and he gives a forthcoming bond with the other as his only surety, such surety, being already bound, is not security such as the law requires; and if the execution on the forthcoming bond prove unavailing, the sheriff will in this case be liable to the creditor, although he may prove that the surety in the forthcoming bond was sufficient in point of estate at the time of taking the bond. S. C., 545, 6

FRANCHISE.

- See Lottery, and Phalen v. Commonwealth, 713

FRAUD.

- I. Fraudulent dealing with trustee.
1. What dealing with an executor or trustee is fraudulent. See Trusts and trustees No. 5, and Jackson & al. v. Updegraffe & al., 107

II. Fraudulent assignment of purchase money.

2. When assignee of bond for purchase money must prove that the assignment was for value. See Assignment No. 4, and Breckenridge v. Auld &c., 148

III. What conveyance is fraudulent as to subsequent creditors.

3. The policy of the statute of 13 Eliz. ch. 5, (substantially adopted in the act of Virginia to prevent frauds and perjuries) investigated by Baldwin, J., and the true principle declared by him to be, that a fraudulent intent of the grantor against one or more creditors is fraudulent against all, and that no distinction exists between prior and subsequent creditors, other than that which arises from the necessity of shewing a fraudulent intent against some creditor, which cannot be done in behalf of creditors not in existence at the time of the conveyance, but by proving either a prior indebtedness, or a prospective fraud against them only.

Hutchison & al. v. Kelly, 123

4. A father made a deed, whereby, in consideration of natural love and affection, he conveyed to his four children, who were infants living with him, all of his property both real and personal. He had another child afterwards. The real property was transferred to the grantees on the commissioner's books, and the taxes charged to them. But the taxes were paid by the father, who continued to reside on the lands and cultivate them, and to use the personal property as his own. A small part of the land was sold by him after the deed. One of the tracts of land conveyed by the deed was afterwards levied upon and sold under an execution at the suit of the commonwealth against the father, for money for which he was liable as sheriff. The father was still residing on the land at the time of the sale; and on the day of the sale, the father and one of the sons offered to sell the land, and make a good title; but the son forbade the sale by the sheriff. The purchaser from the sheriff obtained possession by virtue of a judgment against the father upon a complaint for unlawful detainer. And then ejectment was brought against the purchaser by the grantees, all of whom were infants at the time of the sheriff's sale. In the action of ejectment, a special verdict was returned, finding the foregoing facts, and also the additional fact, that the deed made by the father to his children was executed for the purpose of avoiding a liability to which he might be subjected in consequence of being the surety of a deputy sheriff: held, the deed made by the father is void as to his creditors, and the purchaser at the sheriff's sale is entitled to hold the tract of land so purchased by him. But it appearing that the commonwealth was satisfied by the proceeds of that tract of land, and the conveyance by the sheriff being not only of that tract, but of another, which was neither levied upon nor sold, held further, the conveyance by the sheriff presents no

obstacle to a recovery by the lessors of the plaintiff of the last mentioned tract.

Hutchison & al. *v.* Kelly, 124

IV. Presumption of fraud from indebtedness of donor.

5. The conclusion drawn from the cases by Kent, chancellor, in *Reade v. Livingston & others*, 3 Johns. Ch. Rep. 500, that if a grantor be indebted at the time of a voluntary conveyance, it is presumed to be fraudulent in respect to debts then existing, and no circumstance will permit those debts to be affected by the conveyance, or repel the legal presumption of fraud, approved by Stanard, J., and disapproved by Baldwin, J. The principle declared by the latter to be, that while the indebtedness of the grantor at the time of a voluntary conveyance raises a legal presumption against its validity, that presumption is only *prima facie*, and not conclusive.

Hutchison & al. *v.* Kelly, 123, 4

V. What voluntary conveyance is not fraudulent as to a subsequent creditor.

6. In March 1807, a voluntary conveyance was made, settling real and personal estate for the benefit of a wife and children. It was attested by highly respectable and intelligent witnesses, and immediately placed upon record. Eighteen years afterwards, a bill was filed to impeach this conveyance, by a creditor whose debt originated some years after the conveyance was made, and who, it appeared, had notice of the conveyance when not more than a fourth of the debt had been contracted. The bill alleged, that at the time of the conveyance the grantor was very much involved, and largely indebted to many persons. But in the opinion of the court it was proved that he was then, and for several years afterwards, able to meet all his engagements; the owner of property to a considerable amount; in good credit and extensive business; having the command of large sums of money, and not indebted except to a single individual, the debt to whom was not large, considering the grantor's estate: *held* (in accordance with the principles laid down by Baldwin, J., in *Hutchison and others v. Kelly*, ante, p. 132), that the bill of the creditor in this case cannot be sustained.

Bank of Alexandria *v.* Patton &c., 500

VI. What purchaser cannot avoid voluntary conveyance.

7. The policy of the statute of 27 Eliz. ch. 4, and of so much of the virginian statute to prevent frauds and perjuries as relates to purchasers, investigated by Baldwin, J. And the principle laid down by him and concurred in by the court, that a voluntary settlement, without actual fraud, made by the grantor upon his wife and children, is not to be deemed conclusively fraudulent and void as to a subsequent purchaser *from him for valuable consideration, when such purchaser has full notice of the prior settlement.

Bank of Alexandria *v.* Patton &c., 500

FREEDOM.

1. What issue of freedwoman is not entitled to freedom. See *Emancipation No. 1, 2, and*

Henry *v.* Bradford, 53

2. Concerning suit by slave entitled to freedom in futuro, against his master, see *Slaves &c. No. 5, and*

Williams *v.* Manuel, 639

FREEHOLD.

Concerning disclaimer by devisee, see *Disclaimer, and*

Bryan *v.* Hyre & al., 94

GENERAL COURT.

When general court will remand prisoner before a justice, after discharging him on habeas corpus from illegal commitment by circuit court. See *Commitment No. 2, and* Young *v.* Commonwealth, 744

GHEENT—Treaty of.

Widow's interest in money received under treaty of Ghent as indemnity for deported slaves of intestate. See *Slaves &c. No. 1, and*

Foushee *v.* Blackwell & wife, 488

GIFT.

What voluntary settlements are void, and what valid, as to subsequent creditors and purchasers. See *Fraud, and*

Hutchison & al. *v.* Kelly, 123, 4

Bank of Alexandria *v.* Patton &c., 500

GUARDIAN AND WARD.

I. Mode of stating guardian's account.

1. The decree of this court at the time of the decision reported in 3 Leigh 407, having remanded this cause with directions that the account of the land fund and the hire of the slaves should be stated as a guardian's account, question now whether those directions have been complied with.

Garrett *ex'or &c. v.* Carr & ux. &c., 196

2. Construction of the 7th section of the act in R. C. 1819, p. 407, concerning guardians, which requires every guardian to exhibit to the court which appointed him, once in every year, "accounts of the produce of the estate, of the sales and disposition of such produce, and of the disbursements;" and of the 9th section, which provides that the balance appearing against the guardian "may be put out to interest for the benefit of the ward, upon such security as the court shall direct and approve; or the guardian, if it remain in his hands, shall account for the interest, to be computed from the time his account was or ought to have been passed."

S. C., 196

3. If, upon the first settlement by the guardian of his account, a balance remain in his hands on which he is to account for interest, such interest must, in his second annual account, be credited to the ward, like other profits of the estate; and if the interest and other profits credited in this second account exceed the disbursements, the surplus, whether it arise from the interest aforesaid

or from other profits, will constitute a balance against the guardian, on which, if it remain in his hands, he must account for interest, which interest must, in the third annual account, be credited to the ward; and so on toties quoties. S. C., 196

4. The case of a guardian indebted to his ward for the annual value of land occupied, and of a slave possessed by him, forms an exception to the general rule that interest is not to be allowed on estimated rents and hires. Such annual value must, in the annual account exhibited by the guardian, be credited to his ward, and the surplus beyond the disbursements will bear interest, like other profits of the estate. S. C., 196

5. Where a guardian has returned no account to the court which appointed him, and a bill in equity is filed against him, the court of equity will charge him with interest from the time and in the manner that he would have been charged, if his account had been exhibited annually to the court which appointed him; and will settle the accounts, in other respects, upon the principles that 776 would have governed the settlements, if regular returns had been made to that court. S. C., 197

6. From the time that the guardianship terminates, the account between the guardian and ward will be stated upon the ordinary principle that prevails between debtor and creditor. Sums paid after that time by the guardian to the ward will be credited at the respective dates of such payments, so as to stop interest pro tanto from those dates. S. C., 197

II. Guardian ad litem.

7. Concerning appointment of guardian ad litem for defendant in chancery suggested to be lunatic, see Lunacy, and

Campbells v. Bowen's adm'rs &c., 241

8. No rule is better settled, than that an answer of an infant by guardian ad litem cannot be read against him at all, for any purpose. Per Baldwin, J.

Bank of Alexandria v. Patton &c., 500

HABEAS CORPUS.

1. What commitment does not sufficiently specify offence. See Commitment No. 1, and Young v. Commonwealth, 744

2. When general court will remand prisoner before a justice, after discharging him from illegal commitment by circuit court. See Commitment No. 2, and S. C., 744

3. Right of prisoner for treason or felony to be discharged of the crime if not tried at or before third term after examination. See Criminal jurisdiction &c. No. 11, and Green v. Commonwealth, 731

4. A person of full age voluntarily enlisting in the army of the United States is not entitled to be discharged from the service upon the ground of his being an alien.

United States v. Cottingham, 615

HEIR.

Concerning application of personal estate, in favour of heir, to relieve the realty, see Appellate jurisdiction No. 7, and

Cocke's adm'r v. Gilpin, 21

HUSBAND AND WIFE.

1. A suit for alimony being brought by a wife against her husband, who has deserted her and left the commonwealth, and a sum of money being obtained for her by her attorney at law by a compromise of that suit, held, that on a bill in equity, in the name of the feme by her next friend, against the attorney for the money so obtained by him, a decree may be rendered for the same, although the husband be no party to the suit. Spencer v. Ford, 648, 9

2. Protection against husband, of wife's rights in money directed to be laid out in land, where they sue electing to take the money. See Trusts and trustees No. 2, and Ashby v. Smith and wife, 55, 6

3. Concerning suit by vendee for partial execution of husband's contract to convey wife's land, see Specific execution No. 2, and M'Cann v. Janes, 256

IDIOTS AND LUNATICS.

Proceeding where lunacy of defendant in chancery is suggested. See Lunacy, and Campbells v. Bowen's adm'rs &c., 241

IMPRISONMENT.

Prosecution for assault and imprisonment. See Assault and

Jones & al. v. Commonwealth, 748

INDICTMENTS AND INFORMATIONS.

See Criminal jurisdiction and proceedings.

INFANT.

1. No rule is better settled, than that an answer of an infant by guardian ad litem cannot be read against him at all, for any purpose. Per Baldwin, J.

Bank of Alexandria v. Patton &c., 500

2. Mode of stating guardian's account. See Guardian and ward, and

Garrett ex'or &c. v. Carr & ux. &c., 196, 7

3. When sale of decedent's land under interlocutory decree may be set aside in favour of infant heir, on appeal by administrator. See Appellate jurisdiction No. 7, and

Cocke's adm'r v. Gilpin, 21

777

*INFORMER.

What prosecution is qui tam, for benefit of informer as well as commonwealth. See Slaves &c. No. 8, and

Abrahams v. Commonwealth, 676

INJUNCTION.

1. What bill of injunction is not sustainable for want of jurisdiction. See Slaves &c. No. 3, and

Brent &c. v. Peyton, 604

2. When equity will not interfere by injunction in favour of prior against subsequent surety. See principal and surety No. 4, and

Brown v. Glascock's adm'r, 461

3. What bill of injunction by slave entitled to freedom in futuro, against master, is not supported by the evidence. See Slaves &c. No. 5, and

Williams v. Manuel, 639

4. Relief against damages accrued on dissolution of former injunction. See Vendor and vendee No. 12, and

Crawford & al. v. M'Daniel, 448

5. Setoff in equity to judgment at law. See Setoff No. 2, and

Shores v. Wares, 1

What decree against party injoining judgment is irregular.

6. Where, pending an injunction to a judgment for money, the judgment creditor dies, and there is a revival in the name of his administration of the suit in equity, but not of the judgment at law, it is not regular, though the object be to avoid the delay that would take place after a dissolution of the injunction in reviving the judgment, to make a decree in the suit in equity for the money which will be payable to the creditor upon such dissolution. The court of equity is to dissolve or perpetuate the injunction, or perpetuate it in part and dissolve it for the balance, and it may in the latter case, if it shall appear just, direct that no damages shall be paid by the complainant; but it is not, in any injunction case, not even where the injunction is wholly dissolved, to make a decree for the damages payable to the creditor on the dissolution.

Medley v. Pannills's adm'r, 63

INQUISITION.

What is no ground for setting aside inquisition on application for leave to build a mill. See Mills No. 1, and

Hunter v. Matthews, 468

INSANITY.

Mode of proceeding where insanity of defendant in chancery is suggested. See Lunacy, and

Campbell's v. Bowens adm'r's &c., 241

INSOLVENTS.

1. What purchase of insolvent's land at sheriff's sale is subject to redemption. See Joint tenants No. 2, and

Cosby v. Lambert, 225

2. What ca. sa. issued against insolvent will not be quashed. See Capias ad satisfaciendum, and

Turner v. Harris's ex'ors &c., 475

3. What indictment for perjury in swearing to schedule is insufficient. See Perjury No. 1, and

Commonwealth v. Cook, 729

INSTRUCTION TO JURY.

What refusal of instruction may be reviewed by appellate court. See Appellate jurisdiction No. 6, and

Chapman &c. v. Wilson & co., 269

INSURANCE.

See Mutual assurance society, and

Ingrams v. Mu. ass. society, 661

INTEREST.

1. Allowance of compound interest against

guardian in account with ward. See Guardian and ward No. 3, and

Garrett ex'or &c. v. Carr & ux. &c., 194

2. Allowance of interest on estimated rents and hires, against guardian in account with ward. See Guardian and ward No. 4, and

S. C., 194

INTERLOCUTORY DECREE.

What decree is interlocutory. See Decree No. 1, 2, 3, and

Cocke's adm'r v. Gilpin, 20

JOINT TENANTS.

I. Interest inter se of joint purchasers of land.

1. A tract of land is purchased by a bricklayer and carpenter, who are to pay part of the price in money at stipulated times, and the rest in a house to be erected by them.

778 The *work to be done by each is agreed upon between them, and they commence its execution: but the carpenter, from misfortune in business, becomes unable to comply with his portion of the agreement. Thereupon a new agreement is made, that the carpenter shall cover in the house, and that for the work he has done, and for covering the house, he shall be allowed the value thereof, and receive that amount in land out of the tract. The carpenter nevertheless fails to cover in the house, and the bricklayer has this part of the work done; *held*, 1. that by the new agreement, the carpenter's interest in the land is such proportion thereof, as the amount of work then done, and under that agreement to be done by him, was of the original price of the land; and 2. that this proportion is charged to the bricklayer with the value of the work which under that agreement ought to have been, but was not, done by the carpenter.

Cosby v. Lambert, 225

II. What purchase by one of the interest of another is subject to redemption.

2. The carpenter makes a deed of trust conveying his interest in the land to secure two persons, sureties for him in a bond, one of whom is the bricklayer. Being afterwards taken in execution at the suit of other creditors, the carpenter is discharged as an insolvent debtor, and his interest in the land is sold by the sheriff, and purchased, at the price of 50 cents, for the bricklayer. The bricklayer afterwards declares that the carpenter shall have such benefit from the land as his work entitles him to, and upon applying to his cosurety in the bond to contribute to the satisfaction thereof, states that he does not mean to keep the land for what it sold for; that he wants no advantage of that kind. The cosurety makes contribution. Eleven years afterwards, upon a bill in equity being filed by the carpenter, the bricklayer insists that the sale by the sheriff is valid: *held*, the carpenter is entitled to redeem the interest sold by the sheriff; and a decree should be made for partition of the land, so as to assign him his due proportion, holding the same chargeable with such amount as may be ascertained to

be due the bricklayer, after crediting him for the value of the work done by him that ought to have been done by the carpenter, the sum paid by him in discharge of his suretyship, and the 50 cents paid the sheriff, and debiting him with such portion of the rents and profits as the interest of the carpenter in the land entitles him to.

Cosby *v.* Lambert, 225

III. Suit by survivor to recover for deficiency.

3. Concerning the parties to suit in recovery by surviving vendee of the land to recover compensation for deficiency in the quantity, see Vendor and vendee No. 13, and Crawford *al.* *v.* M'Daniel, 449

JUDGMENT.

1. Judgment on special verdict in ejectment, for plaintiff as to one tract and for defendant as to another. See Special verdict, and

Hutchison *al.* *v.* Kelly, 124

2. Concerning the correctness and sufficiency of judgment granting leave to build mill, see Mills No. 2, 3, and

Hunter *v.* Matthews, 468

3. Practice on reversal for defect in declaration, where no judgment had been given on demurrer thereto. See Appellate jurisdiction No. 13, and

Creel *v.* Brown, 265

4. What action of debt on judgment is not barred by the statute of limitations. See Limitation of suits No. 3, and

Herrington *v.* Harkins's adm'r's, 591

5. What plea of accord and satisfaction to debt on judgment is bad. See Accord and satisfaction, and

S. C., 591

6. Setoff in equity to judgment at law. See Setoff No. 2, and

Shores *v.* Wares, 1

7. What decree against party injoining judgment is irregular. See Injunction No. 6, and

Medley *v.* Pannill's adm'r, 63

JURISDICTION.

See Appellate jurisdiction, Criminal jurisdiction and proceedings, Equitable jurisdiction.

JURY.

I. Jury of inquest.

1. What communication held by applicant *for leave to build a mill, with the jury of inquest, is no ground for setting aside the inquisition. See Mills No. 1, and

Hunter *v.* Matthews, 468

II. Right to trial by jury.

2. Whether master charged with permitting slave to go at large may demand a trial by jury. See Slaves &c. No. 10, and

Abrahams *v.* Commonwealth, 676

III. Right of prisoner to examine juror on voir dire.

3. A person called as a juror upon a trial for felony and sworn to answer questions

touching his competency, having deposed that he has formed no opinion nor come to any conclusion on the case, prisoner's counsel is about to interrogate him farther, and asks whether he has not conversed much about the case?—when court arrests the examination, and decides that no farther question shall be put to the juror by prisoner's counsel, and that he is a competent juror: *held*, such proceeding and decision of the court are erroneous, and judgment against the prisoner must be reversed therefor.

Heath *v.* Commonwealth, 735

IV. Competency of jurors.

4. The doctrine laid down in *Osiander's* case, 3 Leigh 780, and *Armistead's* case, 11 Leigh 657, as to the disqualification of jurors by preconceived opinions respecting the case of the accused, reaffirmed.

Heath *v.* Commonwealth, 735

5. A person is not rendered incompetent as a juror in a criminal case, by the formation of a legal opinion upon facts previously presented to his mind, as he would be by the formation of previous convictions in respect to the facts themselves. S. C., 735

V. Misconduct of jurors.

6. New trial in felony, for separation of a juror from his fellows. See New trial No. 2, and

Overbee *v.* Commonwealth, 756

7. Concerning new trial in capital case, for perjury of jurors on voir dire discovered after verdict, see New trial No. 3, and

Heath *v.* Commonwealth, 735, 6

LACHES.

Upon a bill in equity to charge property which has passed into the hands of a third persons without notice of the complainant's claim, the court being called upon to investigate transactions which occurred thirty years before the institution of the suit, and, from the lapse of time and the obscurity of the transactions, it being impossible to arrive at the truth of the case, *held*, the bill ought to be dismissed.

Page &c. *v.* Booth &c., 161

LAND.

1. What is not waste and unappropriated. See Patent No. 1. Caveat, and

Warwick & ux. & al. *v.* Norvell, 308

2. What is no dedication to public use. See Dedication, and

Skeen &c. *v.* Lynch &c., 186

3. What conveyance by sheriff passes no title. See Fraud No. 4, and

Hutchison & al. *v.* Kelly, 124

4. Concerning disclaimer by devisee of freehold, see Disclaimer, and

Bryan *v.* Hyre & al., 94

5. Right to money directed to be laid out in land. See Trusts and trustees No. 2, and

Ashby *v.* Smith & wife, 55, 6

6. Equitable jurisdiction of bill to quiet title. See Rescission No. 2, and

Morris *v.* Coleman &c., 478

7. See Vendor and vendee.

LAPSED LAND.

See Caveat, Patent No. 1, and
Warwick & ux. & al. *v.* Norvell, 308

LAPSE OF TIME.

See Laches, and
Page & c. *v.* Booth & c., 161

LARCENY.

I. Examination.

1. What examination will support indictment for larceny of checks, bank notes, and United States treasury notes. See Examining court No. 2, and

Boyd *v.* Commonwealth, 691

II. Indictment.

2. Indictment against S. S. for second offence of petit larceny alleges former conviction and punishment of S. S. for a like offence, but does not in terms allege that the court in which the first offence was tried had competent authority to try the same; nor that the former conviction remains in force; nor that such conviction appears by the record; nor that S. S. formerly convicted is the same person who is charged with the subsequent offence. Verdict, guilty: *held*, none of the omissions aforesaid in the indictment is a ground for arresting the judgment.

Stroup *v.* Commonwealth, 754

3. Indictment for larceny of checks, bank notes, and United States treasury notes.

Boyd *v.* Commonwealth, 691

III. Verdict.

4. One count of indictment charges petit larceny in the usual form; another, petit larceny committed after party had been convicted of a like offence: verdict finds prisoner guilty on both counts, and fixes imprisonment at five years: *held*, no objection lies to the verdict.

Stroup *v.* Commonwealth, 754

LEGACY AND LEGATEE.

See Trusts and trustees, and Will.

LETTER OF ATTORNEY.

See Principal and agent, and
Hewes *v.* Doddridge & c., 143

LIEN.

1. Lien of one joint purchaser of land, who has paid more than his share of the price, on the interest of the other. See Joint tenants No. 1, 2, and

Cosby *v.* Lambert, 225

2. Who is not a vendor entitled to lien for purchase money. See Vendor and vendee No. 1, and

Page & c. *v.* Booth & c., 161

3. What is not a lis pendens affecting purchaser from absent defendant. See Principal and surety No. 3, and

Stout *v.* Vause & others, 169

LIMITATION OF SUITS.

1. Construction of clause excepting ac-

counts between merchant and merchant out of the statute of limitations. See Merchants' accounts, and

Coalter *v.* Coalter, 79

2. Limitation of suit by one partner against another for account. See Partnership No. 6, 7, and S. C., 79

3. The statute 1 R. C. 1819, p. 489, ch. 128, § 5, declaring that where execution hath issued and no return is made thereon, the party in whose favour the same was issued may obtain other executions for ten years from the date of the judgment and not after, does not bar such party from maintaining an action of debt on the judgment after ten years.

Herrington *v.* Harkins's adm'rs, 591

4. Where an action of debt is brought on a judgment after ten years from the date thereof, and the defendant wishes to avail himself of the statute of limitations, it is necessary that he should do so by plea. A demurrer to the declaration is not the proper mode to take advantage of the statute.

S. C., 591

LIS PENDENS.

What is not a lis pendens affecting purchaser from absent defendant. See Principal and surety No. 3, and

Stout *v.* Vause and others, 169

LITERARY FUND.

After the decision in the case of the Literary Fund *v.* Dawson and others, 10 Leigh 147, an act of assembly was passed the 10th of March 1841, empowering the president and directors of the literary fund to receive the estate of Martin Dawson, devised by the 17th clause of his will, into the literary fund, and making provision for managing and administering the estate when so received. Whereupon the said president and directors filed a bill against the executor and heirs to recover the estate devised by the said 17th clause. And by the answer of the executor and the demurrer of the heirs, the objection was taken that the act of assembly was passed not on the application of the executor, but against his consent, and in other respects, as well as in this, was not such an act as the testator contemplated. The circuit court dismissed the bill. But on an appeal from the decree, the court of appeals reversed the same, and remanded the cause to the circuit court, with directions to overrule the demurrer and give the relief

*sought by the bill.

Literary fund *v.* Dawsons, 402

LOTTERY.

Constitutionality and construction of law affecting lottery privilege.

On the 30th of January 1829, a statute is passed appointing commissioners to superintend the raising by way of lottery the sum of 30,000 dollars, to be paid to the president and directors of a turnpike company for the improvement and repair of their road, and authorizing the commissioners to contract with some proper person for managing and

conducting the lottery. The turnpike company, relying on the benefit of the statute, contract debts for the erection and completion of their road, expecting and intending to raise money for the payment thereof by a lottery; such debts being contracted prior to the 25th of February 1834, on which day a statute is passed enacting that it shall not be lawful to draw any lottery within the commonwealth, or to sell any ticket in a lottery to be drawn therein, after the 1st of January 1837, but providing that nothing in the statute contained shall interfere with contracts already made for the drawing of lotteries to extend beyond the 1st of January 1837, or with contracts to be thereafter made, under existing laws, for the drawing of lotteries not to extend beyond the 1st of January 1840. On the 11th of March 1834, a statute is passed appointing two persons commissioners, in place of two of the commissioners appointed by the act of January 1829 (who had resigned), to carry into effect the last mentioned act. No contract for the drawing of the lottery is made by the commissioners until the 15th of December 1839, when they make a contract for that purpose with J. P. who, after the 1st of January 1840, sells a ticket in the lottery, which is proposed to be drawn within the commonwealth. On presentment against J. P. for selling the ticket, *held*, 1. The act of February 1834 did not impair the obligation of any contract, expressly or impliedly made by the commonwealth with the turnpike company, nor contravene any right of private property vested in the company. 2. The act of March 1834, appointing new commissioners, had not the effect of exempting the lottery authorized by the act of January 1829, from the operation of the act of February 1834.

Phalen v. Commonwealth, 713

LUNACY.

Mode of proceeding where lunacy of defendant in chancery is suggested.

In a suit in equity to foreclose a mortgage, after the defendant has answered, an account been taken before a commissioner, and a decree of foreclosure made, the sons of the defendant file a petition, suggesting that the defendant is, and was at the time of the mortgage, a lunatic; and they exhibit some affidavits in support of the suggestion. The circuit court thereupon appoints the petitioners guardians ad litem to the defendant, suspends the decree of foreclosure, and (the petition being traversed) directs an issue to try the validity of the mortgage. Afterwards, considering it improper that there should be an enquiry as to the validity of the mortgage until the fact of lunacy at the time of the suggestion is first established, the court sets aside the order directing the issue, leaves those interested to furnish proof of the fact of lunacy by procuring the appointment of a committee by the county court, and declares that if this be not done in a reasonable time, it will rescind the order suspending the decree. The court waits 18 months, and then (no such step having been taken) allows the decree of foreclosure to

operate, and orders the parties who filed the petition to pay the costs incurred in consequence thereof. Whereupon those parties, as well as the original defendant, appeal: *held*, 1. That on the petition and the traverse thereof, the circuit court should have instituted an enquiry as to the state of the defendant's mind at that time, and ascertained whether it was such as to require for him the protection of a guardian ad litem. 2. That the court erred, when, without making this enquiry, it appointed guardians ad litem, and directed an issue to ascertain whether the defendant was of unsound mind when he made the mortgage. *3. That the order directing the issue was properly set aside, to correct the error in making it. 4. That, for the purpose of ascertaining whether there was such incapacity as made it proper to appoint a guardian ad litem, the court might have taken such a course as is resorted to in England in like cases; that is to say, it might have referred the matter to a master, for him to report, on a personal examination of the party, aided (if need were) on such examination, by physicians. 5. (Allen, J., dissenting.) That, under the circumstances of the case, the appellate court ought to consider that which was done in the circuit court, as equivalent to an enquiry before the master, and a report by him against the suggestion. And 6. that the parties who filed the petition were not interested as parties in the original suit, and can only claim to be injured by the decree for costs, the appellate court must dismiss the appeal from such decree for costs, as a matter of which it has not jurisdiction.

Campbells v. Bowen's adm'rs &c., 241

MERCHANTS' ACCOUNTS.

Construction of exception in statute of limitations.

1. Question whether the exception made by the statute of limitations, of accounts which concern the trade of merchandise between merchant and merchant, prevents the statute from barring an action upon such accounts, when there has been a cessation of dealings between the parties for five years. Per Stanard and Allen, J., the statute is no bar in such a case. Accord. *Mandeville &c. v. Wilson*, 5 Cranch 15, and *Robinson v. Alexander*, 8 Bligh 352.

Coalter v. Coalter, 79

2. Question whether persons engaged as partners in the business of farming, distilling, and purchasing and selling cattle, can properly be considered merchants within the meaning of the said exception. It seems, from opinions of Stanard and Allen, J., they cannot be so considered. Accord. *Lansdale v. Brashear*, 3 Monroe 330, and *Forbes v. Skelton*, 8 Simons 335, 11 Cond. Eng. Ch. Rep. 466.

Coalter v. Coalter, 79

MILLS.

I. What communication with jury of inquest is no ground to set aside inquisition.

1. The jury impanelled under a writ of ad

quod damnum awarded on an application for leave to build a mill, having found difficulty in agreeing upon the damages to be assessed for the overflowing of certain land, it is announced by the sheriff that they are not likely to agree in a verdict; whereupon the applicant requests that the jury will make another effort to come to an agreement, saying that the business is a tedious and troublesome one, and he is willing to pay whatever damages they may think reasonable. A juror then states, that the other jurors wish to assess an amount of damages which he himself thinks too large, and that he is unwilling to concur with them, unless the applicant will consent to pay the damages; and he puts the question to the applicant, whether he is willing to pay the amount (naming it) which the other jurors have fixed upon? The applicant replies that he is; and this juror thereupon concurring with the others, the inquisition is completed. The communications aforesaid take place openly, before the sheriff and all the jurors, as well as other persons assembled; though the owner of the land to be overflowed is not present at the taking of the inquisition: *held*, this is not such an interference of the applicant with the jury, as to make it proper to set aside the inquisition.

Hunter *v.* Matthews, 468

II. What judgment granting leave to build mill is valid.

2. A judgment granting leave to the proprietor of the lands on both sides of a stream to erect thereon a mill and dam, is valid and sufficient, though the record does not set forth to whom the bed of the stream belongs, and though the owner of the land which the inquisition finds will be overflowed had no notice of the time of making the application for the writ of *ad quod damnum*, or of the time of executing the same.

Hunter *v.* Matthews, 468

783 *III. What judgment granting leave to build mill is erroneous.

3. Where, upon an application to a county court for leave to erect a mill and dam, the inquisition finds that a certain quantity of land not belonging to the applicant will be overflowed, and assesses damages to the proprietor, it is erroneous for the judgment granting leave to erect the mill and dam, to provide, that upon the payment of the damages so assessed, the land overflowed shall become vested in the applicant in fee simple; and upon appeal to the circuit court by the proprietor of the land, that court must reverse the judgment with costs, though the appellee himself suggest the error and move that it be corrected.

Hunter *v.* Matthews, 468

MISDEMEANOUR.

Concerning affiance of judgment imposing a fine, see *Fine*, and

Abrahams *v.* Commonwealth, 676, 7

MISJOINDER.

1. Where one of the counts in a declaration is in case for a tort, and another in

assumpsit, a general demurrer to the declaration for such misjoinder ought to be sustained.

Creel *v.* Brown, 265

2. What objection for misjoinder of plaintiffs in bill contesting validity of will is unavailable. See *Will No. 2*, and

Malone's adm'r & al. *v.* Hobbs & al., 346

MISTAKE.

I. Correction of mistake in conveyance.

1. Sale is made of land embraced by a deed under which the vendor claims, but by mistake the conveyance from the vendor embraces some land not conveyed by that deed, and omits some comprised in it. On a bill by the vendee against the administrator and heirs of the vendor, *held*, equity will correct the mistake, by directing a conveyance from the heirs of the vendor according to the calls of the deed under which the vendor claimed.

Blessing's adm'r's *v.* Beatty, 287

II. Compensation for excess or deficiency.

2. Concerning compensation for excess or deficiency in estimated quantity of land sold, see *Vendor and vendee No. 8, 9, 10, 11, 12, 13*, and

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1. Election to take money directed to be laid out in land. See *Trusts and trustees No. 2*, and

Ashby *v.* Smith & wife, 55, 6

2. Widow's interest in money received under treaty of Ghent as indemnity for deported slaves of decedent. See *Slaves &c. No. 1*, and

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MORTGAGES AND TRUSTS.

I. What shall be deemed a mortgage.

1. Where a deed for land is absolute on its face, and, at the time it is made, a written agreement is entered into by the parties, shewing that the object of the deed is to secure to the grantee money, and indemnify him against liabilities, such deed is only a mortgage, and the right of redemption by the mortgagor is incident to it.

Breckenridge *v.* Auld &c., 148

II. Decree for sale.

2. The opinion of the supreme court of the United States in *Ray v. Law*, 3 Cranch 179, that a decree for a sale under a mortgage is a final decree, disapproved.

Cocke's adm'r *v.* Gilpin, 20

III. Controversy between claimants under successive deeds of trust.

3. On the 25th of August 1827, a deed of trust was made to four trustees of the second part, for the benefit of certain *cestuis que trust* of the third part, conveying land slaves and personal property, and also a growing crop of tobacco and corn, subject to such disposition as the trustees might find it necessary to make of the crop for the payment of any money due from the grantor

(who was an attorney at law) to his clients. The deed was only executed by the grantor, and upon his acknowledgment was admitted to record. Two of the trustees expressly declined to act. On the 26th of November 1827, another deed was made by the same grantor to the two other trustees, conveying all the slaves mentioned in the deed of 1827, as well as some *others, and also the crop of tobacco, to secure to a party money advanced by him to pay off executions which had been levied upon the slave property mentioned in the first deed, one of which executions was for a debt due to a client, of greater amount than the value of the tobacco crop. The proceeds of the property conveyed by this deed are applied according to its provisions. It does not appear that the deed of August 1827 was made on previous consultation with, or received the subsequent ratification of, the creditors or trustees named therein, or that any claim was asserted under it until October 1832; when a bill is filed by a party not named in that deed, and, for aught that appears, not known until then as one embraced by the description of client creditor, asking a decree against the cestui que trust in the deed of November 1827 for the value of the tobacco crop: *held* that the plaintiff has no title to the relief sought. Per Stanard, J. The deed of August 1827, being, when the deed of November 1827 was made, without the sanction of assent or ratification, could not in that predicament be any shield of the property against the levy of executions of creditors, nor any effectual impediment to the bona fide conveyance of the property by the grantor for valuable consideration.

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1. According to the original plan of the mutual assurance society, as developed by the acts of 1794 and 1795, none but an unincumbered fee simple estate was insurable; the insurance of mortgaged property was not thereby contemplated.

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2. In 1796, declarations were made for assurance in the mutual assurance society. In 1798, the party who declared for assurance died. And in 1821, a bill was filed by the society against his widow and heir, to subject the property insured to sale for the payment of certain quotas, which had been required in 1805 and 1809, and succeeding years down to 1820, inclusive. It appearing that at the time of the insurance the property was under mortgage, and the lapse of time being also relied on, decreed that the bill be dismissed.

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2. Pending a trial for felony and before the testimony is closed, five of the jury having received permission to retire from the courtroom accompanied by the sheriff, another juror thereupon leaves the jury box without the knowledge of the court, passes out of the courthouse through a crowd of persons collected about the door, and remains absent a few minutes, after which he returns into court; having (as he deposes) held no communication whatever with any person during his absence; but not having been, during that period, in charge of the sheriff, or even seen by him. The trial proceeds and the prisoner is convicted: *held*, such separation of the juror from his fellows is sufficient cause for setting aside the verdict.

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3. After a verdict of conviction for murder in the first degree, prisoner adduces testimony that two of the jurors who tried the case, and who on the voir dire declared that they had not formed or expressed any opinion as to the guilt or innocence of the prisoner, had in fact, previous to the trial, expressed decided opinions that the prisoner was guilty and ought to be hung; of which circumstance prisoner alleges he had no knowledge until since the verdict was rendered: and on this ground he moves to set aside the verdict: *held*, 1. Such enquiry

*was open, and the evidence admissible, for the purpose of shewing perjury and corruption in the jurors. But, 2. It belonged exclusively to the judge who presided at the trial, to weigh the conflicting credibility of the witnesses adduced by the prisoner and of the jurors, and to decide whether, in justice to the prisoner, and upon all the circumstances of the case, a new trial ought or ought not to be awarded. Heath v. Commonwealth, 735, 6

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4. What is not a lis pendens affecting purchaser from defendant. See Principal and surety No. 3, and

Stout v. Vause and others, 169

5. Concerning notice to master, of proceeding for suffering slaves to go at large, see Slaves &c. No. 7, 9, and

Abrahams v. Commonwealth, 676

NUISANCE.

Prosecution for building fence across a road. See Roads No. 3, 4, 5, and

M'Clintic v. Commonwealth, 727

ONUS PROBANDI.

What assignee of bond for purchase money must prove that the assignment was for value. See Assignment No. 4, and

Breckenridge v. Auld &c., 148

OYER.

Effect of oyer of specialty pleaded, in curing defect in the plea. See Escape No. 2, and

Vanmeter & al. v. Giles governor, 328, 9

PARDON.

That no title to pardon is acquired by a particeps criminis testifying for the commonwealth on the trial of his associate, see Accomplice, and

Commonwealth v. Dabney, 696

PARENT AND CHILD.

Construction of devise for benefit of testator's daughter and her children. See Will No. 7, and

Stinson ex'or &c. v. Day & wife, 435

PARTICEPS CRIMINIS.

See Accomplice, and

Commonwealth v. Dabney, 696

PARTIES TO SUITS.

1. When husband is not a necessary party to suit by wife. See Husband and wife No. 1, and

Spencer v. Ford, 648, 9

2. Parties to suit by surviving vendee of land to recover for deficiency. See Vendor and vendee No. 13, and

Crawford & al. v. M'Daniel, 449

3. What objection for misjoinder of plaintiffs in bill contesting validity of will is not available. See Will No. 2, and

Malone's adm'r & al. v. Hobbs & al., 346

4. See Appellate jurisdiction No. 7, and

Cocke's adm'r v. Gilpin, 21

PARTITION.

See Joint tenants No. 2, and

Cosby v. Lambert, 225

PARTNERSHIP.

I. Competency of evidence on issue as to existence of partnership.

1. In assumpsit against S. B. & C. as

partners under the firm of S. & Co. for goods sold, the question being *whether B. and C. were partners of S. by whom the goods were purchased, and B. and C. appearing to have had a storehouse in another town, a witness was asked whether he saw boxes of goods marked S. & Co. at the storehouse of B. and C. The defendants objected to the question, but the circuit court permitted it to be answered, and the defendants excepted: *held*, the evidence had a connexion, though very slight, with the matter in controversy, and though it might have been of very little weight, it was not error to permit it to go to the jury as a link in the chain of circumstances.

Chapman &c. v. Wilson & co., 267

2. A second bill of exceptions stated that the defendants asked a witness, whether he was present at a settlement made between S. B. and C. of their accounts relative to their mercantile transactions, after goods had been furnished the first by the last two? whether he knew for what certain bonds then executed by S. to B. and C. were given; and whether 20 per cent. on the amount stated to be due was not included in said bonds? The plaintiffs objected to the question, on the ground that the acts and declarations of the defendants could not be given in evidence for them, and the court sustained the objection: *held*, the evidence was properly rejected; the bill of exceptions not shewing the time of the transaction between the defendants, nor suggesting any connexion between the fact which the evidence was offered to prove and the matter in controversy, nor stating any thing from which such connexion could be inferred.

S. C., 267, 8

3. A third bill of exceptions stated, that the plaintiffs asked a witness if he had heard S. say what representations he had made to the plaintiffs at the time he purchased the goods from them, as to the existence of a partnership between himself and the other defendants: *held*, the evidence was properly admissible to prove that the plaintiffs intended to sell to, and S. intended to purchase for, a partnership, but was no proof against B. and C. that they were the partners. That evidence, however, was not regularly admissible, even for this limited purpose, until the plaintiffs had offered evidence tending to shew that there was a partnership between S. B. and C. which authorized S. to purchase on the credit of the three. S. C., 268

II. What does not constitute partnership.

4. A fourth bill of exceptions stated, that the court was asked by the defendants to give the jury the following instructions: 1. If the jury shall believe from the evidence, that in June 1832, S. bought of B. and C. \$1000 worth of goods, to commence merchandizing with on Brush creek, and that S. was to pay B. and C. for said goods 20 per cent. upon the cost thereof, or a portion of the profits of the same, to be left to the election of B. and C. and that in September succeeding the purchase, and before all the \$1000 worth of goods had been received by

S., B. and C. did elect to take the 20 per cent., and that when the goods were sold and delivered, they were charged by B. and C. to S., and the business upon Brush creek conducted, not only to the time of the election, but afterwards, in the name of S., then the said contract is not in law a partnership. 2. If the jury shall believe from the evidence, that the election by B. and C. under the contract with S. of June 1832, was made in September thereafter, and was to take the 20 per cent., and that the same was previous to the purchase of goods by S. of the plaintiffs, and that the plaintiffs at the time of giving the credit to S. did not know of the said contract made in June 1832, then they ought to find for the defendants: *held*, the instructions so asked correctly expound the law of the case stated therein, and the circuit court erred in refusing to give them. S. C., 268

III. Limited partnership, and notice of dissolution.

5. The fourth bill of exceptions further shewed that the circuit court, instead of the instructions so asked, gave the following: "If the jury shall believe from the evidence, that B. and C. entered into a contract with S. by which they agreed to furnish him with 1000 dollars worth of goods for the purpose of merchandizing on Brush creek, for which, by said contract, they were entitled to demand from S. either an advance of 20 787 per cent. or to take a portion *of the profits arising from the sale thereof, and that the said goods or a portion thereof were furnished to S. who traded thereon previous to the said election being made, it constituted B. and C. partners of S. until such period as they have made their said election and given notice thereof to the world, and responsible for his contracts in relation to said business": *held*, the instruction so given was wrong in this, that though the case stated might have created a temporary partnership until election, it was limited to the sale of the goods furnished, and to the profits thereof, and did not extend to purchases and sales of other goods, and the dissolution of such partnership was effectual in respect to all who may have had actual notice, though such notice may not have been given to the world, or even publicly. S. C., 269

IV. Limitation of suit by one partner against another for account.

6. An action of account by one partner against his copartner, for a settlement of the partnership accounts, must be commenced within five years next after the cause of action, and unless so commenced, will be barred by the statute of limitations, 1 R. C. 1819, ch. 128, § 4, p. 488, for such accounts do not concern the trade of merchandise between merchant and merchant, and therefore are not embraced by the exception to the statute. Accord. *Patterson v. Brown*, 6 Monroe 10.

Coalter v. Coalter, 79

7. A suit in equity by one partner against his copartner, for a settlement of the partnership accounts, being a substitute for the

action of account, should, like that action, be brought within five years, and if not brought within that time, will be barred by the statute of limitations. Accord. *Patterson v. Brown*, 6 Monroe 10.

Coalter v. Coalter, 79

V. Joint tenants of land.

8. See Joint tenants No. 1, 2, and *Cosby v. Lambert*, 225

PATENT.

I. What patent is void.

1. Land which had been patented in 1755, being adjudged in 1774, upon petition to the general court, to be forfeited and revested in the crown, was, in 1797, granted anew by patent to the holder of a land office treasury warrant, as waste and unappropriated land: *held* by the court of appeals (following the decision in *Whittington &c. v. Christian &c.*, 2 Rand. 353,) that the patent of 1797 was void.

Warwick & ux. & al. v. Norvell, 308

II. Repeal of patent.

2. Case in which a patent for land was repealed in chancery, under the statute 1 Rev. Code, ch. 119, so far as it interfered with the rights of the complainant. S. C., 308

PAUPER SUITS.

See Emancipation No. 1, 2, *Slaves &c. No. 5*, and

Henry v. Bradford, 53
Williams v. Manuel, 639

PERJURY.

1. Indictment against an insolvent debtor for perjury in swearing to a schedule which did not discover certain debts owing to him, *held* bad on demurrer, for not averring that he well knew and remembered that the omitted debts were then justly due and owing to him.

Commonwealth v. Cook, 729

2. Concerning new trial in felony, for perjury of jurors on voir dire discovered after verdict, see New trial No. 3, and

Heath v. Commonwealth, 735, 6

PETIT LARCENY.

What indictment and verdict of conviction for second offence of petit larceny are sufficient. See Larceny No. 2, 4, and

Stroup v. Commonwealth, 754

PLEADING.

I. Declaration.

1. What is a misjoinder of actions, fatal on general demurrer. See Misjoinder No. 1, and *Creel v. Brown*, 265

2. What declaration on official bond of sheriff, for escape in taking defective bounds bond, is insufficient. See Escape No. 1. and *Vanmeter & al. v. Giles governor*, 328

788

*II. Pleas.

3. Statute of limitations must be taken advantage of by plea, not by demurrer. See Limitation of suits No. 4, and *Herrington v. Harkins's adm'rs*, 591

4. What is no waiver of exception to admission of plea. See Waiver No. 1, and *Campbell's adm'r v. Montgomery*, 392
5. The decision in *White v. Toncray*, 9 Leigh 347, that where pleas are rejected an appellate court will take it to have been rightly done unless the defendant has excepted, approved and acted on. *Herrington v. Harkins's adm'r's*, 591
6. In what actions plea of equitable setoff is admissible. See Setoff No. 1, and *Campbell's adm'r v. Montgomery*, 392
7. What plea to action for escape, that debtor was duly admitted to the bounds, is sufficient. See Escape No. 2, and *Vanmeter & al. v. Giles governor*, 328, 9
8. When debt on judgment is not barred by statute of limitations. See Limitation of suits No. 3, and *Herrington v. Harkins's adm'r's*, 591
9. What plea of accord and satisfaction to debt on judgment is bad. See Accord and satisfaction, and S. C., 591

III. Bill in equity.

10. What bill contesting validity of will is sufficient. See Will No. 1, and *Malone's adm'r & al. v. Hobbs & al.*, 346
11. What bill for specific execution is bad on demurrer. See Specific execution No. 2, and *M'Cann v. Janes*, 256
12. What bill for recovery of slaves is not within the jurisdiction of equity. See Slaves & C. No. 2, 3, and *Armstrong v. Huntons*, 323
Brent & C. v. Peyton, 604

IV. Indictment.

13. Concerning sufficiency of indictment, see references under Criminal jurisdiction & C. IV.

POWER OF ATTORNEY.

- Construction of power. See Principal and agent, and *Hewes v. Doddridge & C.*, 143

PRACTICE IN CIVIL PROCEEDINGS AT LAW.

1. When defendant is not entitled to a continuance. See Continuance No. 1, and *Herrington v. Harkins's adm'r's*, 591
2. Statute of limitations must be taken advantage of by plea, not by demurrer. See Limitation of suits No. 4, and S. C., 591
3. What is no waiver of exception to admission of plea. See Waiver No. 1, and *Campbell's adm'r v. Montgomery*, 392
4. Presumption in appellate court that pleas were rightly rejected. See Pleading No. 5, and *Herrington v. Harkins's adm'r's*, 591
5. What refusal of instruction to jury may be reviewed by appellate court. See Appellate jurisdiction No. 6, and *Chapman & C. v. Wilson & co.*, 269
6. What must be found by verdict for plaintiff in action on sheriff's official bond for an escape. See Escape No. 4, and *Vanmeter & al. v. Giles governor*, 329

7. Judgment on special verdict in ejectment, for plaintiff as to one tract and for defendant as to another. See Special verdict, and *Hutchison & al. v. Kelly*, 124
8. Practice on reversal for defect in declaration where no judgment had been given on demurrer thereto. See Appellate jurisdiction No. 13, and *Creel v. Brown*, 265
9. What ca. sa. issued after oath of insolvency taken by debtor will not be quashed. See *Capias ad satisfaciendum*, and *Turner v. Harris's ex'or & C.*, 475
10. What is no ground for setting aside inquisition on application for leave to build a mill. See Mills No. 1, and *Hunter v. Matthews*, 468
11. What proceedings and judgment on such application are valid. See Mills No. 2, and S. C., 468
12. What judgment on such application is erroneous. See Mills No. 3, and S. C., 468

PRACTICE IN CRIMINAL CAUSES.

See Criminal jurisdiction and proceedings.

PRACTICE IN SUITS IN EQUITY.

1. Parties to such suits. See references under title Parties to suits.
2. Mode of proceeding where lunacy of defendant is suggested. See Lunacy, and *Campbells v. Bowen's adm'r's & C.*, 241
789
- *3. How account will be taken between vendor and vendee on rescinding contract. See Specific execution No. 1, and *Bryan v. Lofftus's adm'r's*, 12
4. How costs of such account are to be borne. See Specific execution No. 1, and S. C., 12
5. Recovery of costs against feme covert and her next friend. See Feme covert No. 2, and *Spencer v. Ford*, 649
6. Decree for costs where bill dismissed as to one defendant and sustained as to another. See Costs No. 1, and S. C., 649
7. What decree against party injoining judgment is irregular. See Injunction No. 6, and *Medley v. Pannill's adm'r*, 63
8. When appellate court will not notice dissolution of corporation appellant. See Corporation No. 2, and *Bank of Alexandria v. Patton & C.*, 499
9. Amendment of decree in appellate court, and affirmance thereupon. See Appellate jurisdiction No. 12, and *Blessing's adm'r's v. Beatty*, 287
10. Decree for costs in appellate court. See Costs No. 7, 8, and *Ashby v. Smith & wife*, 56
Breckenridge v. Auld & C., 148

PRINCIPAL AND AGENT.

Construction of power of attorney.

Under a power of attorney, authorizing the attorney to act in every species of business wherein the principal may be concerned or interested in the United States, *held*, notwith-

standing the broad terms of the power, the attorney is not authorized to pledge the property of his principal, to secure the individual debt of the attorney.

Hewes v. Doddridge &c., 143

PRINCIPAL AND SURETY.

I. Relief to surety against principal.

1. Suit in equity by administrator of surety against principal debtor, to obtain satisfaction for payment out of surety's estate. See Setoff No. 2, and

Shores v. Wares, 1

II. Who is a cosurety entitled to contribution.

2. A joint and several single bill being executed in the country by a principal and seven sureties, to enable the principal to borrow money from a bank, and the principal, upon coming to town, finding that the rules of the bank require a town surety, application is made by him to a citizen to become such surety. This citizen having adopted a rule not to put his name on bank paper for any person, but being willing to accommodate the principal, applies to a friend to become bound on the paper, with an assurance that if the principal does not pay it off when it becomes due, he will pay it off for him. Under this assurance, that friend puts his name on the paper as a co-obligor with the other sureties, without their knowledge. And thereupon the paper is discounted by the bank. The principal makes default when the bill becomes due, and soon afterwards the citizen pays it off: *held* by two judges (Brooke and Stanard) that the citizen is to be considered one of the eight sureties, having become such in the name of his friend, and that he is entitled to contribution from all except that friend: *dissentiente* Cabell, P.

Stout v. Vause and others, 169

III. What suit pending against absent surety does not affect purchaser of his land.

3. The facts being as above stated, a suit in equity was brought by the nominal surety against the cosureties, one of whom was an absent defendant owning land in the commonwealth. The suit was resisted on the ground that no payment had been made by the plaintiff. Subsequently, by an amendment of the bill, the surety who paid was united in the suit as a coplaintiff. In the interval between the commencement of the suit and the amendment of the bill, the absent defendant returned to the commonwealth, and conveyed the land to a purchaser for valuable consideration: *held*, no lien is created upon the land in the hands of the purchaser by these proceedings; not by the proceedings in the name of the nominal surety, because, no payment having been made by him, no decree could be rendered in his favour; and not by the proceedings in the name of the surety who paid, because the conveyance to the purchaser was before those proceedings.

S. C., 169

IV. What prior surety will not be relieved against subsequent surety.

4. A personal decree against an administrator being recovered by a creditor of the de-

cedent, the administrator appeals, giving an appeal bond with surety; the decree being affirmed, an arrangement is made between the creditor and the surety in the appeal bond, by which the decree is transferred to the surety, who makes a part of the amount due thereon by execution against the administrator, and then brings an action on the administration bond, in the name of the creditor as relator, against the surety therein bound, in which action a judgment is recovered for the balance due on the affirmed decree, being less than the amount of damages incurred by the appeal: *held*, the surety in the administration bond has no claim to be substituted to the remedy of the creditor on the appeal bond, and equity will not interfere in his favour by injoining the judgment.

Brown v. Glascock's adm'r, 461

V. Surety in forthcoming bond.

5. One of several defendants bound by judgment is insufficient in law as surety in forthcoming bond given by another. See Forthcoming bond No. 3, and

Garland &c. v. Lynch, 545, 6

PRISON BOUNDS BOND.

I. What bond is sufficient.

1. A prison bounds bond is taken payable to the sheriff, his certain attorney, his heirs or assigns, and the execution debtor having broken the bounds in the time of the same sheriff, the bond is by him assigned to the creditor: *held*, such bond and assignment are good and sufficient in law to render the obligors responsible to the creditor, and the sheriff is not liable for the escape.

Vanmeter & al. v. Giles governor, 328

2. Prior to the 1st of January 1820, the law did not require that bonds given for the prison rules should be conditioned for the return of the debtor to close prison at the end of a year. S. C., 328

II. Who may assign.

3. A prison bound bonds made payable to the sheriff and his successors in office, may be assigned to the creditor by the sheriff who took it, or by a succeeding sheriff, according as the debtor's escape may be in the time of the one sheriff or the other: per Baldwin, J.

S. C., 328

4. Quære whether, if a prison bounds bond were made payable to the sheriff and his representatives, or to him alone, it would be assignable by him, or, in the event of his death, by his executor or administrator, after an escape of the debtor from a succeeding sheriff? S. C., 328

III. Action for taking defective bond.

5. Concerning declaration, plea and verdict in action on official bond of sheriff, charging escape in taking defective bounds bond, see Escape No. 1, 2, 4, and S. C., 328, 9

PRIVILEGE.

1. Constitutionality and construction of law affecting statutory privilege to raise money by lottery. See Lottery, and

Phalen v. Commonwealth, 713

2. Whether a master charged with permit-

ting his slave to go at large is entitled to trial by jury. See *Slaves &c. No. 10*, and *Abrahams v. Commonwealth*, 676

PRIVY EXAMINATION.

When such examination is proper for authorizing payment of wife's money to husband. See *Trusts and trustees No. 2*, and *Ashby v. Smith and wife*, 55, 6

PROBAT.

Concerning bill in chancery to contest validity of will after probat, see *Will No. 1*, 2, 3, and

Malone's adm'r & al. v. Hobbs & al., 346

PROCHEIN AMI.

Recovery of costs against feme covert and her next friend. See *Feme covert No. 2*, and *Spencer v. Ford*, 649

PURCHASER.

1. Rights of joint purchasers of land inter se. See *Joint tenants No. 1, 2*, and *Cosby v. Lambert*, 225

*2. What is not a *lis pendens* affecting purchaser from absent defendant. See *Principal and surety No. 3*, and *Stout v. Vause and others*, 169

3. When assignee of bond for purchase money must prove that the assignment was for value. See *Assignment No. 4*, and *Breckenridge v. Auld &c.*, 148

4. What purchaser cannot avoid voluntary settlement of vendor. See *Fraud No. 7*, and *Bank of Alexandria v. Patton &c.*, 500

5. See *Vendor and vendee*.

QUIETING TITLE.

What suit for quieting the title to land is within the jurisdiction of equity. See *Rescission No. 2*, and

Morris v. Coleman &c., 478

QUI TAM PROSECUTION.

What is sufficient to shew that a prosecution against master for permitting slaves to go at large is *qui tam*. See *Slaves &c. No. 8*, and

Abrahams v. Commonwealth, 676

RAILROAD COMPANY.

See *Winchester and Potomac railroad company*.

RECRUIT.

A person of full age voluntarily enlisting in the army of the United States is not entitled to be discharged from the service upon the ground of his being an alien.

United States v. Cottingham, 615

REDEMPTION.

In what cases the right of redemption exists. See *Joint tenants No. 2*, *Mortgages and trusts No. 1*, and

Cosby v. Lambert, 225

Breckenridge v. Auld &c., 148

RENTS AND PROFITS.

1. Account of rents and profits on rescinding contract for sale and purchase of land. See *Specific execution No. 1*, and

Bryan v. Lofftus's adm'rs, 12

2. Interest on estimated rents and hires allowed against guardian in account with ward. See *Guardian and ward No. 4*, and

Garrett ex'or &c. v. Carr & ux. & al., 196

RESCISSION.

When rescission will be decreed in favour of vendee.

1. The grantee in a deed for land, which is absolute on its face, but in truth a mortgage, having conveyed the land to a purchaser from him for valuable consideration, without notice of the equity; and the purchaser, upon obtaining knowledge of it, having filed a bill against his vendor for a rescission of the contract, in which suit the mortgagor is a party, and unites in the prayer for rescission: *held*, such rescission will be decreed, unless there be some other party who has a right to object.

Breckenridge v. Auld &c., 148

2. The owner of a tract of land conveys the same in trust to secure a debt, and afterwards, in May 1819, sells 100 acres of the tract to a party having notice of the incumbrance, who receives from the vendor a deed and the possession of the land, pays him a part of the purchase money, and engages to pay the residue when the vendor shall make him a good title; no time being limited for perfecting the title, and both parties believing that several years will elapse before it is perfected. The whole tract is sold under the trust deed, and conveyed by the trustee to the purchaser; who, in 1820, brings suit in chancery against the original owner, his vendee of the 100 acres, and a third person, by whom a lien on the land is claimed under a trust deed prior in date to that under which the plaintiff purchased; the object of the suit being to have the plaintiff's title quieted, and possession of the land delivered to him. The vendee of the 100 acres, having failed to answer the bill though duly served with process, is brought into court in June 1832 to answer interrogatories, and the plaintiff thereupon offering him the election, to take a conveyance from the plaintiff of his title to the 100 acres, and pay him the residue of the purchase money stipulated with the vendor, or else *to surrender his own title under the vendor's deed, he answers, declining to have his contract with the vendor carried into execution, and reclaiming the purchase money he has paid him. The land has then become greatly depreciated in value. In 1833 it is decided that the first deed of trust has been satisfied, and that the defendant claiming under it has no lien. In 1834 the court not only decrees that the plaintiff be quieted in his title and possession against all the defendants, but, holding that the vendee of the 100 acres has been unreasonably delayed in his title, and that the tender by the plaintiff was too late, proceeds to decree that the contract and deed for the 100 acres be annulled, and that the vendor repay to the vendee the purchase money he has received. The vendor appeals from the decree, and in the court of appeals objects.

1. That equity has no jurisdiction of the

plaintiff's case. 2. That the vendee ought to have been required to take the title offered by the plaintiff. 3. That the case is not one in which a decree can properly be rendered between codefendants. But the court of appeals affirms the decree.

Morrias v. Coleman &c., 478

3. See Specific execution No. 1, and
Bryan v. Lofftus's adm'rs, 12

REVOCATION.

What is no revocation of will. See Will No. 4, 5, and

Malone's adm'r & al. v. Hobbs & al., 346, 7

ROADS.

I. From what order of county court no appeal is demandable as of right.

1. Construction of the act of April 16, 1831, declaring that appeals to the circuit courts shall be demandable as of right from the orders of the county or corporation courts in controversies concerning mills, roads, or the like.

Hill v. Salem turnpike co., 263

2. Where, upon the application of a turnpike company, a county court appoints freeholders to assess the damages to a tract of land which will result from opening a turnpike road through it, and upon a report being made by the freeholders, it is affirmed by the county court and entered of record, an appeal to the circuit court is not demandable of right from such order of the county court.

S. C., 263

II. Prosecution for building fence across road.

3. Indictment on statute of 1834-5, ch. 77, § 20, against owner and tenant of land through which a public road passes, for building a fence across a portion of the road, and continuing the fence so built across said road for three days, *held* sufficient on demurrer.

McClintic v. Commonwealth, 727

4. On trial of such indictment, court refuses an instruction asked by defendant, that the jury must be satisfied from the evidence that the fence was built across the road: *held*, the instruction was properly refused.

S. C., 727

5. Verdict on such indictment finds defendant guilty, and assesses his amercement to five dollars; and judgment is rendered for the amercement and costs: *held*, there is no error in such proceeding.

S. C., 727

SALE.

1. When sale of decedent's land under interlocutory decree may be set aside on appeal by administrator from final decree. See Appellate jurisdiction No. 7, and

Cocke's adm'r v. Gilpin, 21

2. See Vendor and vendee.

SCIRE FACIAS.

1. What ca. sa. returned is sufficient to found scire facias against special bail. See Capias ad satisfaciendum, and

Turner v. Harris's ex'or &c., 475

2. Scire facias to repeal letters patent. See Patent No. 2, and

Warwick & ux. & al. v. Norvell, 308

SETOFF.

I. Equitable defence in action at law.

1. The 62d section of the act passed the 16th of April 1831, establishing the circuit superior courts, allowed the equitable defences therein provided for, in all actions at law pending in such courts at the time of pleading the same, whether such actions were *originally brought in such courts, or had been transferred thereto from the former superior courts of law.

Campbell's adm'r v. Montgomery, 392

II. Setoff in equity against judgment at law.

2. A sale is made of a tract of land, and the terms set forth in articles of agreement executed under seal between the two vendors and the vendee. One of the vendors dies after bequeathing what is due to her, and appoints her legatee executor. A lien being alleged to exist upon the land, the surviving vendor and the executor enter into bond with surety to indemnify the vendee, who thereupon pays most of the purchase money. Afterwards the vendee is compelled to pay a considerable sum to satisfy the lien, and one of the principal obligors being out of the commonwealth, and the other insolvent, he retains for his indemnity the assets of the surety (of whose estate he is administrator) against other creditors of the surety, some of equal and others of inferior degree. An action of covenant being then brought on the articles of sale, in the name of the vendor who survived, for the benefit of the legatee of the other, against the vendee, a trial is had, upon which both parties treat the amount of assets of the surety's estate retained by the administrator, as a satisfaction pro tanto of the indemnifying bond, and the difference between the amount so retained and the sum paid to satisfy the lien being credited, a verdict is found and judgment rendered for what is supposed to be the balance due of the purchase money. On a bill in equity by the vendee, in his own right and as administrator of the surety, against the surviving vendor and the legatee of the other, shewing the foregoing facts, and that, since the judgment, debts against the surety, alleged to be of superior dignity to that upon the indemnifying bond, have been demanded of the complainant and claimed by suit, *held*, 1. That though none of the other debts against the surety's estate should appear to be of higher dignity than the claim on the indemnifying bond, still the complainant, as administrator of the surety, is rightly in equity, to obtain satisfaction for the payment made out of the surety's estate on account of the suretyship; and one of the principals having removed from the commonwealth, and the other being insolvent, he may stay in his hands the amount due from himself personally on the judgment, in part satisfaction of the claim of the surety's estate: 2. That if any of the debts

against the surety's estate shall appear to be of higher dignity than the claim against the surety on the indemnifying bond, and it shall become necessary to apply to the payment of those debts any part of the assets of the surety's estate, the complainant will for so much have a valid claim in his own right, and to that extent the injunction to the judgment should be perpetuated.

Shores v. Wares, 1

SETTLEMENT.

Concerning validity of voluntary settlement by party indebted at the time, see Fraud and

Hutchison & al. v. Kelly, 123, 4
Bank of Alexandria v. Patton &c., 500

SHERIFFS.

I. Bounds bond, and action for escape.

1. What prison bounds bond is sufficient, and who may assign the same. See Prison bounds bond, and

Vanmeter & al. v. Giles governor, 328

2. Concerning declaration, plea and verdict in action on official bond of sheriff for escape in taking defective bounds bond, see Escape No. 1, 2, 4, and S. C., 328, 9

II. Liability for taking insufficient security in forthcoming bond.

3. That the sheriff is liable for taking as surety in forthcoming bond a party bound by the judgment, see Forthcoming bond No. 3, and

Garland &c. v. Lynch, 545, 6

4. In a suit on a sheriff's bond under the act 1 R. C. 1819, ch. 78, § 13, p. 279, there is a demurrer to the evidence, and it appearing thereby that the party for whose use the suit is brought had an execution against two, which was levied on the goods of one, who gave a forthcoming bond with the 794 other as security, and *that, the bond being forfeited, the execution awarded thereon proved unavailing, the circuit court holds the evidence sufficient to support the action. Some of the evidence which had been introduced tending to shew that part of the debt might have been made under the execution on the forthcoming bond if the creditor had not interfered, the counsel for the defendants then insists that the jury should weigh the evidence in assessing the damages. But the opinion of the circuit court is, that the plaintiff must recover the amount of his debt, or nothing, and that the evidence cannot be urged before the jury in mitigation of damages: *held*, that in fixing the damages absolutely at the amount of the debt, and thus taking from the jury all discretion, the circuit court erred. Accord. Perkins and others v. Giles governor, 9 Leigh 397.

Garland &c. v. Lynch, 546

III. Conveyance by sheriff.

5. What conveyance of land by sheriff passes no title. See Fraud No. 4, and

Hutchison & al. v. Kelly, 124

SLAVES AND FREE NEGROES.

I. Widow's interest in money received for deported slaves under treaty of Ghent.

1. Under the first article of the treaty of Ghent, and the subsequent conventions between the United States and Great Britain, of London in October 1818, and of St. Petersburg in July 1822, the owners of slaves which were carried away from the territories of the United States by the british forces at the close of the late war, were entitled to indemnity for all such slaves, but not to the slaves in and specie: and a citizen of Virginia, the owner of certain slaves so deported, having died in 1825 without issue, leaving his wife surviving him, and his administrator having afterwards received, under the act of congress of the 2d March 1827, a sum of money as indemnity for those slaves, the widow is entitled to half the distributable surplus of that money, as her absolute property, not merely to such interest therein as she would have been entitled to in the slaves.

Foushee v. Blackwell & wife, 488

II. What suit for slaves is not within jurisdiction of equity.

2. Bill in equity by claimant of legal title to a female slave, against an adverse claimant, charges that the slave, with her increase if any, is in possession of defendant, who refuses to surrender the same to plaintiff; and prays that defendant may be decreed to give up the slave, that he may set forth the names of her increase if any, and say if the same be not in his possession, and that he may account for the hires and profits thereof since the plaintiff's title accrued: *held*, equity has no jurisdiction of the case.

Armstrong v. Huntons, 323

3. A feme sole owning slaves made a bill of sale of them for 500 dollars, took from the purchaser his bond for that sum, and on the same day made her will releasing the bond. She died soon afterwards, and her will was offered for probat to the county court of Nelson, and the case continued until the next term. Before that term a bill in equity was exhibited to a judge in vacation, by the purchaser against two defendants, setting forth that at the time the instruments were executed the slaves were in Stafford, but that after the death of the testatrix, and before her will could be proved, one of the defendants went to Stafford and took possession of the slaves, and together with the other, who aided him in getting possession of them, had clandestinely removed them, or was clandestinely removing them, from the county of Stafford, and would probably sell them to a trader, or so secrete them as to put it out of the complainant's power to regain the possession of them. An injunction was awarded, and the order directed to the clerk of the circuit court of Nelson, though neither the defendants nor the slaves had ever been in that county. The defendants in their answers objected to the jurisdiction, but did not set up any title to the slaves except through the decedent, and as her next of kin: *held*, 1. that the case made by the

bill was not one for the equitable jurisdiction of any court; and 2. that if it were, that jurisdiction could not have been properly exercised by the circuit court of Nelson.

Brent &c. v. Peyton, 604

795 *III. Suits for recovery or protection of freedom.

4. What issue of freedwoman is not entitled to freedom. See Emancipation, and Henry v. Bradford, 53

5. A testatrix domiciled in the district of Columbia bequeaths a negro to a legatee, to serve him 27 years, and then be free. The legatee sells the negro for that period, and takes from the purchaser a bond conditioned that he will not sell the negro for a longer time. The negro is brought into Virginia by the purchaser, with the purpose of carrying him through this state to a city or state farther south. On a bill in the name of the negro, an injunction is awarded by a judge in Virginia, to prevent his being carried out of the commonwealth until farther order. The purchaser, by his answer, denies that he has attempted to sell the negro for a longer period than the 27 years, and denies that he has designed, or does design, to do any act to prevent him from enjoying his liberty at the end of that time. The evidence in support of the bill only shews that the purchaser was engaged in the business of purchasing and selling slaves: *held*, as it does not appear by the evidence that the contemplated removal of the negro beyond the limits of this commonwealth was with intent to defeat his right to freedom when the same should accrue, or upon any claim to hold or sell him as a slave beyond that period, the injunction must be dissolved, and the negro restored to the purchaser's possession.

Williams v. Manuel, 639

IV. Proceeding where slaves have been suffered by master to go at large.

6. No warrant is necessary for apprehending a slave going at large or hiring himself out contrary to law.

Abrahams v. Commonwealth, 675

7. A slave is committed to the jail of a corporation "until the next court of hustings to be held for the same," by warrant from a justice of the peace of the corporation, which recites that the slave has been apprehended therein and brought before the justice by J. T. informer, for having been permitted by S. A. his master to go at large and hire himself out contrary to the act of assembly in such case provided, and that it appears to the justice that such slave comes within the purview of said act: *held*, 1. The court of hustings has jurisdiction to proceed against the master, according to the statute 1 Rev. Code, ch. 111, § 81. 2. It is no objection to the proceeding before the court, that the master had no notice of the proceeding before the justice. 3. In the proceeding before the court, no presentment, indictment or information against the master is necessary.

S. C., 675, 6

8. Warrant committing to jail a slave apprehended for going at large and hiring himself out contrary to law, recites that he

was apprehended and brought before the justice "by J. T. informer;" order of court directing master to be summoned states that the slave is "charged on the information of J. T.;" judgment imposing fine on master directs two thirds thereof to be paid "to J. T. the informer, who caused the fact to be established": *held*, it sufficiently appears hereby, that the prosecution was *qui tam*, for the benefit as well of the informer as the commonwealth.

S. C., 676

9. Several slaves of one master, apprehended in a corporation for going at large and hiring themselves out contrary to law, are committed to jail until the next corporation court, by separate warrants from a justice of the peace; the court awards a summons against the master, which is issued and duly served, requiring him to shew cause why he should not be fined as the law directs, for permitting his slaves D. A. &c. (naming them all) to go at large and hire themselves out in the city, contrary to law; the master appears and makes defence, and in respect to each slave a separate trial is had, and a separate fine imposed: in appellate court, the master objects that there was only one summons, and the corporation court had no authority to divide the trial: *held*, there is nothing in the objection.

S. C., 676

10. Quære whether a master, charged, under the statute 1 Rev. Code, ch. 111, § 81, with having permitted his slave to go at large and hire himself out contrary to law, is entitled to demand that the fact shall be tried by a jury? But whether he has such right or not, yet if he appear in court and make defence without demanding a trial by jury, and a judgment be thereupon rendered against him, he cannot object in the appellate court that such trial was not awarded.

S. C., 676

11. Judgment in county or corporation court, against a master for permitting his slave to go at large and hire himself out contrary to law, is properly rendered for the costs of the prosecution, including jail fees, as well as for the fine.

S. C., 676

SOLDIERS.

See Army, and

United States v. Cottingham, 615

SPECIAL BAIL.

What ca. sa. returned is sufficient to found scire facias against special bail. See *Capias ad satisfaciendum*, and

Turner v. Harris's ex'or &c., 475

SPECIAL PLEA.

1. See Accord and satisfaction, and Herrington v. Harkins's adm'rs, 591

2. See Escape No. 2, and Vanmeter & al. v. Giles governor, 328

3. See Setoff No. 1, and Campbell's adm'x v. Montgomery, 392

SPECIAL VERDICT.

Judgment for plaintiff in part and for defendant in part.

In ejectment, the jury having returned a special verdict, which finds facts in relation

to two tracts of land, and concludes by saying, that if the law arising upon the facts be for the plaintiff, they find for the plaintiff the lands in the declaration mentioned, and one cent damages, but if the law be for the defendant, they find for the defendant; and the court being of opinion that the law is for the plaintiff as to one of the tracts of land, and for the defendant as to the other; *held*, it is unnecessary to award a venire de novo, but judgment may be given on the special verdict, for the plaintiff for one tract, and for the defendant for the other.

Hutchison & al., *v.* Kelly, 124, 5

SPECIFIC EXECUTION.

I. Specific execution denied to vendor; contract rescinded; and account taken between vendor and vendee.

1. On the 10th of October 1818, a sale was made of a tract of 370 acres of land in Augusta county, at \$40 per acre, to be paid as follows, viz: \$600 in hand (which was paid accordingly), \$1200 on the 28th of December 1818 with interest from the day of sale, \$1200 on the 28th of March 1819 with like interest, \$750 on the 28th of March 1820, and the residue in sums of \$750 payable at specified times. By the articles of agreement, the vendee was to give bonds and satisfactory security for his payments, and the vendor bound himself to make the vendee a good and sufficient deed in fee simple, with general warranty, at the first Augusta court after the payment in 1819. The vendee paid the instalment which fell due on the 28th of December 1818, and the instalment which fell due in 1819 was paid, part before, and the residue on, the 9th of December in that year, so that the vendor became bound to make a deed for the land as early as the first Augusta court after the 9th of December 1819. No deed was made. The vendee notwithstanding paid the instalment which fell due on the 28th of March 1820. About the 10th of April of that year, the vendor died insolvent, and the vendee, soon after his death, made known his determination to make no farther payments until he should get a title. On the 10th of September 1821, a suit in equity was brought by the administrators of the vendor against the vendee and the heirs of the vendor, to compel a specific execution of the contract; and no title having ever been obtained by the vendor, the complainants made defendants those in whom that title was outstanding. A considerable fall having taken place in the value of property, the vendee, by his answer sworn to in May 1825, resisted the prayer of the bill, on the ground that, under the circumstances of the case, equity required a rescission, and not an execution of the contract. At this time the default of the vendor's heirs still continued, and it continued three years afterwards; that
797 *is to say, it continued for more than eight years from the time when the vendor had bound himself to make the title. During this time the land had fallen in value more than 50 per cent. and the vendee had never surrendered possession: *held*, 1. That

the long continued default of the vendor and his heirs, and the change of circumstances during its continuance, constitute a valid objection to a specific performance of the contract. 2. That the vendee should, on the one hand, release all his rights under the contract, deliver up the land, and account for its rents and profits during the time he held it; and, on the other hand, have the purchase money paid by him returned, with interest from the times when the payments were made, and also have the value of any permanent improvements which he may have put upon the land set off against the rents and profits, provided they do not exceed the amount of the said rents and profits. 3. That if, on stating an account between the parties on these principles, a balance should appear to be due from the vendee, he should be decreed to pay it; if in his favour, it should be decreed to him, and if there be no sufficient personal estate of the vendor to pay the same, the land should be subjected to its payment. 4. That each party should pay his own costs, except as to taking the accounts, the costs of which should be equally divided between the parties.

Bryan *v.* Lofftus's adm'rs, 12

II. What bill by vendee for specific execution in part will be dismissed.

2. A husband sells land in which his wife has an estate in fee, and executes a bond to the purchaser, conditioned that he and his wife will make a deed to the purchaser within a specified time. After that time the husband states that his wife has declined joining him in the deed, and has forbidden him to convey his estate, and he refuses to make any conveyance. Thereupon a bill is filed by the purchaser against the husband, stating that there are children of the marriage, claiming that the husband is therefore entitled to a life estate, and praying that he may be decreed to convey to the complainant all his interest in the land, reserving to the complainant his right of action at law upon the bond against the husband for failing to procure his wife to unite with him in the conveyance. The bill being demurred to, the circuit court sustains the demurrer and dismisses the bill; and this decree is affirmed.

M'Cann *v.* Janes, 256

STATUTE—Constitutionality of.

See Lottery, Slaves &c. No. 10, and

Phalen *v.* Commonwealth, 713

Abrahams *v.* Commonwealth, 676

STATUTE OF FRAUDS.

See Fraud.

STATUTE OF LIMITATIONS.

See Limitation of suits.

STATUTES OF VIRGINIA, OF A GENERAL NATURE, CITED AND CONSTRUED.

I. Literary fund.

1. Ch. 33, p. 82 of 1 R. C. constituting and regulating the literary fund, cited.

Literary fund *v.* Dawsons, 413

2. Suppl. to R. C. ch. 18, p. 33; Id. ch. 19, p. 35; Id. ch. 20, p. 36; Id. ch. 28, p. 40, regulating the literary fund, cited.

S. C., 413

3. Acts of 1820-21, ch. 11, § 5, p. 16, appropriating surplus income of literary fund to endowment of colleges, academies and intermediate schools to be thereafter designated by the legislature, cited.

S. C., 416

4. Acts of 1835-6, ch. 4, p. 7-8, allowing surplus revenue of literary fund to be applied to colleges and academies, cited.

S. C., 414, 432

5. Acts of 1836-7, ch. 12, p. 13, for payment of outstanding claims against school commissioners, and dividing counties and corporations into school districts, cited.

S. C., 413

II. Jurisdiction and practice of courts.

6. Ch. 64, § 11, 17, p. 192, 194 of 1 R. C. concerning reviving and other process from the court of appeals, cited.

Bank of Alexandria v. Patton &c., 516

7. Same chapter, § 23, p. 195, authorizing the judges of the court of appeals to direct the form of writs, cited.

S. C., 517

8. Acts of 1830-31, ch. 11, § 31, Suppl. to R. C. p. 149, providing that process consequent upon appeals to the court of appeals should be regulated by the laws and usages then in force and in practice, cited.

S. C., 516

9. Ch. 66, § 38, p. 203 of 1 R. C. giving to the judges of the district courts of chancery general jurisdiction in awarding injunctions and writs of ne exeat, cited.

Brent &c. v. Peyton, 609, 612, 13

10. Acts of 1830-31, ch. 11, § 22, Suppl. to R. C. p. 142, defining the chancery jurisdiction of the circuit superior courts, cited.

S. C., 608

11. Same chapter, § 41, Suppl. to R. C. p. 151, giving to judges of circuit superior courts general jurisdiction in awarding injunctions, construed.

S. C., 604

12. Ch. 66, § 51, p. 206 of 1 R. C. concerning appeals to the court of appeals from decrees in chancery, cited.

Campbells v. Bowen's adm'r's &c., 249

13. Same chapter, § 50, 51, concerning appeals to the court of appeals from final decrees, cited.

Cocke's adm'r v. Jilpin, 34

14. Acts of 1830-31, ch. 11, § 31, Suppl. to R. C. p. 146, 7, on same subject, cited.

S. C., 34

15. Statute of October 1778, 9 Hen. stat. at large p. 523, 4, concerning appeals to the court of appeals, cited.

S. C., 34

16. Statute of May 1779, 10 Hen. stat. at large p. 90, on same subject, cited.

S. C., 34

17. Statute of 1792, 13 Hen. stat. at large p. 406, on same subject, cited.

S. C., 34

18. Statute of January 1796, Acts of 1797-8, ch. 5, § 1, p. 6, allowing appeals to the court

of appeals from interlocutory decrees, cited.

S. C., 34

19. Ch. 66, § 60, p. 208 of 1 R. C. concerning dismissal of bill where injunction is dissolved, cited.

Warwick & ux. &c. v. Norvell, 316

20. Same chapter, § 61, Acts of 1830-31, ch. 11, § 43, concerning damages on dissolution of injunction to judgment, construed.

Medley v. Pannill's adm'r, 63

cited. S. C., 66

21. Ch. 66, § 73, p. 212 of 1 R. C. concerning power of chancery court to appoint guardian ad litem to insane defendant, cited.

Campbells v. Bowen's adm'r's &c., 249

22. Acts of 1830-31, ch. 11, § 62, Suppl. to R. C. p. 157, allowing special pleas in the nature of pleas of set-off to be filed in actions brought in the circuit superior courts, construed.

Campbell's adm'r v. Montgomery, 392

23. Same chapter, § 96, Suppl. to R. C. p. 169, providing for the transfer of causes from the superior courts of law to the circuit superior courts of law and chancery, cited.

S. C., 392

24. Same chapter, § 30, Suppl. to R. C. p. 145, declaring in what cases appeals to the circuit superior courts shall be demandable as of right, construed.

Hill v. Salem turnpike co., 263

25. Same chapter, § 97, Suppl. to R. C. p. 169, for transferring causes from the district courts of chancery to certain circuit superior courts of law and chancery, cited.

Bank of Alexandria v. Patton &c., 514

III. Sheriffs.

26. Ch. 78, § 12, p. 278 of 1 R. C. prescribing form of sheriff's official bond, cited.

Garland &c. v. Lynch, 546

27. Same chapter, § 13, p. 279, giving action on sheriff's official bond, in favour of any person injured, to recover damages sustained by the breach of the condition, construed.

S. C., 546

IV. Caveats.

28. Ch. 86, § 38, p. 330 of 1 R. C. concerning omission of party to avail himself of remedy by caveat, cited.

Warwick & ux. &c. v. Norvell, 317

29. Statute of May 1779, ch. 13, 10 Hen. stat. at large p. 50, 58, giving the remedy by caveat for determining the right to waste and unappropriated lands, construed.

S. C., 308

V. Fraudulent conveyances.

30. Ch. 101, § 2, p. 372 of 1 R. C. avoiding conveyances made to delay, hinder or defraud creditors, construed.

Hutchison & al. v. Kelly, 123, 4

Bank of Alexandria v. Patton &c., 500

31. Same section, avoiding conveyances made to defraud purchasers, construed.

Bank of Alexandria v. Patton &c., 500

799 *VI. Usury.

32. Ch. 102, p. 373 of 1 R. C. against usury, cited.

U. S. bank &c. v. Merchants bank, 579

VII. Wills.

33. Acts of 1834-5, ch. 60, p. 43, Acts of 1839-40, ch. 57, § 2, p. 50, prescribing the mode of executing wills of personalty, cited. Malone's adm'r & al. v. Hobbs & al., 364
34. Ch. 104, § 3, p. 376 of 1 R. C. declaring the modes of revoking a will of lands, cited. S. C., 374
35. Same chapter, § 9, p. 377, declaring that written wills of chattels shall not be revoked by unwritten declarations, cited. S. C., 361
36. Same chapter, § 13, p. 378, allowing validity of will to be contested by bill in chancery after probat, construed. S. C., 346
37. Same chapter, § 14, concerning evidence on trial of issue devisavit vel non, cited. S. C., 388
38. Acts of 1838, ch. 92, p. 71, authorizing validity of will to be finally determined in court of probat, cited. S. C., 389

VIII. Guardians.

39. Ch. 108, § 7, p. 407 of 1 R. C. requiring guardian to account annually with the appointing court, construed. Garrett ex'or &c. v. Carr & ux. &c., 196, 7
40. Same chapter, § 9, p. 408, providing that the balance of account appearing against guardian may be put out to interest, or that the guardian, if it remain in his hands, shall account for the interest, construed. S. C., 196, 7
41. Statute of October 1785, ch. 86, 12 Hen. stat. at large p. 196, on same subject, cited. S. C., 208
42. Statute of December 1794, Acts of 1794, ch. 14, § 6, p. 11, on same subject, cited. S. C., 208

IX. Idiots and lunatics.

43. Ch. 109, § 3, p. 413 of 1 R. C. directing justices of peace to examine insane persons, cited. Campbells v. Bowen's adm'rs &c., 249
44. Same chapter, § 6, 9, 22, p. 413, 415, 417, concerning the appointment of committees of insane persons, cited. S. C., 249

X. Unlawful entries and detainers.

45. Ch. 115, § 14, p. 458 of 1 R. C. prescribing form of verdict on complaint of forcible or unlawful entry or unlawful detainer, cited. Vanmeter & al. v. Giles governor, 337

XI. Repeal of letters patent.

46. Ch. 119, p. 466 of 1 R. C. declaring and regulating the practice of suing out and prosecuting writs of scire facias to repeal letters patent, construed. Warwick & ux. &c. v. Norvell, 308
47. Same chapter, § 1, p. 467, providing that patent shall not be repealed unless the petitioner has a good equitable right, cited. S. C., 317

XII. Foreign attachments.

48. Ch. 123, p. 474 of 1 R. C. directing the method of proceeding in courts of equity against absent debtors, construed. U. S. bank &c. v. Merchants bank, 573

49. Act of 1744, 5 Hen. stat. at large p. 220 on same subject, cited. S. C., 575
50. Act of 1777, 9 Hen. stat. at large p. 396, on same subject, cited. S. C., 575

XIII. Statute of limitations.

51. Ch. 128, § 4, p. 488 of 1 R. C. excepting out of the statute such accounts as concern the trade of merchandise between merchant and merchant, construed. Coalter v. Coalter, 79
52. Same chapter, § 5, 17, p. 489, 492, limiting proceedings on judgments, cited. Cocke's adm'r v. Gilpin, 48
53. Same chapter, § 5, declaring that where execution has issued and no return is made thereon, the party in whose favour the same was issued may obtain other executions for ten years from the date of the judgment and not after, construed. Herrington v. Harkins's adm'rs, 591

XIV. Proceedings in civil suits.

54. Ch. 128, § 38, p. 497 of 1 R. C. providing that no personal action or suit in equity, originally maintainable by or against an executor or administrator, shall abate by the death of either party before verdict or final decree, cited. Bank of Alexandria v. Patton &c., 519, 522
55. Same section, p. 498, providing that if a party die between verdict and judgment, the judgment shall be entered as if both parties were living, cited. S. C., 518
56. Statute of 1792, 1 R. C. of 1814, ch. 76, § 20, p. 153 [110], preventing abatement of any such action by death of either party between interlocutory and final judgment, cited. S. C., 522
57. Acts of 1825-6, ch. 15, § 2, Suppl. to R. C. p. 130, providing that no suit in equity shall abate by the death or marriage of the plaintiff, cited. S. C., 517
58. Acts of 1839, ch. 66, § 1, p. 42, providing that no suit at law or in equity in the name of a curator or committee of an estate shall abate by the grant of letters testamentary or of administration on such estate, cited. S. C., 517
59. Acts of 1830-31, ch. 11, § 65, 66, Suppl. to R. C. p. 159, 160, allowing equitable defences in ejectments and real actions, cited. Campbell's adm'r v. Montgomery, 400
60. Same chapter, § 68, Suppl. to R. C. p. 161, allowing discovery in action at law, cited. S. C., 397
61. Same chapter, § 69, allowing production of papers to be compelled in action at law, cited. S. C., 397
62. Same chapter, § 101, Suppl. to R. C. p. 172, saving rights accrued before the commencement of the act, cited. S. C., 395
63. Ch. 128, § 78, p. 508 of 1 R. C. providing that new issues may be tried at the first term unless good cause be shewn for a continuance, construed. Herrington v. Harkins's adm'rs, 591

XV. Executions and forthcoming bonds.

64. Ch. 134, § 3, 4, 8, 33, p. 527, 528, 538 of 1 R. C. providing for a new execution where

the first has not produced satisfaction of the judgment, cited.

Garland &c. v. Lynch, 555
65. Same chapter, § 16, p. 530, allowing owner of goods levied on to retain the possession upon giving a forthcoming bond with sufficient security, construed.

S. C., 546

66. Same chapter, § 18, p. 531, providing remedies for obligee in forthcoming bond in case the same be quashed as faulty, construed.

S. C., 545, 6

XVI. Prison bounds.

67. Ch. 134, § 30, p. 535 of 1 R. C. prescribing the condition of prison bounds bonds, cited.

Vanmeter & al. v. Giles governor, 335, 343

68. Statute of 1793, 1 R. C. of 1814, ch. 151, § 37, p. 428 [303], on same subject, cited.

S. C., 335

69. Acts of 1806-7, ch. 27, § 2, p. 16, on same subject, cited.

S. C., 335, 339

70. Same section, requiring sheriff to recommit prison bounds debtor to close prison at the expiration of one year, cited.

S. C., 335, 339

71. Acts of 1812-13, ch. 26, § 10, p. 38, on same subject, cited.

S. C., 335

72. Acts of 1817-18, ch. 28, p. 30, 1 R. C. ch. 135, p. 547, on same subject, making sheriff liable to a fine in case of failure to recommit, cited.

S. C., 335, 339

73. Statute of 1792, 1 R. C. of 1814, ch. 66, § 18, p. 107 [76], providing that prison rules and bounds shall be assigned by the district courts, cited.

S. C., 336

74. Acts of 1807-8, ch. 3, § 2, 20, p. 7, 10, concerning the power of the superior courts of law to lay off prison rules, cited.

S. C., 336

XVII. Insolvents.

75. Ch. 134, § 31, p. 536 of 1 R. C. allowing a debtor taken or charged in execution to discharge himself by taking the oath of insolvency, construed.

Turner v. Harris's ex'or &c., 475
cited.

Commonwealth v. Cook, 729

76. Same chapter, § 34, vesting insolvent debtor's estate in the sheriff, cited.

Cosby v. Lambert, 232

77. Same chapter, § 35, providing remedy to recover money due or personal property belonging to insolvent, cited.

S. C., 233

XVIII. Escapes.

73. Ch. 136, § 3, p. 550 of 1 R. C. prescribing what shall be found in verdict against sheriff for escape, construed.

Vanmeter & al. v. Giles governor, 329

XIX. Crimes, prosecutions and punishments.

79. Ch. 111, § 81, p. 442 of 1 R. C. prescribing the proceedings in respect to slave permitted by owner or hirer to go at large or hire himself out, construed.

Abrahams v. Commonwealth, 675, 6
cited in note.

S. C., 678, 9

80. Acts of 1830-31, ch. 11, § 32, Suppl. to R. C. p. 149, allowing damages on affirmation of judgment, construed.

S. C., 676, 7

801 *81. Ch. 131, § 6, p. 517 of 1 R. C. providing that no confession or statement made by a witness on his examination shall be given in evidence against him in any prosecution other than for perjury, cited.

Commonwealth v. Dabney, 707, 711

82. Ch. 169, § 59, p. 614 of 1 R. C. declaring that approvers shall never be admitted in any case whatsoever, cited.

S. C., 706, 709

83. Ch. 147, § 5, p. 563 of 1 R. C. imposing penalty for gaming at public places, cited.

Abrahams v. Commonwealth, 688

84. Ch. 169, § 1, p. 598 of 1 R. C. concerning the day to be appointed for holding court of examination, construed.

Boyd v. Commonwealth, 691

85. Same chapter, § 28, p. 607, for securing a speedy trial to persons charged with treason or felony, construed.

Green v. Commonwealth, 731

cited in note.

S. C., 733

86. Same chapter, § 31, p. 608 of 1 R. C. providing that the charges of prosecution shall be paid out of the convict's estate, cited.

Abrahams v. Commonwealth, 685

87. Same chapter, § 65, p. 614, providing that presentments, where the penalty of the offence does not exceed a certain sum, shall be tried without a jury, cited.

S. C., 688

88. Suppl. to R. C. ch. 223, § 2, p. 278, making it felony for a bank officer to embezzle money placed under his care by virtue of his office, cited.

Commonwealth v. Dabney, 696

89. Suppl. to R. C. ch. 313, p. 382, to prevent the circulation of notes of unchartered banks, cited.

United States bank &c. v. Merchants bank, 576

90. Acts of 1828-9, ch. 21, § 1, p. 25, Suppl. to R. C. ch. 184, § 1, p. 243, making it a misdemeanour to aid a slave in escaping from his owner, cited.

Young v. Commonwealth, 744, 5

91. Acts of 1833-4, ch. 69, p. 81, for suppressing, after a certain period, the drawing of lotteries within the commonwealth, and the sale of tickets in lotteries to be drawn therein, construed.

Phalen v. Commonwealth, 713
cited.

S. C., 715, 16

92. Acts of 1834-5, ch. 66, p. 47, making it felony for a party knowingly to have in possession, without lawful authority, any plate or instrument for coining, construed.

Commonwealth v. Scott, 695

cited in note.

S. C., 695

93. Acts of 1834-5, ch. 77, § 20, p. 66, 7, imposing fine for obstruction of public road, construed.

M'Clintic v. Commonwealth, 727

cited in note.

S. C., 727

94. Ch. 236, § 11, p. 238 of 2 R. C. on same subject, cited.

S. C., 727

XX. Turnpike companies.

95. Ch. 234, p. 211 of 2 R. C. prescribing

general regulations for the incorporation of turnpike companies, cited.

Hill v. Salem turnpike co., 263

96. Same chapter, § 7, p. 213, 14, providing for assessment of damages to result from opening turnpike road, cited. S. C., 263

XXI. Mills and roads.

97. Ch. 235, § 4, p. 226 of 2 R. C. prescribing the proceedings on application by owner of land on both sides of a stream, for leave to build a mill and dam thereon, construed.

Hunter v. Matthews,

98. Same chapter, § 6, p. 227, as to the judgment granting leave to build a mill and dam, construed. S. C., 468

cited in note. S. C., 472

99. Ch. 236, p. 233 of 2 R. C. concerning public roads, cited.

Hill v. Salem turnpike co., 264

SUBROGATION.

What prior surety will not be subrogated to creditor's remedy against subsequent surety. See Principal and surety No. 4, and Brown v. Glascock's adm'r, 461

SUMMONS.

Concerning summons to master in proceeding for suffering several slaves to go at large, see Slaves &c. No. 9, and

Abrahams v. Commonwealth, 676

SUNDAY.

Court of examination may be held on the fifth day after the date of the warrant, though one of the five days be Sunday. See Examining court No. 1, and

Boyd v. Commonwealth, 691

802

*SURETY.

See Principal and surety.

SURVEY.

Concerning right of surveying on sale and purchase of land, see Vendor and vendee No. 7, and

Crawford & al. v. M'Daniel, 448

TRESPASS.

Prosecution for assault and imprisonment. See Assault, and

Jones & al. v. Commonwealth, 748

TRIAL.

1. Whether master charged with permitting slave to go at large is entitled to trial by jury. See Slaves &c. No. 10, and

Abrahams v. Commonwealth, 676

2. Right of prisoner for treason or felony to speedy trial. See Criminal jurisdiction &c. No. 11, and

Green v. Commonwealth, 731

3. See New trial.

TRUSTS AND TRUSTEES.

I. What is received by ex'or as a trustee.

1. What fund received by executor is not received in his executorial character but in that of trustee under the will. See Wills No. 6, and

Jackson & al. v. Updegraffe & al., 107

II. Rights of cestuis que trust in case of unexecuted trust to purchase and divide lands.

2. An inhabitant of Frederick county, Virginia, who died in 1806, desired by his will, 1. that the tract of land on which he lived should be sold by his executors, at such time and upon such terms as they in their judgment might think would be most conducive to the advantage of his heirs; 2. that the money arising from the sale should be applied to the purchasing other lands upon the most advantageous terms, either in state of Kentucky, or some other part of the western country that his executors might think would be most to the general interest of his heirs; and 3. that the lands so purchased should be divided amongst his five daughters and two sons, in the following manner; each of his daughters to have 400 acres, and the residue to be equally divided between the two sons; all of which divisions he desired should bear an equal proportion to each other in respect to the quality of land. The testator appointed his wife executrix, and one of his sons executor. The son qualified as executor a few months after the testator's death, and the widow died about two years afterwards. The husband of one of the daughters purchased the right of another daughter, and the three other daughters sold their rights to the son who was executor. In 1816, a bill was filed in the name of the husband and wife, to compel the executor to execute the trust by selling the land and distributing the proceeds. In 1827, a supplemental bill was filed, setting forth that in 1817 a sale was made, but the executor had taken no further step towards the execution of the trust; and praying that the plaintiffs might have a decree for their proportion of the proceeds of sale. The executor answered, that he had always been ready to purchase land in the western country for the complainants: *held*, 1. That as the trustee has improperly delayed the execution of the trust, until a great change has taken place in the situation of the western country and the circumstances of the parties, the beneficiaries ought not now to be compelled to take lands in the western country, but should be allowed to take their just proportion of the money arising from the sale of the Frederick lands; and that the principle of equality in the division of the said money is in this case just and proper. 2. That the female complainant's portion of the money arising from the sale of the lands should be so secured and protected, as to prevent its being subjected to the control or debts of the husband to a greater extent than if it were land, unless the wife should consent that the money be paid to the husband absolutely; as to which she ought to be privily examined, separately and apart from her husband, in the same manner as in the conveyance of her real estate.

Ashby v. Smith and wife, 55, 6

803 *III. Devise for testator's daughter and her children.

3. Concerning devise in trust for testator's

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Stinson ex'or &c. v. Day & wife, 435

IV. Devise for literary fund.

4. Concerning devise to executors in trust for the literary fund, see Literary fund, and Literary fund v. Dawsons, 402

V. Breach of trust, and cooperation therein.

5. Parties dealing with an executor or trustee, and cooperating with him in the misapplication of assets or trust funds, in violation of the duties of the executor, or in breach of the trust, cannot use such transactions as a defence against the claim of creditors, legatees, or cestuis que trust. And the application of assets or trust funds, by the executor or trustee, to the discharge of his individual responsibilities, is, unless the estate or trust be indebted to the executor or trustee, a violation of duty or breach of trust.

Jackson & al. v. Updegraffe & al., 107

TURNPIKE COMPANY.

See Roads No. 2, and
Hill v. Salem turnpike co., 263

VENDOR AND VENDEE.

I. Who is not entitled to lien for purchase money.

1. A person entitled to have an assignment of a title bond and the possession of the property upon paying a certain sum, transfers his right, and his assignee pays that sum, and assigns his right to another, who obtains title to the property according to the bond; after which the person first mentioned files a bill, alleging that his transfer was in consideration of money which has never been paid him, and claiming that the lien of a vendor for purchase money exists in his favor, upon the property in the hands of the subsequent holders, who purchased, as he alleges, with notice: held, no such lien exists.

Page &c. v. Booth &c., 161

II. Specific execution and rescission.

2. Specific execution denied to vendor; contract rescinded; and account taken between vendor and vendee. See Specific execution No. 1, and

Bryan v. Loftus's adm'rs, 12

3. What bill by vendee for partial execution of husband's contract to convey wife's land will be dismissed. See Specific execution No. 2, and

M'Cann v. Janes, 256

4. Rescission decreed to vendee shewing that his vendor was merely a mortgagee of the land. See Rescission No. 1, and

Breckenridge v. Auld &c., 148

5. Rescission decreed between vendor and vendee codefendants. See Rescission No. 2, and

Morriss v. Coleman &c., 478

III. Correction of mistake.

6. When equity will correct mistake in conveyance of land. See Mistake No. 1, and Blessing's adm'rs v. Beatty, 287

IV. Right of surveying.

7. Where there is a sale of land by the acre, a right of surveying exists whether expressly reserved or not, and if no time is limited for making the election to survey, it may be done at any time before the whole business is closed between the parties. Accord. Nelson v. Carrington & others, 4 Munf. 332, and Carter v. Campbell, Gilm. 170.

Crawford & al. v. M'Daniel, 448

V. Compensation for deficiency or excess.

8. A deed of bargain and sale conveys a tract of land described as "containing by survey 785 acres, and bounded as follows, to wit, beginning" &c: (here certain metes and bounds were set out) "this part containing 765 acres, and another part attached to the same tract containing 20 acres, and making up the full amount of 785 acres, being bounded as follows," &c.—the price stated in the deed being 11775 dollars, which is the product of 785 acres at 15 dollars per acre, and there being no evidence but the deed itself of the terms of the contract between the vendor and vendee. It turns out that the tract contains less than 785 acres: held, the vendee is entitled to compensation for the deficiency.

Crawford & al. v. M'Daniel, 448

9. The principles upon which equity gives relief to vendor in case of excess, or to vendee in case of deficiency *in the estimated quantity of land, examined by Baldwin, J.

Blessing's adm'rs v. Beatty, 287

10. An estimate by the parties of the quantity of land sold, whether in a contract executed or in a contract executory, ought to be taken prima facie to have influenced the price. Therefore where a sale was made, for 2000 dollars, of a tract of land, which, in the articles of sale and in the deed of conveyance, was mentioned as "containing 280 acres," without the addition of the customary words "more or less," and the tract proved to contain only 253 acres, it was considered that although the purchase money was not an equimultiple of the number of acres, yet the presumption was against the contract being one of hazard, and the vendor was held liable for the deficiency; dissentiente Standard, J.

S. C., 287

VI. Rate of compensation and extent of relief to vendee.

11. Where, at the time of the sale of a tract of land, it is estimated that there is a certain number of acres within the boundaries by which the tract is conveyed, and it afterwards appears that the vendee is entitled to be compensated for a deficiency in the quantity, the rule of compensation will generally be according to the average value of the whole tract.

S. C., 287

12. The vendee of land injoins a judgment recovered against him for a balance of the purchase money, alleging a defect in the title to the land, which he fails to prove, whereupon the injunction is dissolved and the bill dismissed. Afterwards he brings another suit, in which he establishes his right to

compensation for a deficiency in the quantity of the land, to an amount equal to the unpaid balance of the purchase money: *held*, he is entitled to relief as well against the damages accrued on the dissolution of the first injunction, as against the judgment at law.

Crawford & al. v. M'Daniel, 448

VII. Parties to suit by surviving vendee for compensation.

13. After judgment recovered by vendor against two joint vendees of land for a balance of the purchase money, one of the vendees dies, and the other brings a suit in equity against the vendor, alleging and proving a deficiency in the quantity of the land to a value exceeding the unpaid balance of the purchase money, and claiming that the judgment be enjoined and the overpaid money refunded: *held*, it is improper to decree in the cause without having the representatives of the deceased vendee before the court: dissentient Stanard, J.

Crawford & al. v. M'Daniel, 449

VIII. Assignees of purchase money.

14. Concerning the rights of parties to whom bonds for purchase money have been assigned, see Assignment No. 2, 3, 4, and

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4. What is ground for setting aside verdict of conviction in felony. See New trial, and

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Campbell's adm'r v. Montgomery, 392

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1. No warrant is necessary for apprehending a slave going at large or hiring himself out contrary to law.

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Foushee v. Blackwell & wife, 488

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I. Bill contesting validity of will.

1. Where a bill has been admitted to probat, and a person interested appears within seven years afterwards and files a bill in chancery under the act 1 Rev. Code of 1819,

ch. 104, § 13, it is sufficient in such bill to aver in general terms that the writing of which probat has been received is not the will of the decedent.

Malone's adm'r & al. v. Hobbs & al., 346

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2. An answer to a bill contesting the validity of a will states, that some of the plaintiffs had accepted legacies and devises under the will; and the fact appears to be so by exhibits filed with the answer. After verdict and decree against the will, the objection is taken in an appellate court, that those parties had precluded themselves from disputing the validity of the will, and that as they are improperly joined with the other plaintiffs, the suit cannot be sustained: *held*, the objection will not avail. S. C., 346

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*IV. What is no revocation of will.

4. On the trial of an issue whether a writing, admitted to probat as a will, was the will of the decedent or not, it appeared that the decedent had made a codicil to his will, and that the codicil was afterwards destroyed by his direction. The evidence tended to shew that the will was written on one sheet of paper, and the codicil on another; that the will was left with one person, and the codicil with another; and that the will and codicil were with those persons respectively, at the time the codicil was destroyed. The circuit court instructed the jury, that if they believed from the evidence, that the decedent intended, at the time of destroying the codicil, thereby to destroy or revoke the will, in that case the destruction of the codicil was a revocation of both the will and codicil: *held*, this instruction was erroneous. S. C., 346, 7

5. Although a testator has directed his will to be destroyed, and believes that it has been destroyed as requested, yet if it be not in fact destroyed, such direction and belief will not operate as a revocation of the will, even in relation to the personal estate. S. C., 347

V. Direction that ex'or receive and pay over legacy charged on devisee.

6. A testator, besides bequeathing a sum of money to his wife, and another sum to his daughter Rebecca, bequeathed to his daughter Susanna \$4000 to be paid by his executors in equal payments of \$1000 each after his decease. He devised lands to certain devisees, provided they should pay into the hands of his executors the sum of \$1000 per

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IX. Emancipation.

10. What issue of freedwoman is not entitled to freedom. See Emancipation, and *Henry v. Bradford*, 53

WINCHESTER AND POTOMAC RAILROAD COMPANY.

What assessment of damages will not sustain action of debt against the company.

Under the act passed April 8, 1831, to incorporate the Winchester and Potomac railroad company, the free holders appointed by an order of the county court for the purpose of ascertaining the damages which would be sustained by the proprietor of certain lands through which the railroad was to be opened, certified, in the form prescribed by the act, that they assessed the damages at the sum of 972 dollars; and then subjoined the following words: "We further declare that if the railroad company shall refuse to pass the water from the south side of the road to the north side, by a culvert west of the lane, the thoroughfare of the farm, and return the same by a culvert on the east side of the lane, she (the proprietor) shall receive the additional

sum of 2000 dollars." The report, upon being returned to the county court, was ordered to be recorded. An action of debt was afterwards brought to recover the 2000 dollars; the declaration averring that the company, although requested so to do, had refused to pass the water as aforesaid. Upon demurrer to the declaration, *held*, the action cannot be maintained. Per Stanard, J., the charter of the company does not warrant a contingent assessment of damages by the commissioners, and does not authorize the county court to render a conditional judgment therefor: the court is authorized to render such judgment only as would authorize the clerk to issue an execution thereon.

Winchester & Potomac railroad co. v.
Washington, 67

WITNESS.

See Accomplice, and
Commonwealth v. Dabney, 696

WRITS OF ERROR AND SUPERSEDEAS.

See Appellate jurisdiction and Criminal jurisdiction and proceedings.

REPORTS OF CASES
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By CONWAY ROBINSON.

VOLUME II.

FROM APRIL 1, 1843 TO APRIL 1, 1844.

Entered according to the act of congress, this tenth day of September eighteen hundred and forty-four, for the commonwealth of Virginia, in the clerk's office of the district court of the eastern district of Virginia.

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OF THE
COURT OF APPEALS

DURING THE TIME OF THESE REPORTS.

WILLIAM H. CABELL, PRESIDENT.
FRANCIS T. BROOKE. ROBERT STANARD.
JOHN J. ALLEN. BRISCOE G. BALDWIN.

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JUDGES
OF THE
GENERAL COURT,

DURING THE TIME OF THESE REPORTS.

DANIEL SMITH.	JOSEPH L. FRY.
FLEMING SAUNDERS.	JOHN B. CLOPTON.
LEWIS SUMMERS.	RICHARD H. BAKER.
RICHARD H. FIELD.	JOHN B. CHRISTIAN.
JOHN T. LOMAX.	ISAAC R. DOUGLASS.
JOHN SCOTT.	PHILIP N. NICHOLAS.
WILLIAM LEIGH.	DANIEL A. WILSON.
LUCAS P. THOMPSON.	EDWARD JOHNSTON.
BENJAMIN ESTILL.	JAMES H. GHOLSON.
JAMES E. BROWN.	JOHN ROBERTSON.
EDWIN S. DUNCAN.	THOMAS H. BAYLY.

PREFACE.

In the court of appeals, on the first day of April 1844, Conway Robinson resigned the office of reporter. On the ninth of the same month, the court proceeded to fill the vacancy; and the vote being given viva voce in open court, judges Baldwin, Allen, Stanard, Brooke and the president voted for Peachy R. Grattan esquire, and so he was unanimously appointed.

The present reporter for the state of New York has announced, in the preface to his first volume, that within the last few years the justices of the supreme court of that state have, by extraordinary exertions, been able to clear off the large amount of arrearages upon their calendar, and to prevent any new accumulations of business. He tells us, that "at each of the forty-eight terms, general and special, which have been held within the last four years, with only two exceptions—one in 1838 and the other in 1839—every cause and motion has been heard which was ready for argument; and such as were not disposed of at the time, have usually been disposed of at the next succeeding term."* It is not now, and for many years it has not been, in the power of the reporter of the court of appeals of Virginia to communicate any such agreeable intelligence. The great principle of magna charta, that "justice or right shall not be sold, denied or deferred to any man," has been fully recognized in Virginia by statute;† but we have only in practice the benefit of part of it,—the most important part, it is true, but not enough without the other also. Justice, with us, is not sold, but it is deferred to a most grievous extent,—to such an extent as to amount almost to a denial of it. It is intolerable that a party to an appeal should be unable, with all possible diligence, to get a hearing for seven or eight years after the appeal is allowed. Yet such is the state of things in the court at Richmond, and it is fast becoming as bad at Lewisburg; for according to the returns, the number of cases decided at either place within a year is not equal to the number of new appeals and supersedeases awarded within the same time. The evil has increased, is increasing, and ought to be diminished.

The present volume terminates the official connexion of its compiler with the court; but he retains in full remembrance the courtesy always manifested towards him by the judges, and holds each and all of them in the highest respect. He feels the deepest interest in the court, being still at its bar, and expecting to be employed there so long as his capacity for labour

shall continue. Thus situated, and fully sensible of the magnitude of the evil to which he has adverted; regarding it as one which bar, bench and legislature ought to do all in their respective spheres to correct, he ventures, with all due respect, to make the following suggestions.

From the bench we want, in the first place, some evidence that if more causes are argued or submitted, more can be decided. It happens often, after an argument is closed, that the decision is delayed for some months; sometimes for a year or two. This tends to produce an impression that, small as is the number of causes argued or submitted, it is as great as the court finds it in its power to decide. The best way to remove this impression is for the court to pursue a more energetic course of action. That will operate as a stimulus to counsel.

The court will then have a right to expect that counsel will be prepared to bring on a greater number of causes, and that time will not be wasted (in useless words) in one cause, which can be employed, so much to the advantage both of client and counsel, in another. Printed arguments will probably be made use of to a greater extent. And the arguments, when ore tenus, may be expected to be more condensed, because of the previous preparation.

Very possibly the court may, in this way, get as many causes argued or submitted as it may find itself able to decide. But if it shall be found otherwise, then it may be advisable for the court to protract its session an hour longer each day. It is, indeed, desirable that the morning hours prior to the meeting of the court should be retained by the judges for the examination of the records and authorities: but the court may perhaps find it in its power, instead of adjourning at three o'clock in the afternoon, to sit till four. And if it should, the time gained will be much more than the additional hour. Many an argument which, with the daily session of three hours, now takes up two days, would then be closed in one. Considering the ages of our judges, the amount of work they have to do every day out of court, and the length of their terms, a session of four hours a day is as much as can be hoped for, and perhaps more than can be accomplished.

In England, it is true, the usual hours of sitting in the court of queen's bench are from ten a. m. to four p. m. and the court, from a desire to keep down the business, has latterly protracted its session frequently till five, and sometimes an hour later.‡ But there the records to be examined out of court, being altogether in common law causes, are far

*1 Hill, published in 1842.

†1 R. C. 1819, ch. 166, § 1, p. 596.

‡American Jurist, January 1841. p. 337, note.

less voluminous than the records generally in our court of appeals. And there, too, the compensation is sufficient to command the ablest lawyers in the prime of life. Here it is generally otherwise. And we are apt to find, that if our judges have attained great reputation for ability, they have also attained an age at which the capacity for labour begins to be impaired. It is worthy the consideration of the legislature, whether it be not wise to enlarge the range of selection for the office of judge of its supreme tribunal, and whether it be not more proper that one filling this high office should have a salary sufficient to enable him to live with his family in Richmond, than that he should be put on an allowance so meagre as to require him to be separated from them half the year.

It becomes our legislators also to consider whether they are not chargeable, on other grounds, with the delay in the administration of justice. It is a grievous thing that in the election of a judge, members should act as if they were choosing an elector for the office of president of the United States. If a suitor has his cause delayed or erroneously decided, it is small consolation to him that, at the time the judge was elected, he and the judge concurred in opinion on the question who was the most suitable person to be elected president. An appointment to the general court bench, upon any such ground, of a man of inferior judicial qualifications, operates most deleteriously in respect to the court of appeals. Many a case necessarily comes up, which, had there been a proper judge below, would have been there finally determined.

Perhaps the number of judges of the general court is larger than may be necessary as a permanent measure. If some were dispensed with, and the compensation of the rest increased by giving them the salaries of those dispensed with, the tendency would undoubtedly be to elevate the office. Any legislation of this sort must of course be prospective. It might be left to the judges, upon the happening of a vacancy, to re-arrange the circuits to suit the number of judges then remaining.

The most beneficial measure, however, that could be adopted to produce immediate relief, would be to create an office of chancellor for the country east of the blue ridge, and another for the country west of the ridge, to whom appeals should lie from the circuit courts in all equity causes. Supposing the office to be placed upon a good footing in

respect to compensation, and the incumbent to be well qualified for it, the consequence here, as in New York, would be, that the mass of equity cases would never go beyond the chancellor: there would rarely be an appeal from him to the court of appeals, except in cases presenting very novel questions, or cases of great magnitude; and indeed the amount requisite to give the court of appeals jurisdiction might then, with great propriety, be enlarged in equity cases, say to five hundred dollars. The chancellors would very easily dispose of all the appeals from the circuit courts in equity cases, and might, in addition, give relief in those circuits in which the chancery business might be unreasonably delayed, by having jurisdiction to remove by certiorari chancery causes so delayed. In common law cases, as appeals lie in New York from the circuit courts to the supreme court, so here they might lie directly to the court of appeals. The time taken up with these is small, in comparison with that which is required for appeals from decrees of the circuit courts. And the court of appeals, relieved from the last, would be able to devote almost its whole energies to the present docket. We should then have a fair prospect (which at present we have not) of seeing the docket annually reduced.

This measure of two chancellors with appellate jurisdiction is a very simple one, making but little inroad upon the present system. Its value would of course essentially depend upon the mode of filling the office of chancellor. And the range of selection for the office would greatly depend upon the salary attached to it. It should not be less than the salary of a judge of the court of appeals. Virginia is not too poor to pay what is reasonable and proper for the administration of justice. She might pay the judges of her court of appeals enough to enable them to live in town with their families, and pay for two chancellors besides. But if no further appropriation can be obtained, then let the measure of two chancellors be carried out without any more money. It will only be necessary to provide that no vacancy in the court of appeals shall be filled until the number of judges of that court is reduced to three; and the great desideratum—taking no more money—will be attained.

The great size of the present volume forbids enlarging further upon this subject.

Richmond, August 20, 1844.

TABLE OF CASES REPORTED.

Allison and Syrus and others.....	200	Hickerson's adm'r v. Helm.....	628
Arrington v. Cheatham & wife.....	492	High and Radcliff &c.....	271
Bank of North Carolina and May & another.....	56	Howard and Williamson's ex'or.....	39
Boaz and others and Walkers.....	485	Hunt and others and Smith.....	206
Boyd's heirs v. Magruder's heirs....	761	Jennings and others and Pettit.....	676
Brooks v. The commonwealth.....	845	Jenny and others and Ellis.....	597
Browning v. Headley.....	340	Johnson and Poling.....	255
Buckles v. Lafferty's legatees.....	292	Johns v. Davis's ex'or and others....	729
Burcher and The commonwealth.....	826	Lafferty's legatees and Buckles.....	292
Burnley's representatives v. Duke and others.....	102	Lathrop v. Lumpkin and others.....	49
Calwells v. Shields & Somerville.....	305	Lomax & another and Perrin & others..	133
Campbell and others v. The common- wealth.....	791	Lumpkin and others and Lathrop.....	49
Chapman and Pauley.....	235	Macaulay's ex'or v. Dismal swamp land company and others.....	507
Chappell v. Robertson.....	590	Magruder's heirs and Boyd's heirs....	761
Cheatham & wife and Arrington.....	492	Mason &c. v. Moyers.....	606
Cocke v. Hazall's ex'x.....	470	Matthews & co. v. Woodson and others..	601
The commonwealth and Brooks.....	845	May & another v. The state bank of North Carolina.....	56
The commonwealth and Campbell and others.....	791	M'Cune v. The commonwealth.....	771
The commonwealth and Cottrell.....	771	M'Key &c. v. Garth.....	33
The commonwealth and Cropper.....	842	Mears and wife and Savage and others..	570
The commonwealth and Foulkes.....	836	Miller v. Trevilian and others.....	1
The commonwealth and M'Cune.....	771	Motter and Ward.....	536
The commonwealth and Parsons.....	771	Moyers and Mason &c.....	606
The commonwealth and Pitman.....	800	Muire &c. v. Smith.....	458
The commonwealth and Summerfield...	767	Mutual assurance society &c. and Shir- ley.....	705
The commonwealth and Thomas.....	795	Newman and Davis and others.....	664
The commonwealth and Wright.....	800	North Carolina state bank and May & another.....	56
The commonwealth v. Burcher.....	826	Page &c. v. Page.....	424
The commonwealth v. Farmers bank....	737	Parsons v. The commonwealth.....	771
The commonwealth v. Hart.....	819	Patrick v. Ruffners.....	209
Compton's ex'or and Hendricks & others..	192	Pauley v. Chapman.....	235
Cottrell v. The commonwealth.....	771	Perrin and others v. Lomax & another..	133
Cropper v. The commonwealth.....	842	Pettit v. Jennings and others.....	676
Dabney's ex'ors v. Dabney's adm'r.....	622	Pitman v. The commonwealth.....	800
Davis and others v. Newman.....	664	Pitzer v. Williams.....	241
Davis's ex'or and others and Johns.....	729	Poling v. Johnson.....	255
Davison and Wilson and others.....	384	Preston's heirs and Robinett.....	273
Dawson v. Watkins.....	259	Radcliff &c. v. High.....	271
Dickerson &c. and Farneyhough's ex'ors	582	Robertson and Chappell.....	590
Dismal swamp land company and others and Macaulay's ex'or.....	507	Robinett v. Preston's heirs.....	273
Duke and others and Burnley's repre- sentatives.....	102	Robinson and Tavenner.....	280
Ellis v. Jenny and others.....	597	Roe and Tichanal.....	288
Farmers bank and The commonwealth..	737	Ruffners and Patrick.....	209
Farneyhough's ex'ors v. Dickerson &c..	582	Savage and others v. Mears and wife... 570	
Findlay v. Toncray.....	374	Shields & Somerville and Calwells.....	305
Floyd v. Harrison and others.....	161	Shirley v. Mutual assurance society &c..	705
Foulkes v. The commonwealth.....	836	Smith and Muire &c.....	458
Garth and M'Key &c.....	33	Smith and others v. The governor.....	229
Gordon &c. and Thornton.....	719	Smith v. Hunt and others.....	206
The governor and Smith and others....	229	State bank of North Carolina and May & another.....	56
Greenwood and wife and Wade's heirs..	474	Summerfield v. The commonwealth....	767
Harrison and others and Floyd.....	161	Syrus and others v. Allison.....	200
Hart and The commonwealth.....	819	Talley v. Tyree.....	500
Hazall's ex'x and Cocke.....	470	Tavenner v. Robinson.....	280
Headley and Browning.....	340	Thomas v. The commonwealth.....	795
Helm and Hickerson's adm'r.....	628	Thornton v. Gordon &c.....	719
Hendricks & others v. Compton's ex'or..	192	Tichanal v. Roe.....	288
		Toncray and Findlay.....	374
		Trevilian and others and Miller.....	1

2 ROB.

CASES REPORTED.

Tyree <i>and</i> Talley.....	500	Weaver <i>v.</i> Vowles	438
Vowles <i>and</i> Weaver.....	438	Williams <i>and</i> Pitzer.....	241
Wade's heirs <i>v.</i> Greenwood and wife....	474	Williamson's ex'or <i>v.</i> Howard.....	39
Walkers <i>v.</i> Boaz and others.....	485	Wilson and others <i>v.</i> Davisson	384
Ward <i>v.</i> Motter.....	536	Woodson and others <i>and</i> Matthews & co..	601
Warne &c. <i>and</i> Young.....	420	Wright <i>v.</i> The commonwealth.....	800
Watkins <i>and</i> Dawson.....	259	Young <i>v.</i> Warne &c.....	420

TABLE OF CASES CITED.

Abbot &c. and Varnum, 12 Mass. R. 474..	276, 277	Bank of Alexandria and Taylor's adm'r,	5 Leigh 477	539
Ackroyd v. Smithson and others, 1		Bank of Alexandria v. Patton and others,	1 Rob. 499.	62, 74, 84, 87, 93, 95, 99, 100
Brown's ch. rep. 503.	141	Bank of England and Glyn, 2 Ves. sen.	43.	625
Acton and Gage, 1 Salk. 327.	362	Bank of Gettysburg and Agnew, 2 Harr.	& Gill 478	96
Agnew v. bank of Gettysburg, 2 Harr. &		Bank of Marietta and Jackson's adm'r, 9	Leigh 244, 5.	63
Gill 478.	96	Bank of Marietta and Pindall's ex'r &c.,	10 Leigh 484.	1, 2, 13, 16, 27
Alam v. Jourdan, 1 Vernon 161.	724	Bank of Michigan and Williams, 7 Wend.	539.	61, 74
Aldridges v. Boisseaus, 5 Leigh 239.	574	Bank of Orleans and Torrey, 9 Paige 663.		302
Alexander and Conway's ex'ors, 7 Cranch		Bank of Silver Lake v. North, 4 Johns.	ch. rep. 373.	220
218.	168, 169, 170, 181	Bank v. Sutton, 2 P. Wms. 700.		523
Alexandria bank and Taylor's adm'r, 5		Baptist society v. Rapalee, 16 Wend. 605.		64
Leigh 477.	539	Barclay and Hill, 16 Ves. 402.		734
Alexandria bank v. Patton and others, 1		Barnes v. Williams, 11 Wheaton 415.		267
Rob. 499.	62, 74, 84, 87, 93, 95, 99, 100	Barrett & co. and Woodson &c., 2 Hen. &	Munf. 88.	692, 700
Allen v. Dundas, 3 T. R. 125.	114	Barringer and others and Stevens, 13	Wend. 639.	19
Allen v. Freeland, 3 Rand. 170.	644	Barrington (lord) and Searle, 2 Str. 826.		624, 626
Ambler & others v. Warwick & co., 1		Bartlett &c. and Weeden, 6 Munf. 123.		433
Leigh 201.	20	Bartlett v. Marshall, 2 Bibb 470.		685
Ancaster (duke of) v. Mayer & others, 1		Bartlet v. Harlow, 12 Mass. R. 348.		276
Brown's ch. rep. 454.	143, 152	Bartly and others and Linton and others,	9 Leigh 444.	425, 488, 491
Anderson &c. and Shields adm'r &c., 3		Barton and Greenhow &c., 1 Munf. 590.		708
Leigh 729.	639	Barton and Newman, 2 Vern. 205.		666, 675
Anderson &c. v. Fox &c., 2 Hen. & Munf.		Bartrop and Eyre, 3 Madd. C. R. 221, am.	edi. 120.	339
245.	298	Bassett and others and Fisher, 9 Leigh	119.	13, 17, 23, 103, 113, 117, 119, 120, 127, 128
Anderson's ex'ors v. Anderson, 11 Leigh		Bates v. Dandy, 2 Atk. 207.		340, 354, 356, 360, 361, 367, 370
616.	599	Barthurst and Rex, 3 Burr. 1618.		237, 238
Annesley (lord) and Hovenden, 2 Sch. &		Baylor and Tod, 4 Leigh 498.		515, 517, 519, 523, 530
Lef. 631.	517	Beaumont and Field, 1 Swanst. 208.		504
Anspach (margravine of) v. Noel, 1 Madd.		Becket v. Becket, 1 Dick. 340.		363, 368
C. R. 310, am. edi. 172.	482	Beecher and wife and Scott, 2 Madd. ch.	rep. 96 (am. edi. 65).	152, 155
Anthony &c. v. Lawhorne, 1 Leigh 1.	249, 252	Beckman and others and Stevens, 1	Johns. ch. rep. 318	504
Archer and Roanes, 4 Leigh 550, 568.	596	Bell v. Puller, 2 Taunt. 285.		453
Arell and Warder, 2 Wash. 282.	804	Belvedere (earl of) v. Rochfort, 5 Brown's	par. cas. Tomlin's edi. 299.	153, 155
Argyle's ex'or and others and Miller, 5		Bennet and Woodcock, 1 Cowen 739.		89
Leigh 460.	7	Bennett and Maule's adm'r, Gilm. 305.		324
Armistead's case, 11 Leigh 657.	789	Bennett ex parte, 10 Ves. 393.		304
Ashburner and Fletcher, 1 Brown's ch.		Bennett v. Hamill, 2 Sch. & Lef. 566.		412
rep. 500, 501.	145	Beresford and Like, 3 Ves. 506.		348, 364
Assignees of Ingraham and Phoenix, 5		Beresford &c. v. Hobson &c., 1 Madd. C.	R. 361, am. edi. 199.	341, 373
Johns. R. 426.	681	Bernard &c. and Hipkins, 4 Munf. 83		586, 587, 588
Atkinson v. Leonard, 3 Brown's ch. rep.		Bernard v. Brewer, 2 Wash. 76.		248, 249, 251
218.	14	Berrington and Rees, 2 Ves. jun. 540.		324
Attoo v. the commonwealth, 2 Virg. cas.		Best and Platner, 11 Johns. R. 530.		446
382.	807, 813, 814			
Attorney general and Gallego's ex'ors, 3				
Leigh 488.	666, 669			
Attorney general v. Duplessis, 2 Ves.				
sen. 286.	734			
Auditor and Moore's ex'or, 3 Hen. &				
Munf. 235.	472			
Auld and Hepburn, 5 Cranch 262.	481			
Auld and others and Breckenridge, 1 Rob.				
148.	162, 171, 183			
Auriol v. Smith, 18 Ves. 198.	249			
Babb v. Clemson, 12 Serg. & Rawle 328.	680			
Bagot (lord) v. Williams, 3 Barn. & Cress,				
235.	445, 446, 447, 455			
Bailey and Teakle, 2 Brock. 52.	304			
Baker's case, 2 Va. cas. 353.	822			
Baldwin and King, 2 Johns. ch. rep. 560.	324			
Baldwin and Lloyd, 1 Ves. sen. 173.	390			
Ballentine v. Poyner, 2 Hayw. 110.	529			
Bampton and Bowyer, 2 Strange 1155.	701			

Beveridge v. Lacey, 3 Rand. 63.....	504	Buckle v. Mitchell, 18 Ves. 111.....	482
Billington and Roseboom, 17 Johns. R. 182.....	625	Buckner &c. v. Smith &c., 1 Wash. 296.....	676, 691, 692, 699, 701, 703
Biscoe and Nelthrop, 1 Ch. cas. 135.....	668	Buck v. Pennybacker's ex'ors, 4 Leigh 5.....	594
Bishop and Sherer, 4 Bro. C. C. 55, 60..575, 578		Bull and Hill, Gilm. 149.....	324
Black and Smith, 9 Serg. & Rawle 142.....	560, 565	ullitt's ex'ors v. Winatons, 1 Munf. 269.....	53
Blake and Moore, 1 Ball & Beatty 68, 9.....	480	Bullock and Pigot, 1 Ves. jun. 479.....	522, 526
Bland and Robinson, 2 Burr. 1077.....	701	Burnell v. Brown, 1 Jac. & Walk. 173.....	482
Bloom and Haviland, 6 Johns. ch. rep. 178.....	348, 364, 373	Burnet and Ewing, 11 Peters 53.....	264
Bloom and Slee, 5 Johns. ch. rep. 381.....	220	Burnett v. Kinaston, Prec. in ch. 119, 121.....	363, 367, 368
Bob & others v. Winn, 3 Leigh 140.....	433	Burnley v. Lambert, 1 Wash. 308.....	667
Boisaeus v. Aldridges, 5 Leigh 239.....	574	Burt and Clifton, 1 P. Wms. 678.....	156
Bolling v. mayor &c. of Petersburg, 3 Rand. 570.....	264	Burtis and Smith, 9 Johns. 180.....	264
Bonham v. Newcomb, 1 Vern. 214, 232.....	169	Bury and Whetstone, 2 P. Wms. 146.....	734
Bond & co. and Mason, 9 Leigh 181.....	54, 286	Butler &c. and Wilson & Trent, 3 Munf. 559.....	641
Bond v. Mewburn and others, 1 Brock. 316.....	472	Butler &c. v. Haskell, 4 Desausa. 705.....	304
Boughan and Wood, 1 Call 329.....	248, 249, 251	Butts and Hodgson, 3 Cranch 140.....	472
Boulbee v. Stubbs, 18 Ves. 20.....	324	Cabell's ex'ors v. Megginson's adm'rs, 6 Munf. 202.....	14
Bower's ex'or v. Glendening, &c., 4 Munf. 219.....	669	Cabell's ex'ors v. Roberts's adm'rs, 6 Rand. 580.....	197
Bowman and others v. Middleton, 1 Bay 252.....	248	Calland's ex'or and Galt's ex'ors, 7 Leigh 594.....	538, 540, 542, 552, 567
Bowyer v. Bampton, 2 Strange 1155.....	701	Cameret and Lambert, Comberbach's R. 446.....	72
Boyd and Steele, 6 Leigh 547.....	324, 338	Campbell and Hitchen, 2 Bl. R. 827.....	457
Bozon and Roberts, 1 Powell on mortg. p. 9, note.....	171	Campbell and Smith, 19 Ves. 400.....	574, 578
Brace and Pennoir, 1 Salk. 319.....	92	Campbell &c. and Robertson, 2 Call 421.....	170
Bracebridge v. Buckley, 2 Price 200.....	734	Campbell v. Freeling, 32 Eng. C. L. R. 418.....	824
Braddy and Talbot, 1 Vern. 395.....	182	Carroll and Cassell, 11 Wheat. 152.....	355
Bradford and Henry, 1 Rob. 53.....	598	Carroll and Pratt and others, 8 Cranch 471.....	480
Bradshaw v. Bradshaw and others, 2 Meriv. 492.....	482	Carr's adm'r &c. v. Chapman's legatees, 5 Leigh 164.....	517
Bradwin v. Harpur, Ambl. 374.....	574	Carson and Harris, 7 Leigh 632.....	606, 613, 620
Bragg's adm'r v. Smith's ex'x, 5 Munf. 401.....	331, 5, 8	Carter &c. v. Harris, 4 Rand. 204.....	304
Bramham and Ringrose, 2 Cox's C. R. 384.....	573, 578, 579	Carteret (lord) v. Paschal, 3 P. Wms. 197.....	340, 354, 356, 360, 367
Brashier v. Gratz and others, 6 Wheat. 528.....	480	Carter's case, 2 Va. cas. 319.....	828, 829, 835
Breckenridge v. Auld and others, 1 Rob. 148.....	162, 171, 183	Carter's ex'ors v. Cutting and wife, 5 Munf. 227.....	582, 586, 587
Brewer and Bernard, 2 Wash. 76.....	248, 249, 251	Carver and Guernsey, 8 Wend. 492.....	447
Briggs and Cecil, 2 T. R. 639.....	447	Cassell v. Carroll, 11 Wheat. 152.....	355
Brisbane v. Dacres, 5 Taunt. 144.....	671	Castleman &c. and Graff and others, 5 Rand. 195.....	13, 23, 169
Briscoe &c. and Givens, 3 J. J. Mar. 533.....	322, 338	Caulfield and Conry, 2 Ball & Beatt. 255.....	595
Broadus and others, v. Rosson and wife and others, 3 Leigh 12.....	13	Cavendish v. Fleming, 3 Munf. 198.....	517
Brockway v. Kenny, 2 Johns. R. 210.....	446, 456	Cecil v. Briggs, 2 T. R. 639.....	447
Bromley v. Littleton, Yelv. 112.....	518	Chambers v. Furey, 1 Yeates 167.....	219, 221
Brookman and Rothschild, 5 Bligh N. S. 190.....	304	Chambliss and Cleaton, 6 Rand. 92.....	449
Brown and Burwell, 1 Jac. & Walk. 173.....	482	Chamley v. lord Dunsany &c., 2 Sch. & Lef. 710, 718.....	595
Brown and Dan &c., 4 Cowen 483, 493.....	679	Chapman's adm'x v. Turner, 1 Call 280.....	170
Brown and Earl, 1 Wils. 302.....	69, 90	Chapman's legatees and Carr's adm'r &c., 5 Leigh 164.....	517
Brown and Little &c., 2 Leigh 353.....	395, 400	Cheever and Coates, 1 Cowen 460.....	400, 406, 526
Brownlow (lord) and Franklin, 14 Ves. 550.....	480	Chichester's adm'r v. Mason, 7 Leigh 244.....	339
Brownson and Jackson, 7 Johns. R. 227.....	522, 527	Child and Harewood, Cas. temp. Talb. 204.....	156
Brune and Enders &c., 4 Rand. 438.....	539	Chowning and Taylor's adm'rs &c., 3 Leigh 654.....	171, 179, 186, 189
Brush and Clement, 3 Johns. cas. 180.....	542, 552, 567	Chowning v. Cox and others, 1 Rand. 306.....	161
Bryan v. Lofftus's adm'rs, 1 Rob. 16.....	479	162, 171, 178, 179, 183, 185, 186, 188, 189, 190	
Bryant and Marks and wife, 4 Hen. & Munf. 91.....	434	Christian and others and Shearman, 6 Rand. 49.....	125
Bryant and Rose, 2 Camp. 321.....	625	Clarke v. Hoomes's ex'ors &c., 2 Hen. & Munf. 23.....	643
Buckley and Bracebridge, 2 Price 200.....	734		

Clarke v. Munroe, 14 Mass. rep. 351.....	395	Coxe and Parkins, 2 Hayw. 339.....	527
Clarke's ex'ors v. Van Riemsdyk, 9 Cranch 153, 156.....	681	Cox's case, 1 Leach's C. L. 71.....	798, 9
Claxton &c. and Smith, 4 Madd. C. R. 484.....	148	Coysegame ex parte, 1 Atk. 192.....	364
Clay and others and Gilliam, 3 Leigh 590.....	722, 727	Craddock v. Turner's adm'r, 6 Leigh 129, 130, 131.....	449
Clay and others v. Willis, 1 Barn. & Cres. 364.....	168	Cramer and Hawley, 4 Cowen 734.....	304
Clayborn's ex'or v. Hill, 1 Wash. 177.....	472	Crawford v. Moses, 10 Leigh 277.....	598
Clay v. White &c., 1 Munf. 162.....	268	Crawford v. Satchwell, 2 Str. 1218.....	66
Cleaton v. Chambliss, 6 Rand. 92.....	449	Crenshaw and Wingfield, 3 Hen. & Munf. 256.....	249
Clement v. Brush, 3 Johns. cas. 180.....	542, 552, 567	Crenshaw v. Slate river company, 6 Rand. 245.....	504
Clemson and Babb, 12 Serg. & Rawle 536..	680	Crisp and Turner, 2 Str. 827.....	625
Cleveland and Reynolds, 4 Cow. 282.....	549	Cross &c. and Smallcomb, 1 Ld. Raym. 251.....	37
Clifton v. Burt, 1 P. Wms. 678.....	156	Crouch v. Puryear &c., 1 Rand. 258.....	516, 522, 523, 526
Clutton and Garlington, 1 Call 520.....	116, 123	Croughton v. Duval, 3 Call 69.....	324
Coates v. Cheever, 1 Cowen 460.....	400, 406, 526	Croy and Snider &c., 2 Johns. rep. 227..	455
Cock and Matchwick, 3 Ves. 609.....	573, 577	Crummey &c. and Norris, 2 Rand. 334....	324, 338
Cocke and Coleman, 6 Rand. 629.....	378	Crunkleton and Hastings, 3 Yeates 261..	527
Cocke & wife and Heth, 1 Rand. 344.....	388, 406, 407	Curtis v. Curtis, 2 Bro. C. C. 620.....	516, 523
Codling &c. and Greasley, 2 Bing. 263 ..	226	Cuthbert and Hayward, 1 M'Cord 386....	414
Colchester (mayor &c. of) v. Seaber, 3 Burr. 1866.....	61	Cutting and wife and Carter's ex'ors, 5 Munf. 227.....	582, 586, 587
Cole &c. and Watts, 2 Leigh 664.....	265, 266, 267	Cuyler and White, 6 T. R. 176 ..	539
Coleman v. Cocke, 6 Rand. 629.....	378	Dacres and Brisbane, 5 Taunt. 144.....	671
Coleman v. Moody, 4 Hen. & Munf. 1..	249, 252	Dade and Smock, 5 Rand. 639.....	19, 23
Coles v. Trecothick, 9 Ves. 246.....	304	Dade's adm'r v. Madison, 5 Leigh 401....	676, 685, 694, 696, 697, 698, 699, 703
Cole v. Wade, 16 Ves. 27.....	147	Dalby v. Price, 2 Wash. 191.....	255, 256, 257
Colson v. Thompson, 2 Wheat. 336, 341..	480	Dan &c. v. Brown, 4 Cowen 483, 493.....	679
Colver and Jackson, 1 Wend. 487.....	447	Dandy and Bates, 2 Atk. 207.....	340, 356, 360, 361, 367, 370
Commonwealth and Attoo, 2 Virg. cas. 382.....	807	Davenport and others and Thompson, 9 Barn. & Cress. 78.....	538
Commonwealth and Green, 11 Leigh 677..	770	Davenport &c. and Thompson, 1 Wash. 125.....	170
Commonwealth and Harman, 12 Serg. & Rawle 72.....	769	Davis and Dutchess cotton manufactur- ing co., 14 Johns. 238.....	61, 64
Commonwealth and Shields, 4 Rand. 541 ..	14	Davis and Wolstenholm, Freeman's ch. cas. 289.....	337
Commonwealth and Webb, 2 Leigh 721..	504	Davison v. Franklin, 1 Barn. & Adolph. 142.....	690, 702
Commonwealth v. Jackson, 2 Va. cas. 501 ..	797	Davis's adm'r v. Thomas &c., 5 Leigh 1 ..	335, 676, 689, 691, 700
Commonwealth v. Hewitt, 2 Hen. & Munf. 181.....	804	Davoue v. Fanning, 2 Johns. ch. rep. 252.....	304
Commonwealth v. Martin's ex'ors &c., 5 Munf. 125.....	144	Dawes v. Hoare, 1 Dougl. 371.....	538, 544
Compton (lord) and Oxenden, 2 Ves. jun. 77. 8.....	146	Dawson and Dixon, 2 Sim. & Stu. 327...	148
Compton (lord) v. Oxenden, 2 Ves. jun. 265.....	146	Day &c. v. Leal &c., 14 Johns. R. 404....	539
Conner v. Shepherd, 15 Mass. R. 164.....	522	De Bret v. Papillon, 4 East 502.....	72
Conry v. Caulfield, 2 Ball & Beatt. 255..	595	Decker &c. v. Miller, 2 Paige 149.....	587
Consequa and Willings &c., 1 Peters' C. C. R. 306.....	541, 556, 565, 566	Delver v. Hunter, Bunb. 57.....	520
Conway's ex'ors v. Alexander, 7 Cranch 218.....	168, 169, 170, 181	Denne and Cooper, 1 Ves. jr. 565.....	480
Cooke and Roberts's adm'r, 1 Rand. 121..	171	Denne and Walker, 2 Ves. jun. 176.....	146
Cookson and Whelpdale, 1 Ves. sen. 9....	302	Denny and Jourden, 2 Bulstrode 241.....	70
Cooper v. Denne, 1 Ves. jr. 565.....	480	Denton & others v. Noyes, 6 Johns. R. 296.....	339
Cooper v. Smith, 9 Serg. & Rawle 26..	219, 221	Despard and Wilkins, 5 T. R. 112.....	734
Coppin v. Coppin, 2 P. Wms. 292.....	666	Dewitt and Jackson, 6 Cowen 317.....	401
Corbin v. Emmerson, 10 Leigh 663.....	20	Digby v. Legard, 2 Dick. 500.....	141
Cordell & others and Elliott, 5 Madd. ch. rep. 96, am. edi. 150.....	364	Dishman's ex'ors and Sale, 3 Leigh 548 ..	538, 540, 552, 567
Corning and others v. Lowerre, 6 Johns. ch. rep. 439.....	504	Dixon v. Dawson, 2 Sim. & Stu. 327.....	148
Coulson v. White, 3 Atk. 21.....	504	Doe v. Pott, Dougl. 720, 21.....	515
Coutts v. Walker, 2 Leigh 268.....	377	Donaghe's ex'or and Williams, 1 Rand. 304.....	547
Cox and others and Chowning, 1 Rand. 306.....	161, 162, 171, 178, 179, 183, 185, 186, 188, 189, 190	Dormer v. Fortescue, 3 Atk. 130, 31.....	516
		Dowdall and Pickets, 2 Wash. 106.....	734
		Downes v. Glazebrook, 3 Meriv. 207.....	304

Downey v. Farmers and Mechanics bank, 13 Serg. & Rawle 288.....	553	Farmers and Mechanics bank and Dow- ney, 13 Serg. & Rawle 288.....	553
Drake v. Mitchell and others, 3 East 258.....541, 545, 565		Farrant v. Thompson, 5 Barn. & Ald. 826.....	521
Duke of Ancaster v. Mayer and others, 1 Brown's ch. rep. 454.....	143, 152	Farrington &c. v. Payne, 15 Johns. R. 432.....	447
Duke of Northumberland and Jervoise, 1 Jac. & Walk. 549.....	480	Faulkner's adm'r v. Harwood, 6 Rand. 125.....	197
Dundas and Allen, 3 T. R. 125.....	114	Fauntleroy and Templeman, 3 Rand. 434.....	595
Dunn v. Murray, 9 Barn. & Cress. 780...	546	Field &c. v. Holland &c., 6 Cranch 8, 24.. .....681, 682	
Dunn v. Price, 11 Leigh 203.....	202	Field v. Beaumont, 1 Swanst. 208.....	504
Dunsany &c. and Chamley, 2 Sch. & Lef. 710, 718.....	595	Field v. Gibbs &c., Peters's C. C. R. 155.....325, 329, 445	
Duplessis and Attorney general, 2 Ves. sen. 286.....	734	Field v. Schieffelin, 7 Johns. ch. rep. 157.....	19
Dutchess cotton manufacturing co. v. Davis, 14 Johns. 238.....	61, 64	Findlay v. Smith &c., 6 Munf. 148.....	
Dutch West India company and Hen- riques, 2 Ld. Raym. 1532.....	64, 74, 89	Finney and Holbrook, 4 Mass. R. 566....	395
Duval and Croughton, 3 Call 69.....	324	First Baptist society v. Rapalee, 16 Wend. 605.....	64
Earl of Belvedere v. Rochfort, 5 Brown's par. cas. Tomlin's edi. 299.....	153, 155	Fish and Sloper, 2 Ves. & Beames 145...	480
Earl of Ripon and others v. Hobart and others, 3 Mylne & Keene 169.....	504	Fisher v. Bassett and others, 9 Leigh 119 ...13, 17, 23, 103, 113, 117, 120, 127, 128	
Earl of Salisbury v. Newton, 1 Eden 370..348, 352, 353, 354, 356, 361, 363, 364, 367		Fitch v. Leitch, 11 Leigh 471.....	452, 454, 456
Earl Thanet and Milward, 5 Ves. 720, note.....	480	Fitzhugh v. Gordon, 2 Leigh 626.....	721
Earl v. Brown, 1 Wils. 302.....	69, 90	Flanagan v. Flanagan, 1 Brown's ch. rep. 500, 501.....	145, 146
Eckhols v. Graham & others, 1 Call 492.....33, 35, 36		Fleetwood v. Green, 15 Ves. 594.....	482
Eden and Stewart, 2 Caines's R. 150....	693	Fleming and Cavendish, 3 Munf. 198....	517
Edwards and wife and Hughes and others, 9 Wheat. 489.....	168	Fletcher v. Ashburner, 1 Brown's ch. rep. 500, 501.....	145
Edwards and wife and Segar, 11 Leigh 213.....	304	Flinn's adm'r and Manns, 10 Leigh 93..	482
Edwards v. Harben, 2 T. R. 587.....	286	Foljambe and White, 11 Ves. 337.....	480
Elder v. Elder's ex'or, 4 Leigh 252.....	599	Fontaine v. Phoenix insurance company, 11 Johns. R. 293.....	734
Elibank (lady) v. Montolieu, 5 Ves. 744.....369		Foote and Taliaferro, 3 Leigh 58.....	14
Ellicott v. Pearl, 10 Peters 442.....	264	Foreman v. Loyd and others, 2 Leigh 284.....	374, 377, 380
Elliott &c. v. Gurr, 2 Phil. 16.....	365	Fortescue and Dormer, 3 Atk. 130, 31....	516
Elliott's ex'or v. Lyell, 3 Call 268.....	804	Fox &c. and Anderson &c., 2 Hen. & Munf. 245.....	298
Elliott v. Cordell & others, 5 Madd. C. R. 96, am. edi. 150.....	364	Fox v. Mackreth and others, 2 Brown's C. C. 400.....	302, 303
Emblyn v. Freeman, Prec. in ch. 541...	141	Francis and Viner, 2 Bro. C. C. 658..	573, 577
Emly v. Lye, 15 East 7.....	555	Franklin and Davison, 1 Barn. & Adolph. 142.....	690, 702
Emmerson and Corbin, 10 Leigh 663....	20	Franklin v. lord Brownlow, 14 Ves. 550..	480
Enders &c. v. Brune, 4 Rand. 438.....	539	Frazier and Griffith, 8 Cranch 1.....	114
England (bank of) and Glyn, 2 Ves. sen. 43.....	625	Freeland and Allen, 3 Rand. 170.....	644
Eppes & others v. Randolph, 2 Call 186..	319	Freeling and Campbell, 32 Eng. C. L. R. 418.....	824
Errington and Randall, 10 Ves. 427.....	304	Freeman and Emblyn, Prec. in ch. 541..	141
Erskine v. Henry and wife and others, 9 Leigh 188.....	599	French and Inchiquin, Amb. 33.....	156
Estabrook v. Hapgood, 10 Mass. rep. 315.....414		Fristoe and others and Gibson, 1 Call 76, 81.....	172
Evans &c. v. Kingsberry &c., 2 Rand. 120.....	144	Fullarton and Hodgson, 4 Taunt. 787....	249
Evelyn v. Evelyn, 2 P. Wms. 664.....	152	Fuqua's ex'or v. Young, 4 Hen. & Munf. 430.....	298
Ewing v. Burnet, 11 Peters 53.....	264	Furey and Chambers, 1 Yates's R. 167.. .....219, 221	
Ex parte Bennett, 10 Ves. 393.....	304	Gage v. Acton, 1 Salk. 327.....	362
Ex parte Coysegame, 1 Atk. 192.....	364	Gallegoe's ex'ors v. Attorney general, 3 Leigh 488.....	666, 669
Ex parte James, 8 Ves. 345.....	303	Galt's ex'ors v. Calland's ex'or, 7 Leigh 594.....	538, 540, 542, 552, 567
Ex parte Lacey, 6 Ves. 626.....	303	Gammel & wife and Thomas, 6 Leigh 9.. .....515, 519, 523, 530	
Ex parte Lyons, 2 Leigh 761.....	117, 118, 120, 127	Garden and Haden, 7 Leigh 157.....	197
Eyre v. Bartrop, 3 Madd. C. R. 221, am. edi. 120.....	339	Gardiner and Hanson, 7 Ves. 307.....	504
Fanning and Davoue, 2 Johns. ch. rep. 252.....	304		

Gardner v. village of Newburgh, 2 Johns. ch. rep. 164.....	504	Haggerty v. Wilber, 16 Johns. R. 287....	53
Garlington v. Clutton, 1 Call 520.....	116, 123	Hale v. James, 6 Johns. ch. rep. 258.....	
Garrard &c. v. Henry &c., 6 Rand. 110..	485, 488, 491	.....	406, 516, 531
Garnett v. Jones, 4 Leigh 633.....	331	Haleys v. Williams, 1 Leigh 140.....	377
Gates and the people, 13 Wend. 311.....	769	Halliday &c. and Scott & wife, 5 Munf. 103.....	641
Gay v. Hancock & others, 1 Rand. 72....	480	Halsey v. Grant, 13 Ves. 73.....	481
Gee and Sydnor, 4 Leigh 536.....	286	Hamill and Bennett, 2 Sch. & Lef. 566..	412
George and Howel, 1 Madd. C. R. 1.....	482	Hamilton and Lodge, 2 Serg. & Rawle 491.....	359
George's adm'r and Moore's adm'r, 10 Leigh 228.....	594, 642	Hancock and Hook's adm'rs, 5 Munf. 549.....	86
Gettysburg bank and Agnew, 2 Harr. & Gill 478.....	96	Hancock & others and Gay, 1 Rand. 72..	480
Gibbes and Kennedy, 2 Desauss. 380....	337	Hansard v. Hardy, 18 Ves. 455.....	170
Gibbon & co. &c. and Scott & wife &c., 5 Munf. 86.....	342, 364, 596	Hanson v. Gardiner, 7 Ves. 307.....	504
Gibbs &c. and Field, Peters's C. C. R. 155.....	325, 329, 445	Hapgood and Estabrook, 10 Mass. rep. 315.....	414
Gibson v. Fristoe and others, 1 Call 76, 81.....	172	Harben and Edwards, 2 T. R. 587.....	286
Gibson v. Jeyes, 6 Ves. 271.....	304	Hardy and Hansard, 18 Ves. 455.....	170
Gilliam v. Clay and others, 3 Leigh 590..	722, 727	Harewood v. Child, Cas. temp. Talb. 204.....	156
Gilliam v. Moore, 4 Leigh 30.....	395, 398	Harlow and Bartlet, 12 Mass. R. 348....	276
Gilliam's case, 4 Leigh 688.....	822	Harman v. Commonwealth, 12 Serg. & Rawle 72.....	769
Gilmore v. Shuter, 2 Lev. 227.....	804	Harpur and Bradwin, Amb. 374.....	574
Givens v. Briscoe &c., 3 J. J. Mar. 533....	332, 338	Harris and Carter &c., 4 Rand. 204.....	304
Glazebrook and Downes, 3 Meriv. 207....	304	Harris and Howard, 2 Ch. cas. 147.....	168, 169, 181
Glendening &c. and Bowers's ex'or, 4 Munf. 219.....	669	Harris and Parker, 1 Salk. 262.....	82
Glyn v. bank of England, 2 Ves. sen. 43..	625	Harrison v. Southcote &c., 2 Ves. sen. 389.....	734
Godwin's adm'r v. Godwin's adm'r &c., 4 Leigh 410.....	143, 640, 642, 643, 653, 662	Harris v. Carson, 7 Leigh 632....	606, 613, 620
Gonsalus and Packer, 1 Serg. & Rawle 536.....	680	Hart and Wilson &c., 7 Taunt. 295.....	538
Goodrich and others and Tom, 2 Johns. R. 213.....	537, 539, 542, 552, 567	Harwood and Faulkner's adm'r, 6 Rand. 125.....	197
Gordon and Fitzhugh, 2 Leigh 626.....	721	Haskell and Butler &c., 4 Desauss. 705..	304
Graff and others v. Castleman &c., 5 Rand. 195.....	13, 23, 169	Hastings v. Crunkleton, 3 Yeates 261... 527	
Graham and others and Eckhols, 1 Call 492.....	33, 35, 36	Hatchett v. Marshall, Peake's N. P. cas. 172.....	454
Granberry's ex'or v. Granberry, 1 Wash. 246.....	587	Hathaway and Welland canal company, 8 Wend. 480.....	64
Grant and Halsey, 13 Ves. 73.....	481	Haviland v. Bloom, 6 Johns. ch. rep. 178.....	348, 364, 373
Gratz and others and Brashier, 6 Wheat. 528.....	480	Haviland v. Myers, 6 Johns. ch. rep. 27.....	348, 369
Greasley v. Codling &c., 2 Bing. 263.....	226	Hawley v. Cramer, 4 Cowen 734.....	304
Green and Fleetwood, 15 Ves. 594.....	482	Hazen and Mitchell, 4 Conn. R. 495.....	276
Green and Liler and others, 2 Wheat. 306.....	488	Hazen v. Thurbur, 4 Johns. ch. R. 604... 532	
Greenhow &c. v. Barton, 1 Munf. 590....	708	Hazleton and Prince, 20 Johns. 502.....	433
Greenlaw v. King, 5 Lond. Jur. 18.....	303	Headley v. Redhead, Coop. 50.....	150
Green v. Commonwealth, 11 Leigh 677..	770	Heapy v. Parria, 6 T. R. 368.....	92
Green v. Liler and others, 8 Cranch 233..	265, 268, 488	Heeble and Hess's ex'or, 6 Serg. & Rawle 57.....	445, 446, 455
Green v. Otte, 1 Sim. & Stu. 250....	353, 358, 369	Henriques v. Dutch West India company, 2 Ld. Raym. 1532.....	64, 74, 89
Green v. Watkins, 7 Wheat. 27.....	259, 265, 266, 268	Henry and Jackson, 10 Johns. R. 184, 204, 205.....	171, 692
Greenwood and Skyring, 4 Barn. & Cress. 281.....	671	Henry and wife and others and Erakine, 9 Leigh 188.....	599
Gregory's adm'r v. Marks's adm'r, 1 Rand. 372, 385.....	368	Henry &c. and Garrard &c., 6 Rand. 110.....	485, 8, 491
Griffith v. Frazier, 8 Cranch 1.....	114	Henry v. Bradford, 1 Rob. 53.....	598
Griswold v. Johnson, 5 Conn. R. 363....	276	Hepburn v. Auld, 5 Cranch 262.....	481
Grymes's adm'r &c. and Hefferman's adm'r &c., 2 Leigh 512.....	122	Herbert and others v. Wren and others, 7 Cranch 380.....	384, 392, 402
Guernsey v. Carver, 8 Wend. 492.....	447	Hess's ex'or v. Heeble, 6 Serg. & Rawle 57.....	445, 6, 455
Gurr and Elliott, 2 Phil. 16.....	365	Heth v. Cocke & wife, 1 Rand. 344..	388, 406, 7
Haden v. Garden, 7 Leigh 157.....	197	Hewitt and Commonwealth, 2 Hen. & Munf. 181.....	804
		Heyward v. Cuthbert, 1 M'Cord 386....	414
		Higgin's case, 6 Co. rep. 45.....	553

CASES CITED.

Hill and Clayborn's ex'or, 1 Wash. 177.	472	Ingraham's assignees and Phoenix, 5	681
Hill and Porter, 9 Mass. R. 34.	276, 277	Johns. R. 426.	71
Hill and Pryor, 4 Bro. C. C. 139	351, 363	Irwin and M'Farland, 8 Johns. R. 78.	75
Hillary v. Waller, 12 Ves. 251.	481	Irwin and Wallop, 1 Wils. 315.	446
Hill v. Barclay, 16 Ves. 402.	734	Irwin v. Knox, 10 Johns. R. 365.	599
Hill v. Bull, Gilm. 149.	324	Isaac v. West's ex'or, 6 Rand. 652.	797
Hinman v. Leavenworth, 2 Conn. R. 244	276	Jackson and Commonwealth, 2 Va. cas.	370
note (a).	586, 587, 588	501.	445
Hopkins v. Bernard &c., 4 Munf. 83.	122	Jackson and Purdew, 1 Russ. 1.	541
Hefferman's adm'r &c. v. Grymes's adm'r	457	340, 353, 354, 355, 360, 361, 368.	334, 335
&c., 2 Leigh 512.	538, 544	Jackson and Reed, 1 East 355.	63
Hitchen v. Campbell, 2 Bl. R. 827.	504	Jackson and Wilkes, 2 Hen. & Munf.	522, 527
Hoare v. Dawes, 1 Dougl. 371.	724	355, 361.	447
Hobart and others and earl of Ripon and	340, 373	Jackson and Wood, 8 Wend. 1.	401
others, 3 Mylne & Keene 169.	472	Jackson's adm'r v. bank of Marietta, 9	171, 692
Hobbs and others and Malone's adm'r	202	Leigh 244, 5.	266
and others, 1 Rob. 346.	340, 373	Jackson v. Brownson, 7 Johns. R. 227	287
Hobson &c. and Beresford &c., 1 Madd.	202	204, 205.	453
C. R. 361, am. edi. 199.	347	Jackson v. Peaked, 1 Mau. & Selw. 234.	693
Hodgson v. Butts, 3 Cranch 140.	19, 23	Jackson v. Sharp, 9 Johns. 167.	531
Hodgson v. Fullarton, 4 Taunt. 787.	639	Jackson v. Thomas, 16 Johns. R. 293.	303
Hodsdon v. Staple, 2 T. R. 684.	395	Jackson v. Wood, 8 Wend. 44.	286
Hogg v. Smith and others, 1 Taunt. 347	681, 682	Jacob and Hussey, 1 Salk. 344.	566
	353	James and Hale, 6 Johns. C. R. 258.	286
Hogheads and Robertson, 3 Leigh 667.	332	James and Weston, 1 Salk. 42.	480
Holbrook v. Finney, 4 Mass. rep. 566.	340, 355, 368, 370	James ex parte, 8 Ves. 345.	324
Holland &c. and Field &c., 6 Cranch 8, 24	86	Jameson and Triplett's ex'ors, 2 Munf.	364
	643	242.	582, 584, 586
Holloway and M'Neillage, 1 Barn. & Ald.	703	Jeffries &c. and Land &c., 5 Rand. 211,	363
218.	550	559.	371
Holloway and Wilkinson & Co., 7 Leigh	202	Jekyl and Wind, 1 P. Wms. 575.	414
277.	276	Jennings and Wright, 1 Bailey 280.	169
Honner v. Morton, 3 Russ. 65.	481	Jennings & others v. Ward & others, 2	480
	368	Vern. 520.	324
Hook's adm'rs v. Hancock, 5 Munf. 549.	517	Jervoise v. duke of Northumberland, 1	363
Hoomes's ex'ors &c. and Clarke, 2 Hen.	181	Jac. & Walk. 549.	276
& Munf. 23.	224	Jett and Hunter's adm'rs, 4 Rand. 107.	446
Hoomes v. Smock, 1 Wash. 389.	169	Jewson v. Moulson, 2 Atk. 417.	558, 565, 566
	482	348, 351, 353, 363	324
676, 685, 691, 692, 697, 698, 699.	355	Jeyes and Gibson, 6 Ves. 271.	371
Hooper's case, 2 Leon. 110.	152	Johnson and Griswold, 5 Conn. R. 363.	446
Hopkins &c. v. Ward &c., 6 Munf. 38.	168	Johnson and Smith, 15 East 213.	148
Horde &c. and Taylor, 1 Burr. 108.	824	Johnson and Ward &c., 13 Mass. rep.	355, 361
Hornblow v. Shirley, 13 Ves. 81.	520	Johnson and Ward, 6 Munf. 6.	355, 361
Hornsbey v. Lee, 2 Madd. C. R. 16. am.	339	Johnson v. Johnson, 1 Jac. & Walk. 456	331
edi. 352.	152	355.	337
Hovenden v. lord Annesley, 2 Sch. & Lef.	168	Johnson and Hutchinson, 1 T. R. 729.	447
631.	824	Jones and Garnett, 4 Leigh 633.	338
Howard v. Harris, 2 Ch. cas. 147. 168, 169,	520	Jones and Smith, 15 Johns. R. 229.	331, 338
Howarth and Samuel, 3 Meriv. 278.	324	Jones v. Raine, 4 Rand. 386.	668
Howell and wife and Wharf, 5 Binn. 499	467	Jones v. Williams, 2 Call 102.	238
	452	Jopson &c. and Rex, Sayer 27.	724
Howel v. George, 1 Madd. C. R. 1.	693	Jourdan and Alam, 1 Vern. 161.	70
Hoyle and Schuyler, 5 Johns. ch. rep.	339	Jourdan and Denny, 2 Bulstrode 241.	666
207, 210.	37	Kaines v. Orr, 2 Ves. sen. 194.	364
Hudson and Lawson, 1 Brown's ch. rep.	451	Kane and wife and Smith and others, 2	13, 17
58.	156	Paige 303.	214, 217, 219, 221, 224
Huey and Skip, 3 Atk. 91.	446, 456	Keane and others v. Robarts and others,	337
Hughes and others v. Edwards and wife,	446, 456	4 Madd. C. R. eng. edi. p. 332, am. edi.	734
9 Wheat. 489.	446, 456	177.	210
Hulme and Rex, 7 Carr. & Payne 8.	446, 456	Kendal &c. and Peter, 6 Barn. & Cress.	446, 456
Hunter and Delver, Bunb. 57.	446, 456	703.	224
Hunter's adm'rs v. Jett, 4 Rand. 107.	446, 456	Kennedy v. Gibbes, 2 Desauss. 380.	337
Hunter v. Matthews, (to be reported in	446, 456	Kennedy v. Strong, 14 Johns. R. 128.	734
12 Leigh).	446, 456	Kennedy and Brockway, 2 Johns. R. 210.	446, 456
Hurst v. Watkins, 1 Campbell's rep. 68.	446, 456		
Hussey v. Jacob, 1 Salk. 344.	446, 456		
Huston v. Mitchell, 14 Serg. & Rawle	446, 456		
307.	446, 456		
Hutchinson v. Johnston, 1 T. R. 729.	446, 456		
Hutson v. Lowry &c., 2 Va. cas. 42.	446, 456		
Inchiquin v. French, Amb. 33.	446, 456		

Kennedy and Udall, 3 Cowen 590.....	364	Liter and others v. Green, 2 Wheat. 306..	488
Kennedy v. Udall, 5 Johns. ch. R. 464		Little &c. v. Brown, 2 Leigh 353.....	395, 400
.....	348, 364, 373	Littleton and Bromley, Yelv. 112.....	518
Kerby's case, 7 Leigh 747.....	829, 836	Liverpool waterworks and Sparks, 13 Ves.	
Kidd and Roake, 5 Ves. 647.....	480	.....	734
Kinaston and Burnett, Prec. in ch. 119,		Livingston v. Tompkins, 4 Johns. ch. rep.	
121.....	363, 367, 368	.....	733
Kincheloe v. Kincheloe, 11 Leigh 393....	724	Lloyd v. Baldwin, 1 Ves. sen. 173.....	390
King and Greenlaw, 5 Lond. Jurist 18....	303	Lodge v. Hamilton, 2 Serg. & Rawle 491..	359
King &c. and M'Pherrin &c., 1 Rand....		Lofftus's adm'rs and Bryan, 1 Rob. 16....	479
172.....	724	Loines and Schermerhorn, 7 Johns. R.	
Kingsberry &c. and Evans &c., 2 Rand.		311.....	549
120.....	144	Lomax v. Picot, 2 Rand. 247.....	500, 502
Kingsbury and Ripley, 1 Day 150, note..	555	Long and Shirley, 6 Rand. 735.....	202, 205
King v. Baldwin, 2 Johns. ch. rep. 560....	324	Long v. Short, 1 P. Wms. 403.....	150
The king v. Bathurst, Sayer 225.....	237, 238	Lord Annesley and Hovenden, 2 Sch. &	
The king v. Cox, Leach's Cr. Ca. 71.....	789, 799	Lef. 631.....	517
The king v. Hulme, 7 Carr. & Payne 8....	824	Lord Bagot v. Williams, 3 Barn. & Cress.	
The king v. Jopson &c., Sayer 27.....	238	235.....	445, 446, 447
The king v. Radcliffe, 1 W. Black. 6.....	850	Lord Barrington and Searle, 2 Str. 826	
The king v. Richards, 7 Dowl. & Ry. 665.	798	.....	624, 625
The king v. Stephens, 5 Barn. & Cress.		Lord Brownlow and Franklin, 14 Ves.	
246.....	799	550.....	480
The king v. Storr, 3 Burr. 1698.....	237, 238	Lord Carteret v. Paschal, 3 P. Wms. 197	
The king v. Wheelock, 5 Barn. & Cress.		.....	340, 354, 360, 367
511.....	449	Lord Compton and Oxenden, 2 Ves. jun.	
The king v. Wick St. Lawrence, 5 Barn.		77, 8.....	146
& Adolph. 526.....	449	Lord Compton v. Oxenden, 2 Ves. jun.	
The king v. Wilson & others, 8 T. R.		265.....	146
357.....	238	Lord Dunsany &c. and Chamley, 2 Sch.	
Knox and Irwin, 10 Johns. R. 365.....	446	& Lef. 710, 718.....	595
Kyles v. Robert's ex'or and others, 6		Lord Northwick and Tait, 4 Ves. 816....	156
Leigh 495.....	539	Lottey's case, Russ. & Ryan 237.....	352
Lacey and Beveridge, 3 Rand. 63.....	504	Lowerre and Corning and others, 6 Johns.	
Lacey ex parte, 6 Ves. 626.....	303	ch. rep. 439.....	504
Lady Elbank v. Montolieu, 5 Ves. 744....	369	Lowes v. Lush, 14 Ves. 547.....	480
Lambert and Burnley, 1 Wash. 308.....	667	Lowe v. Waller, Dougl. 736.....	701
Lambert v. Cameret, Comberbach's R.		Lowry &c. and Hutson, 2 Va. cas.	
446.....	72	42.....	447, 451
Land &c. v. Jeffries &c., 5 Rand. 211, 599.	286	Loyd and others and Foreman, 2 Leigh	
Lane v. Mason, 5 Leigh 520.....	472	284.....	374, 377, 380
Lawhorne and Anthony &c., 1 Leigh 1....		Lush and Lowes, 14 Ves. 547.....	480
.....	249, 252	Lyddal v. Weston, 2 Atk. 19.....	481
Lawrence and Trevivan, 1 Salk. 276.....	335	Lye and Emly, 15 East 7.....	555
Lawson v. Hudson, 1 Brown's ch. rep. 58..	152	Lyell and Elliott's ex'or, 3 Call 268.....	804
Leal &c. and Day &c., 14 Johns. R. 404....	539	Lyman and the United States, 1 Mason	
Leavell v. Robinson, 2 Leigh 161.....	170	482.....	539, 542
Leavenworth and Hinman, 2 Conn. R.		Lynch and Stoughton, 2 Johns. ch. rep.	
244, note (a).....	276	210.....	335
Leavitt and Starr, 2 Conn. R. 243.....	276	Lynch &c. and Skeen &c., 1 Rob. 186....	245
Lee and Hornsby, 2 Madd. C. R. 16, am.		Lyons ex parte, 2 Leigh 761.....	
edi. 352.....	340, 354, 355, 368	.....	117, 118, 120, 127
Leftwich's case, 5 Rand. 657.....	813	Macaulay v. Phillips, 4 Ves. 19.....	363
Legard and Digby, 2 Dick. 500.....	141	Mackenzie and York buildings co., 8	
Legg v. Legg, 8 Mass. R. 99.....	359	Brown's par. cas. 42.....	302
Leigh and Stoughton, 1 Taunt. 402.....	523, 526	Mackreth and others and Fox, 2 Brown's	
Leitch and Fitch, 11 Leigh 471.....	452, 454, 456	C. C. 400.....	302, 303
Leonard and Atkinson, 3 Brown's ch. rep.		Madison and Dade's adm'r, 5 Leigh	
218.....	14	401.....	676, 685, 694, 696, 697, 698, 699, 702, 703
Leslie v. Wilson, 3 Brod. & Bingh. 171....		Malone's adm'r and others v. Hobbs and	
.....	538, 542, 553, 568	others, 1 Rob. 346.....	724
Levet v. Needham, 2 Vern. 138.....	144	Mandeville &c. and Sheehy, 6 Cranch	
Lewis's ex'ors &c. and Ruffners, 7 Leigh		253.....	537, 8, 9, 540, 554, 9, 60, 561, 4, 6
720.....	205	Manns v. Flinn's adm'r, 10 Leigh 93....	482
Like v. Beresford, 3 Ves. 506.....	348, 364	March v. Russell, 3 Mylne & Craig 31....	668
Lindsay and Tovey, 1 Dow's R. 117.....	352	Margravine of Anspach v. Noel, 1 Madd.	
Lindsay's adm'rs and others and Martin,		C. R. 310, am. edi. 172.....	482
1 Leigh 499.....	721	Maria & others v. Surbaugh, 2 Rand.	
Linton and others v. Bartly and others, 9		228.....	597, 598, 599, 600
Leigh 444.....	485, 488, 491	Marietta bank and Jackson's adm'x, 9	
Liter and others and Green, 8 Cranch 233		Leigh 244, 5.....	63
.....	265, 268, 488		

Marietta bank and Pindall's ex'x &c., 10 Leigh 484.....	1, 2, 13, 16, 27
Markham v. Middleton, 2 Str. 1259.....	447
Marks and wife v. Bryant, 4 Hen. & Munf. 91.....	434
Marks's adm'r and Gregory's adm'r, 1 Rand. 372, 385.....	368
Marks v. Morris, 2 Munf. 407..721, 724, 727, 728	
Marlow v. Smith, 2 P. Wms. 198.....	480
Marshall and Bartlett, 2 Bibb 470.....	685
Marshall and Hatchett, Peake's N. P. cas. 72.....	454
Marshall and others and M'Cutchen and others, 8 Peters 220.....	599, 600
Martin v. Lindsay's adm'rs and others, 1 Leigh 499.....	721
Martin and Penny, 4 Johns. ch. rep. 569.....	541, 558
Martinnant and Toussaint, 2 T. R. 100.....	542
Martin's ex'ors &c. and the commonwealth, 5 Munf. 125.....	144
Mason & Chichester's adm'r, 7 Leigh 244.....	339
Mason and Lane, 5 Leigh 520.....	472
Mason and Wiseman, 1 P. Wms. 459, (Cox's note).....	351
Mason v. Bond & co., 9 Leigh 181.....	54, 286
Matchwick v. Cock, 3 Ves. 609.....	573, 577
Mathers v. Pember, 1 Bro. ch. rep. 52.....	725, 726
Matthews and Hunter, (to be reported in 12 Leigh).....	457, 462, 466, 7
Matthews &c. and Tibbs &c., decided in court of appeals May 1829.....	483
Maule's adm'x and Bennett, Gilm. 305.....	324
Maunde and Walter, 19 Ves. 424.....	147
Mauro and Moore, 4 Rand. 488.....	452, 454
Mayer & others and duke of Ancaster, 1 Brown's ch. Rep. 454.....	143, 152
Mayor &c. of Colchester v. Seaber, 3 Burr. 1866.....	61
Mayor &c. of Petersburg and Bolling, 3 Rand. 570.....	264
Mayo v. Murchie, 3 Munf. 397, 8, 400, 404, 409.....	594, 642
Mayo v. Winfree, 2 Leigh 370.....	639
M'Cullough & al. v. Sommersville, 8 Leigh 437.....	538, 540
M'Cutchen and others and Marshall and others, 8 Peters 220.....	599, 600
M'Fall &c. and Williams &c., 2 Serg. & Rawle 280.....	553
M'Farland v. Irwin, 8 Johns. R. 78.....	71
M'Jurkin &c. and Ross &c., 14 Serg. & Rawle 364.....	205
M'Kennan and the state, 1 Harper's South Car. Rep. 302.....	824, 825
M'Key ex'or of Fuqua v. Young, 4 Hen. & Munf. 430.....	298
M'Murdo &c. and Wernick's adm'r, 5 Rand. 51..102, 114, 115, 116, 121, 122, 126, 127	
M'Neilage v. Holloway, 1 Barn. & Ald. 218.....	353
M'Perrin &c. v. King &c., 1 Rand. 172.....	724
Meggison's adm'rs and Cabell's ex'ors, 6 Munf. 202.....	14
Meredith and Woodhouse, 1 Jac. & Walk. 222.....	304
Mersereau and Runyan, 11 Johns. R. 534.....	515
Mewburn and others and Bond, 1 Brock. 316.....	472
Michigan bank and Williams, 7 Wend. 539.....	61, 74
Middleton and Bowman and others, 1 Bay 252.....	248
Middleton and Markham, 2 Str. 1259.....	447
Miles and Rose, 4 Mau. & Selw. 101.....	226
Miller and Decker &c., 2 Paige 149.....	587
Miller's ex'ors v. Rice &c., 1 Rand. 438.....	668
Miller v. Argyle's ex'or and others, 5 Leigh 460.....	7
Milne and Ross, (to be reported in 12 Leigh).....	453
Milward v. earl Thanet, 5 Ves. 520, note.....	480
Milwood v. Walter, 2 Taunt. 224.....	454
Mitchell and Buckle, 18 Ves. 111.....	482
Mitchell and Huston, 14 Serg. & Rawle 307.....	339
Mitchell and others and Drake, 3 East 258.....	541, 545, 565
Mitchell's ex'or and Sampson, 5 Munf. 175.....	641
Mitchell v. Hazen, 4 Conn. R. 495.....	276
Mitchell v. Warner, 5 Conn. R. 497.....	379
Mitchell v. Webb, Tothill 10.....	697
Mitford v. Mitford, 9 Ves. 87.....	363
Montolieu and lady Elibank, 5 Ves. 744.....	369
Moody and Coleman, 4 Hen. & Munf. 1.....	249, 252
Moore and Gilliam, 4 Leigh 30.....	395, 398
Moore and Taylor, 2 Rand. 575.....	721
Moore and Wilson, 1 Mylne & Keene 126.....	13
Moore's ex'or v. the auditor, 3 Hen. & Munf. 235.....	472
Moore's adm'r v. George's adm'r, 10 Leigh 228.....	594, 642
Moore's case, 9 Leigh 639.....	828
Moore v. Blake, 1 Ball & Beatty 68, 9.....	480
Moore v. Mauro, 4 Rand. 488.....	452, 454
Morewood and Outram, 3 East 346.....	335
Morgan and Selby, 3 Leigh 577.....	728
Morgan v. Plumbe, 9 Wend. 287.....	457
Morley and Wright, 11 Ves. 12.....	348, 354, 356, 361, 369
Morris and Marks, 2 Munf. 407.....	721, 724, 727, 728
Morris &c. v. Terrell, 2 Rand. 6.....	595
Morrison &c. and United States, 4 Peters 124.....	378
Morse v. Royal, 12 Ves. 373.....	304, 698
Morton and Honner, 3 Russ. 65.....	340, 355, 368, 370
Moses and Crawford, 10 Leigh 277.....	598
Moss and others v. Scott, 2 Dana 274, 5.....	264
Moss and Riddle, 7 Cranch 206.....	331, 338
Moulson and Jewson, 2 Atk. 417.....	348, 351, 353, 363
Munroe and Clarke, 14 Mass. rep. 351.....	395
Murchie and Mayo, 3 Munf. 397, 8, 400, 404, 409.....	594, 642
Murray and Dunn, 9 Barn. & Cress. 780.....	446
Mut. ass. society v. Stone &c., 3 Leigh 218.....	709
Myers and Haviland, 6 Johns. ch. R. 27.....	348, 369
Nash v. Preston, Cro. Car. 190.....	397
Needham and Levett, 2 Vern. 138.....	144
Neilson and Titus, 5 Johns. ch. R. 457.....	410
Nelson v. Powell, 3 Dougl. 410.....	538
Neithrop v. Biscoe, 1 Ch. cas. 135.....	668
Newcomb and Bonham, 1 Vern. 214, 232.....	169

Newburgh (village of) and Gardner, 2 Johns. ch. rep. 164.....	504	Phoenix v. assignees of Ingraham, 5 Johns. R. 426.....	681
Newell and Republica, 3 Yeates 407.....	798	Pickard v. Sears, 6 Adolph. & Ellis 474.....	688
Newman v. Barton, 2 Vern. 205.....	666, 675	Pickets v. Dowdall, 2 Wash. 106.....	734
Newton and earl of Salisbury, 1 Eden 370.....	348, 352, 353, 354, 356, 361, 363, 364, 367	Picot and Lomax, 2 Rand. 247.....	500, 502
Nicholas &c. and Smith, 8 Leigh 349.....	172	Pierce's adm'r &c. v. Trigg's heirs, 10 Leigh 406.....	401
Nisbet v. Smith and others, 2 Bro. C. C. 579.....	324	Pigot v. Bullock, 1 Ves. jun. 479.....	522, 526
Nix's case, 11 Leigh 636.....	821	Pindall's ex'x &c. v. the bank of Marrietta, 10 Leigh 484.....	1, 2, 13, 16, 27
Noel and margravine of Anspach, 1 Madd. C. R. 310, am. edi. 172.....	482	Platner v. Best, 11 Johns. R. 530.....	446
Noel v. Robinson, 1 Vern. 94.....	666	Plumb and Morgan, 9 Wend. 287.....	457
Norris v. Crummev &c., 2 Rand. 334.....	324, 338	Porter v. Hill, 9 Mass. R. 34.....	276, 277
North and Silver Lake bank, 4 Johns. ch. R. 373.....	220	Porter v. Perkins &c., 5 Mass. R. 233.....	276
Northumberland (duke of) and Jervoise, 1 Jac. & Walk. 549.....	480	Pott and Doe, Dougl. 720, 21.....	515
Northwick (lord) and Tait, 4 Ves. 816.....	156	Povall &c. and Turpin, 8 Leigh 93.....	721
Noyes and Denton & others, 6 Johns. R. 296.....	339	Powell and Nelson, 3 Dougl. 410.....	538
Oliver v. Richardson, 9 Ves. 222.....	531	Poyner and Ballentine, 2 Hayw. 110.....	529
Orleans (bank of) and Torrey, 9 Paige 663.....	302	Pratt and others v. Carroll, 8 Cranch 471.....	480
Orr v. Kaines, 2 Ves. sen. 194.....	666	Preston and Nash, Cro. Car. 190.....	397
Ossander's case, 3 Leigh 780.....	789	Price and Dalby, 2 Wash. 191.....	255, 256, 257
Otte and Green, 1 Sim & Stu. 250.....	353, 358, 369	Price and Dunn, 11 Leigh 203.....	202
Outram v. Morewood, 3 East 346.....	335	Price and Toulmin, 5 Ves. 238.....	14
Oxenden and lord Compton, 2 Ves. jun. 265.....	146	Prince v. Hazleton, 20 Johns. 502.....	433
Oxenden v. lord Compton, 2 Ves. jun. 77, 8.....	146	Pryor v. Hill, 4 Bro. C. C. 139.....	351, 363
Packer v. Gonsalus, 1 Serg. & Rawle 536.....	680	Pudsey's case, 2 Leon. 110.....	537, 540, 550
Packer v. Windham, Prec. in ch. 412.....	363, 367, 368	Puller and Bell, 2 Taunt. 285.....	453
Papillon and De Bret, 4 East 502.....	72	Pulliam v. Winston &c., 5 Leigh 324.....	628, 638, 641, 645
Parker v. Harris, 1 Salk. 262.....	82	Purdew v. Jackson, 1 Russ. 1.....	340, 353, 354, 355, 360, 361, 368, 370
Parkins v. Cox, 2 Hayw. 339.....	527	Purvey &c. and Crouch, 1 Rand. 258.....	516, 522, 523, 526
Parris and Heapy, 6 T. R. 368.....	92	Radcliffe and Roper, 10 Mod. 230.....	141
Partridge and Wheldale, 5 Ves. 388.....	147	Radcliffe and the king, 1 W. Black. 6.....	850
Paschal and lord Carteret, 3 P. Wms. 197.....	340, 354, 356, 360, 367	Raine and Jones, 4 Rand. 386.....	331, 338
Patton and others and bank of Alexandria, 1 Rob. 499, 62, 74, 84, 87, 937, 95, 99, 100	432	Randall v. Errington, 10 Ves. 427.....	304
Payne and Farrington &c., 15 Johns. R. 432.....	477	Randolph and Eppes & others, 2 Call 186.....	319
Peachy v. duke of Somerset, 1 Str. 452.....	734	Randolph v. Randolph &c., 3 Munf. 99.....	641, 644
Pearl and Ellicott, 10 Peters 442.....	264	Rapalee and First Baptist society, 16 Wend. 605.....	64
Pearman and Wilcox, 9 Leigh 144.....	358, 680	Rayner and Wortley, 2 Doug. 637.....	67
Pegram's case, 1 Leigh 569.....	815	Redford v. Winston, 3 Rand. 148.....	618
Pember v. Mathers, 1 Bro. ch. R. 52.....	725, 726	Redhead and Headley, Coop. 50.....	150
Pennoir v. Brace, 1 Salk. 319.....	92	Reed v. Jackson, 1 East 355.....	445
Pennybacker's ex'ors and Buck, 4 Leigh 5.....	594	Rees v. Berrington, 2 Ves. jun. 540.....	324
Penny v. Martin, 4 Johns. ch. rep. 569.....	541, 553	Respublica v. Newell, 3 Yeates 407.....	798
The people v. Gates, 13 Wend. 311.....	769	Rex v. Bathurst, Sayer 225.....	237, 238
The people v. Rynders, 12 Wend. 429.....	769	Rex v. Cox, Leach's cr. ca. 71.....	798, 799
Perine and Swaine, 5 Johns. ch. R. 492.....	406, 516, 523, 531	Rex v. Hulme, 7 Carr. & Payne 8.....	824
Perkins &c. and Porter, 5 Mass. R. 233.....	276	Rex v. Jopson &c., Sayer 27.....	239
Peaked and Jackson, 1 Mau. & Selw. 234.....	226	Rex v. Radcliffe, 1 W. Black. 6.....	850
Phillips and Macaulay, 4 Ves. 19.....	363	Rex v. Richards, 7 Dowl. & Ry. 665.....	798
Phoenix insurance co. and Fontaine, 11 Johns. R. 293.....	734	Rex v. Stephens, 5 Barn. & Cress. 246.....	799
Peter v. Kendal &c., 6 Barn. & Cress. 703.....	214, 217, 219, 221, 224	Rex v. Storr, 3 Burr. 1698.....	237, 8
		Rex v. Wheelock, 5 Barn. & Cress. 511.....	449
		Rex v. Wick St. Lawrence, 5 Barn. & Adolph. 526.....	449
		Rex v. Wilson & others, 8 T. R. 357.....	238
		Reynolds's case, 4 Leigh 663.....	829
		Reynolds v. Cleveland, 4 Cow. 282.....	549
		Rice &c. and Miller's ex'ors, 1 Rand. 438.....	668
		Richards and the king, 7 Dowl. & Ry. 665.....	798, 799
		Richardson and Oliver, 9 Ves. 222.....	531
		Riddle v. Moss, 7 Cranch 206.....	331, 338

- Rider *v.* the Union factory, 7 Leigh 154.. 59, 74, 82, 85, 90, 100, 101
 Ringrose *v.* Bramham, 2 Cox's C. R. 384 573, 578, 579
 Ripley *v.* Kingsbury, 1 Day 150, note... 555
 Ripon (earl of) and others *v.* Hobart and others, 3 Mylne & Keene 169..... 504
 Roake *v.* Kidd, 5 Ves. 647..... 480
 Roanes *v.* Archer, 4 Leigh 550..... 568, 596
 Robarts and others *and* Keane and others, 4 Madd. C. R. eng. edi. p. 332, am. edi. p. 177..... 13, 17
 Robertson *v.* Campbell &c., 2 Call 421.... 170
 Robertson *v.* Hogsheads, 3 Leigh 667.... 639
 Robertson *v.* Smith & others, 18 Johns. R. 459..... 540, 541, 559, 564
 Roberts's ex'or and others *and* Kyles, 6 Leigh 495..... 539
 Roberts's adm'r's *and* Cabell's ex'ors, 6 Rand. 580..... 197
 Roberts's adm'r *v.* Cocke, 1 Rand. 121... 171
 Roberts *v.* Bozon, 1 Powell on mort. p. 9, note..... 171
 Robinson *and* Leavell, 2 Leigh 161..... 170
 Robinson *and* Noel, 1 Vern. 94..... 666
 Robinson *v.* Bland, 2 Burr. 1077..... 701
 Robinson *v.* Wilkinson, 3 Price 547..... 538, 540, 548, 568
 Rochfort *and* earl of Belvedere, 5 Brown's par. cas. Tomlin's edi. 299..... 153, 155
 Rootes and others *and* Wilcox, 1 Wash. 140..... 573
 Roper &c. *v.* Wren &c., 6 Leigh 38..... 639
 Roper *v.* Radcliffe, 10 Mod. 230..... 141
 Rose *and* Wright, 2 Sim. & Stu. 323.... 144
 Roseboom *v.* Billington, 17 Johns. R. 182.. 625
 Rose *v.* Bryant, 2 Camp. 321..... 625
 Rose *v.* Miles, 4 Mau. & Selw. 101..... 226
 Ross &c. *v.* M'Junkin &c., 14 Serg. & Rawle 364..... 205
 Rosson and wife and others *and* Broadus and others, 3 Leigh 12..... 13
 Ross *v.* Milne, (to be reported in 12 Leigh) 453
 Rothschild *v.* Brookman, 5 Bligh N. S. 190..... 304
 Royall *and* Morae, 12 Ves. 373 304, 698
 Ruffners *v.* Lewis's ex'ors &c., 7 Leigh 720..... 205
 Runyan *v.* Mersereau, 11 Johns. R. 534.. 515
 Russell *and* March, 3 Mylne & Craig 31.. 668
 Rynders and the people, 12 Wend. 429 ... 769
 Sale *v.* Dishman's ex'ors, 3 Leigh 548... 538, 540, 552, 567
 Salisbury (earl of) *v.* Newton, 1 Eden 370 348, 352, 3, 4, 6, 361, 3, 4, 7
 Sampson *v.* Mitchell's ex'or, 5 Munf. 175.. 641
 Samuel *v.* Howarth, 3 Meriv. 278..... 324
 Samwel *v.* Wake, 1 Brown's ch. rep. 144.. 142
 Sanderson *v.* Walker, 13 Ves. 601..... 304
 Satchwell *and* Crawford, 2 Str. 1218... 66
 Schermerhorn *v.* Loines, 7 Johns. R. 311.. 549
 Schieffelin *and* Field, 7 Johns. ch. rep. 157 19
 Schuyler *v.* Hoyle, 5 Johns. ch. rep. 207, 210..... 355
 Scott *and* Moss and others, 2 Dana 274, 5.. 264
 Scott *and* Stapylton, 16 Ves. 272 480
 Scott *v.* Beecher & wife, 5 Madd. ch. rep. 96, am. edi. 65..... 152, 155
 Scott & wife &c. *v.* Gibbon & co. &c., 5 Munf. 86..... 342, 364, 596
 Scott & wife *v.* Halliday &c., 5 Munf. 103. 641
 Scutt's case, 2 Virg. cas. 54..... 813
 Seaber *and* mayor &c., of Colchester, 3 Burr. 1866..... 61
 Searle *v.* lord Barrington, 2 Str. 826.. 624, 625
 Sears *and* Pickard, 6 Adolph. & Ellis 474.. 688
 Seddon *v.* Tutop, 6 T. R. 607..... 334, 438, 445, 6, 7, 8, 9, 450, 451, 455
 Segar *v.* Edwards and wife, 11 Leigh 213..... 304
 Selby *v.* Morgan, 3 Leigh 577..... 728
 Sharp *and* Jackson, 9 Johns. 167..... 266
 Shearman *v.* Christian and others, 6 Rand. 49..... 125
 Sheehy *v.* Mandeville &c., 6 Cranch 253. 537, 8, 9, 540, 554, 9, 560, 561, 4, 6
 Shelton and others *v.* Ward, 1 Call 538.. 335
 Shelton's adm'r *and* Wilson's curator, 9 Leigh 342..... 271
 Shepherd *and* Conner, 15 Mass. R. 164... 522
 Sherer *v.* Bishop, 4 Bro. C. C. 55, 60.. 575, 578
 Shields adm'r &c. *v.* Anderson &c., 3 Leigh 729 639
 Shields *v.* the commonwealth, 4 Rand. 541..... 14
 Shirley *and* Horniblow, 13 Ves. 81..... 481
 Shirley *v.* Long, 6 Rand. 735..... 202, 205
 Short *and* Long, 1 P. Wms. 403..... 150
 Shuter *and* Gilmore, 2 Lev. 227..... 804
 Siffkin *v.* Walker &c., 2 Campb. 308.... 555
 Silver Lake bank *v.* North, 4 Johns. ch. R. 373..... 220
 Siter & another (case of) 4 Rawle 471-483 340, 355
 Sken &c. *v.* Lynch &c., 1 Rob. 186..... 245
 Skip *v.* Huey, 3 Atk. 91..... 339
 Skipwith *v.* Strother &c., 3 Rand. 214... 697
 Skyring *v.* Greenwood, 4 Barn. & Cresa. 281..... 671
 Slate river company and Crenshaw, 6 Rand. 245..... 504
 Slee *v.* Bloom, 5 Johns. ch. R. 381..... 220
 Sloper *v.* Fish, 2 Ves. & Beames 145.... 480
 Smallcomb *v.* Cross &c., 1 Ld. Raym. 251..... 37
 Smith *and* Cooper, 9 Serg. & Rawle 26... 219, 221
 Smith *and* Marlow, 2 P. Wms. 198..... 480
 Smith and others *and* Nisbet, 2 Bro. C. C. 579..... 324
 Smith and others *and* Robertson, 18 Johns. rep. 459..... 540, 541, 559, 564
 Smith and others *v.* Kane and wife, 2 Paige 303..... 364
 Smith &c. *and* Buckner &c., 1 Wash. 296 676, 691, 2, 9, 701, 3
 Smith &c. *and* Findlay, 6 Munf. 148..... 521, 522, 523, 527
 Smith &c. *v.* Smith &c., 4 Rand. 95.... 640, 761
 Smith's ex'x *and* Stowers adm'r of Bragg, 5 Munf. 401..... 331, 335, 338
 Smithson and others *and* Ackroyd, 1 Brown's ch. rep. 503..... 141
 Smith *v.* Auriol, 18 Ves. 198..... 249
 Smith *v.* Black, 9 Serg. & Rawle 142.. 560, 565
 Smith *v.* Burtis, 9 Johns. 180..... 294
 Smith *v.* Campbell, 19 Ves. 400..... 574, 578
 Smith *v.* Claxton &c., 4 Madd. C. R. 484.. 148
 Smith *v.* Johnson, 15 East 213..... 446
 Smith *v.* Jones, 15 Johns. R. 229..... 447
 Smith *v.* Nicholas &c., 8 Leigh 349..... 173
 Smith *v.* Whiting, 11 Mass. R. 445..... 446

Smock and Hoomes, 1 Wash. 389.....	Thomas &c. and Davis's adm'r, 5 Leigh
.....676, 685, 691, 2, 7, 8, 9, 703	1.....335, 676, 689, 691, 700
Smock v. Dade, 5 Rand. 639.....19, 23	Thomas's case, 2 Leach 882.....769
Snaith and others and Hogg, 1 Taunt.	Thomas v. Gammel & wife, 6 Leigh 9....
347.....19, 23	.....515, 519, 523, 530
Somerset (duke of) and Peachy, 1 Str.	Thompson and Colson, 2 Wheat. 336, 341
452.....734	.....480
Sommerville and M'Cullough & al., 8	Thompson and Earrant, 5 Barn. & Ald.
Leigh 437.....538, 540	826.....521
Southcote &c. and Harrison, 2 Ves. sen.	Thompson v. Davenport and others, 9
389.....734	Barn. & Cress. 78.....539
Sparks v. Liverpool waterworks, 13 Ves.	Thompson v. Davenport &c., 1 Wash. 125
428.....734	.....170
Sperling v. Trevor, 7 Ves. 497.....481	Thoroughgood's case, Noy's rep. 73.....92
Sperry and Willard, 16 Johns. R. 121....447	Thurbur and Hazen, 4 Johns. ch. R. 604
Staple and Hodsden, 2 T. R. 684.....202	.....532
Stapylton v. Scott, 16 Ves. 272.....480	Tibbs &c. v. Matthews &c., decided in
Starr v. Leavitt, 2 Conn. R. 243.....276	court of appeals May 1829.....483
Thestate v. M'Kennan, 1 Harper's South	Sift and Stow, 15 Johns. R. 458.....395, 396
Car. rep. 302.....824, 825	Titus v. Neilson, 5 Johns. ch. R. 457....410
Steele v. Boyd, 6 Leigh 547.....324, 338	Tod v. Baylor, 4 Leigh 498.....
Stephens and the king, 5 Barn. & Cress.	.....515, 517, 519, 523, 530
246.....799	Tompkins and Livingston, 4 Johns. ch.
Stevens v. Barringer and others, 13 Wend.	rep. 431.....733
639.....19	Tom v. Goodrich and others, 2 Johns. R.
Stevens v. Beckman and others, 1 Johns.	213.....537, 539, 542, 552, 567
ch. rep. 318.....504	Torrey v. the bank of Orleans, 9 Paige
Stewart v. Eden, 2 Caines's R. 150.....693	663.....302
Stoever v. Stoever, 9 Serg. & Rawle 434..205	Toulmin v. Price, 5 Ves. 238.....14
Stone &c. and Mut. ass. society, 3 Leigh	Toussaint and Martinant, 2 T. R. 100..542
218.....708, 709	Tovey and Lindsay, 1 Dow's R. 117.....352
Stone v. Ware & Smith, 6 Munf. 541....693	Trecothick and Coles, 9 Ves. 246.....304
Storr and Rex, 3 Burr. 1698.....237, 238	Trevivan v. Lawrence, 1 Salk. 276.....355
Stoughton v. Leigh, 1 Taunt. 402.....523	Trevor and Spering, 7 Ves. 497.....481
Stoughton v. Lynch, 2 Johns. ch. rep.	Trigg's heirs and Pierce's adm'r &c., 10
210.....335	Leigh 406.....401
Stowers adm'r of Bragg v. Smith's ex'x,	Triplett's ex'ors v. Jameson, 2 Munf. 242
5 Munf. 401.....331, 335, 338	.....582, 584, 586
Stow v. Tift, 15 Johns. R. 458.....395, 396	Turner and Chapman's adm'x, 1 Call 280..170
Stratford v. Twynam, Jacob 418.....643	Turner's adm'x and Craddock, 6 Leigh
Strong and Kennedy, 14 Johns. R. 128...734	129, 130, 131.....449
Strother &c. and Skipwith, 3 Rand. 214..697	Turner v. Crisp, 2 Str. 827.....625
Stubbs and Boultsbee, 18 Ves. 20.....324	Turpin v. Povall &c., 8 Leigh 93.....721
Surbaugh and Maria & others, 2 Rand.	Tutop and Seddon, 6 T. R. 607.....
228.....597, 598, 599, 600	.....334, 438, 446, 7, 8, 9, 450, 451, 455
Sutton and Banks, 2 P. Wms. 700.....523	Twopenny &c. v. Young, 3 Barn. &
Sutton and West, 2 Ld. Raym. 853.....72	Cress. 208.....538
Swaine v. Perine, 5 Johns. ch. R. 492....	Twyman and Stratford, Jacob 418.....643
.....406, 516, 523, 531	Udall and Kenny, 5 Johns. ch. R. 464....
Sydnor v. Gee, 4 Leigh 536.....286	.....348, 364, 373
Tabele v. Tabele and others, 1 Johns. ch.	Udall v. Kenny, 3 Cowen 590.....364
rep. 45.....392, 396	Union factory and Rider, 7 Leigh 154....
Tait v. lord Northwick, 4 Ves. 816.....156	.....59, 74, 82, 85, 90, 100, 101
Talbot v. Braddyl, 1 Vern. 395.....182	United States v. Lyman, 1 Mason 482....539
Taliaferro &c. v. Taliaferro &c., 4 Call	United States v. Morrison &c., 4 Peters
93.....354, 355	124.....378
Taliaferro & ux. and Wallace & ux., 2	Upshaw v. Upshaw &c., 2 Hen. & Munf.
Call 447.....355, 804	389.....355
Taliaferro v. Foote, 3 Leigh 58.....14	Vanbrymen & others v. Wilson, 9 East
Tapscott and Weaver, 9 Leigh 424.....	321.....76
.....538, 540, 542, 552, 567	Van Deusen and Van Epps and wife, 4
Taylor's adm'rs &c. v. Chowning, 3	Paige 64.....364
Leigh 654.....171, 179, 186, 189	Van Epps and wife v. Van Deusen, 4
Taylor's adm'r v. the bank of Alexan-	Paige 64.....364
dria, 5 Leigh 477.....539, 542	Van Epps v. Van Epps, 9 Paige 241....302
Taylor v. Horde &c., 1 Burr. 108.....276	Van Houten and Wheeler, 12 Johns. R.
Taylor v. Moore, 2 Rand. 575.....721	311.....447
Templeman v. Faunteroy, 3 Rand. 434..595	Van Riemsdyk and Clark's ex'ors, 9
Terell and Morris &c., 2 Rand. 6.....595	Cranch 153, 156.....681
Thanet (earl) and Milward, 5 Ves. 720,	Varnum v. Abbot &c., 12 Mass. R. 474..
note.....480	.....276, 277
Thomas and Jackson, 16 Johns. R. 293..267	

Village of Newburgh and Gardner, 2 Johns. ch. rep. 164.....	504	Wilkins v. Despard, 5 T. R. 112.....	734
Viner v. Francia, 2 Bro. C. C. 658....	573, 577	Willard v. Sperry, 16 Johns. R. 121....	447
Vooght v. Winch, 2 Barn. & Ald. 662....	335	Williams and Barnes, 11 Wheaton 415....	267
Wade and Cole, 16 Ves. 27.....	147	Williams and Haleys, 1 Leigh 140.....	377
Wake and Sanwell, 1 Brown's ch. rep. 144.....	142	Williams and Jones, 2 Call 102.....	668
Walker and Coutts, 2 Leigh 268.....	377	Williams and lord Bagot, 3 Barn. & Cress. 235.....	445, 446, 447, 455
Walker and Sanderson, 13 Ves. 601....	304	Williams &c. v. M'Fall &c., 2 Serg. & Rawle 280.....	553
Walker &c. and Siffkin, 2 Campb. 308....	555	Williams v. Donaghe's ex'or, 1 Rand. 304.....	547
Walker v. Denne, 2 Ves. jun. 176.....	146	Williams v. bank of Michigan, 7 Wend. 539.....	61, 74
Wallace & ux. v. Taliaferro & ux., 2 Call 447.....	355, 804	Willings &c. v. Consequa, 1 Peters's C. C. R. 306.....	541, 556, 565, 566
Waller and Hillary, 12 Ves. 251.....	481	Willis and Clay and others, 1 Barn. & Cress. 364.....	168
Waller and Lowe, Dougl. 736.....	701	Wilson and Leslie, 3 Brod. & Bingh. 171.....	538, 542, 553, 568
Wallop v. Irwin, 1 Wis. 315.....	75	Wilson and Vanbrymen & others, 9 East 321.....	76
Walter and Milwood, 2 Taunt. 224.....	454	Wilson &c. v. Hart, 7 Taunt. 295.....	538
Walter v. Maunde, 19 Ves. 424.....	147	Wilson & others and the king, 8 T. R. 357.....	238
Ward and Johnson &c., 13 Mass. rep. 148.....	558, 565, 566	Wilson's curator v. Shelton's adm'r, 9 Leigh 342.....	271
Ward and Shelton and others, 1 Call 538..	335	Wilson & Trent v. Butler &c., 3 Munf. 559.....	641
Ward &c. and Hopkins &c., 6 Munf. 38..	202	Wilson v. Moore, 1 Mylne & Keene 126..	13
Warder v. Arell, 2 Wash. 282.....	804	Winch and Vooght, 2 Barn. & Ald. 662..	335
Ward & others and Jennings & others, 2 Vern. 520.....	169	Windham and Packer, Prec. in ch. 412..	363, 367, 368
Ward v. Johnson, 6 Munf. 6.....	324	Wind v. Jekyl, 1 P. Wms. 575.....	579
Ware & Smith and Stone, 6 Munf. 541....	693	Winfree and Mayo, 2 Leigh 370.....	639
Warner and Mitchell, 5 Conn. R. 497....	379	Wingfield v. Crenshaw, 3 Hen. & Munf. 256.....	249
Warwick & co. and Ambler & others, 1 Leigh 201.....	20	Winn v. Bob & others, 3 Leigh 140.....	433
Watkins and Green, 7 Wheat. 27..259, 265, 266		Winston and Redford, 3 Rand. 148.....	618
Watkins and Hurst, 1 Campbell's rep. 68.....	452	Winston &c. and Pulliam, 5 Leigh 324.....	628, 638, 641, 645
Watts v. Cole &c., 2 Leigh 664.....	265, 266, 267, 268	Winstons and Bullitt's ex'ors, 1 Munf. 269.....	53
Weaver v. Tapscott, 9 Leigh 424.....	538, 540, 542, 552, 566	Wiseman v. Mason, 1 P. Wms. 459, (Cox's note).....	351
Webb and Mitchell, Tothill 10.....	697	Wolstenholm v. Davis, Freeman's cas. in ch. 289.....	337
Webb v. the commonwealth, 2 Leigh 721..	504	Wood and Jackson, 8 Wend. 44.....	453
Weeden v. Bartlett &c., 6 Munf. 123....	433	Woodcock v. Bennet, 1 Cowen 739.....	89
Weland canal co. v. Hathaway, 8 Wend. 480.....	64	Woodhouse v. Meredith, 1 Jac. & Walk. 222.....	304
Wernick's adm'r v. M'Murdo &c., 5 Rand. 51.....	102, 114, 5, 6, 121, 2, 6, 7	Woodson &c. v. Barrett & co., 2 Hen. & Munf. 88.....	692, 700, 701
Weston and Lyddal, 2 Atk. 19.....	481	Wood v. Boughan, 1 Call 329.....	248, 249, 251
Weston v. James, 1 Salk. 42.....	90	Wood v. Jackson, 8 Wend. 1.....	334, 355
West's ex'or and Isaac, 6 Rand. 652....	599	Wormley v. Wormley, 8 Wheat. 421.....	304
West v. Sutton, 2 Ld. Raym. 853.....	72	Wortley v. Rayner, 2 Dougl. 637.....	67
Wharf v. Howell and wife, 5 Binn. 499..	169	Wren and others and Herbert and others, 7 Cranch 380.....	384, 392, 402
Wheeler v. Van Houten, 12 Johns. R. 311.....	447	Wren &c. and Roper &c., 6 Leigh 38....	639
Wheelock and the king, 5 Barn. & Cress. 511.....	449	Wright v. Jennings, 1 Bailey 280.....	414
Wheldale v. Partridge, 5 Ves. 388.....	147	Wright v. Morley, 11 Ves. 12.....	348, 354, 356, 361, 369
Whelpdale v. Cookson, 1 Ves. sen. 9....	302	Wright v. Rose, 2 Sim. & Stu. 323.....	144
Whetstone v. Bury, 2 P. Wms. 146.....	734	Yerby v. Yerby, 3 Call 334..570, 573, 575, 580	
White and Coulson, 3 Atk. 21.....	504	York buildings co. v. Mackenzie, 8 Brown's par. cas. 42.....	302
White &c. and Clay, 1 Munf. 162.....	268	Young and M'Key ex'or of Fuqua, 4 Hen. & Munf. 430.....	298
White v. Cuyler, 6 T. R. 176.....	539	Young and Twopenny &c., 3 Barn. & Cress. 208.....	539
White v. Foljambe, 11 Ves. 337.....	480		
Whiting and Smith, 11 Mass. R. 445....	446		
Wick St. Lawrence and the king, 5 Barn. & Adolph. 526.....	449		
Wilber and Haggerty, 16 Johns. R. 287..	53		
Wilcox v. Pearman, 9 Leigh 144.....	358, 680		
Wilcox v. Rootes & others, 1 Wash. 140..	573		
Wilkes v. Jackson, 2 Hen. & Munf. 355, 361.....	541		
Wilkinson and Robinson, 3 Price 547....	538, 540, 548, 568		
Wilkinson & co. v. Holloway, 7 Leigh 277.....	19, 23, 334, 335		

CASES

AMONG THOSE CITED.

WHICH WERE EXPLAINED.

Bank of Alexandria <i>v.</i> Patton &c., 1 Rob.	
499, distinguished from May &c <i>v.</i>	
State bank of N. Carolina.....	93, 4, 5, 9
Bernard <i>v.</i> Brewer, 2 Wash. 76, distin-	
guished from Pitzer <i>v.</i> Williams.....	251
Bowers's ex'or <i>v.</i> Glendening &c., 4 Munf.	
219, distinguished from Davis &c. <i>v.</i>	
Newman.....	669
Burnley <i>v.</i> Lambert, 1 Wash. 308, distin-	
guished from S. C.....	667, 8
Chowning <i>v.</i> Cox and others, 1 Rand. 306,	
distinguished from Floyd <i>v.</i> Harrison	
&c.....	178, 9, 186, 7
Gallego's ex'ors <i>v.</i> Attorney general, 3	
Leigh 450, distinguished from Davis	
&c. <i>v.</i> Newman.....	669, 70
Hunter <i>v.</i> Matthews (to be reported in 12	
Leigh) distinguished from Muire &c. <i>v.</i>	
Smith.....	458, 466, 7

Jones <i>v.</i> Williams, 2 Call 102, distin-	
guished from Davis &c. <i>v.</i> Newman...	668
Kerby's case, 7 Leigh 747, distinguished	
from Burcher's case.....	829
Leslie <i>v.</i> Wilson, 3 Brod. & Bing. 171, 6	
J. B. Moore 415, distinguished from	
Ward <i>v.</i> Motter.....	568
Marks <i>v.</i> Morris, 2 Munf. 407, distin-	
guished from Thornton <i>v.</i> Gordon....	727
Pulliam <i>v.</i> Winston &c., 5 Leigh 324, dis-	
tinguished from Hickerson's adm'r <i>v.</i>	
Helm.....	628, 650, 51, 659
Reynolds's case, 4 Leigh 663, distin-	
guished from Burcher's case.....	829
Robinson <i>v.</i> Wilkinson, 3 Price 538, dis-	
tinguished from Ward <i>v.</i> Motter.....	568
Thomas <i>v.</i> Gammel & wife, 6 Leigh 9,	
distinguished from Macaulay's ex'or <i>v.</i>	
Dismal swamp land co.....	530
Tod <i>v.</i> Baylor, 4 Leigh 498, distinguished	
from S. C..	530, 534

CASES

ARGUED AND DETERMINED IN THE

Supreme Court of Appeals of Virginia.

Miller v. Trevilian and Others.

April, 1843, Richmond.

(Absent STANARD,* J.)

Debtor and Creditor—Application of Payments.—The principle laid down by *CABELL, J.*, in *Pindall's ex'x &c. v. The Bank of Marietta*, 10 Leigh, 484, that "a debtor owing a debt consisting of principal and interest, and making a partial payment, has a right to direct its application to so much of the principal in exclusion of the interest, and the creditor, if he receives it, is bound to apply it accordingly," approved and acted on.

Trust and Trustee—Equitable Relief to Cestui Que Trust of Bond Secured by Trust Deed.—A testator having authorized a tract of land to be sold and the money put at interest for the benefit of his children, his executor sold the land and took a bond (secured by a deed of trust) to be paid the 21st of August 1820, with interest from the 25th of December 1817. On the 30th of October 1830, the executor received of the purchaser a sum of money, to be applied to the credit of the principal. The purchaser having sold part of the land and taken from his vendee four bonds, one payable the 16th *of April 1831, and the others on the 25th of December in the years 1831, 1832, and 1833, the executor, on the 21st of January 1832, took an assignment of those bonds and of a deed of trust securing the same, and gave a receipt stating that they were to be credited in part of the principal at the dates at which those bonds were due. In June 1833, the purchaser enjoined the executor from selling under his deed of trust, upon the ground of a defect of title to two parcels of the land, one of 16 $\frac{1}{2}$, the other of 100 acres, part of which last parcel being included in the sale to the subvendee, the alleged defect of title was

*He had been counsel for the appellees.

Trustees—Duty as to Sale of Trust Property—Sacrifice of Property.—In *Morris v. Virginia State Ins. Co.*, 30 Va. 373, 18 S. E. Rep. 843, the court said: "It is the trustee's duty to forbear to sell, and to ask the aid and instructions of a court of equity, in all cases where the amount of the debt is unliquidated or in good faith disputed, when any cloud rests upon the title, when a reasonable price cannot be obtained, or when, for any reason, a sale is likely to be accompanied by a sacrifice of the property, which, at the cost of some delay, may be obviated." 3 Minor Inst. 287; 1 Tuck. Com. 108; *Lane v. Tidball* (Gilmer 180); *Wilkins v. Gordon*, 11 Leigh 547; *Miller v. Argyle*, 5 Leigh 460; *Miller v. Trevilian*, 2 Rob. 25; *Bryan v. Stump*, 8 Gratt. 247."

The principal case is cited in this connection in *Muller v. Stone*, 84 Va. 337, 6 S. E. Rep. 223; *Spencer v. Lee*, 19 W. Va. 195.

See foot-note to *Shurtz v. Johnson*, 28 Gratt. 657.

made the ground also of injunction by him. In 1835, the injunction of the first purchaser was perpetuated as to the price of the 16 $\frac{1}{2}$ acres, and dissolved as to the residue, so far as it remained unpaid. The executor having in the mean time removed from the commonwealth, a bill was thereupon filed by some of the legatees, against the purchaser, the trustee in his deed of trust, the executor, and another legatee, to ascertain the balance due. The bill averred, that many years since, the bond payable to the executor was transferred to the legatee defendant, to collect for himself and the others interested, and he had removed from the state; that the complainants do not know where the bond is, or whether it is lost or destroyed; and that the trustee declines to advertise or sell, for want of the bond. As to all the defendants except the purchaser, the bill was taken for confessed. **HOLD**, 1. Equity has jurisdiction; on the ground that the legatees, though entitled to the balance due from the purchaser, are mere beneficiaries, having no legal right which they could assert at law; and also on the ground that, the case being one in which it would have been improper for the trustee to sell until some proceeding was had to ascertain the amount due, the creditors had a right to come into equity to have the amount ascertained. 2. The purchaser, having in his hands evidence of all the payments alleged by him, has no right to require that the bond shall be produced before an account is stated. 3. The payments which the executor agreed should be credited against the principal must be so applied; the case not being taken out of the influence of the principle laid down in *Pindall's ex'x &c. v. The Bank of Marietta*, 10 Leigh 484, by the circumstance that the party who so agreed was a fiduciary, nor by any of the other circumstances before mentioned.

Frederick Argyle of the county of Goochland died in 1811, having made his will, which contained the following clauses:

"It is my will and desire that all my just debts should be paid by my executors hereinafter mentioned; after which I desire that my wife shall remain in possession of the land whereon I now reside, until such time as my said wife and my executors shall think proper to sell it, and appropriate a part of the money arising from such sale to the purchase of a small tract of land, which they shall deem sufficient for the support of my said wife and children; and after such purchase having been made and the purchase money paid, it is my will and desire that the residue of the money arising out of the sale of the land on which I live shall be put at interest for the benefit of my

children, and the portion of each to be given up to them by my executors as they shall arrive to the age of twenty-one years.

"Item, it is my will and desire that the land directed above to be purchased by my executors shall, at the death of my wife, be sold, and the money arising therefrom equally divided between my children."

The will was admitted to record in the court of Goochland county, and Isaac Curd alone qualified as executor.

The land on which the testator resided contained by survey 1033 acres, and was sold by the executor on the 21st of August 1817, to William Miller, for 27 dollars an acre, amounting to 27891 dollars, bearing interest from the 25th of December 1817, and payable one third the 21st of August 1818, one third the 21st of August 1819, and the other third the 21st of August 1820. At the time of the sale, the executor conveyed the land to Miller, and Miller executed three bonds to the executor for the purchase money, and a deed of trust upon the land, to Thomas Curd and Benjamin Anderson as trustees, to secure the payment of those bonds.

Miller discharged the first two bonds, and on account of the third made the payments evidenced by the two following receipts:

4 "1820, October 30. Received of William Miller 1500 dollars, to be applied to the credit of the principal of his bond due me in August last as executor of Frederick Argyle deceased.

Is. Curd."

"1822, January 21. Received of William Miller, William Guerrant's note for 400 dollars due 16 April 1821, said Guerrant's note for 1777 dollars 50 cents due 25 December 1821, said Guerrant's note for 2777 dollars 50 cents due 25 December 1822, said Guerrant's note for 2777 dollars 50 cents due 25 December 1823, which said several sums are secured by deed of trust given by said Guerrant and wife, which is assigned to Isaac Curd executor of Frederick Argyle deceased by said Miller. Said several notes are to be credited on said Miller's bond to me, in part of the principal of said bond (which was due on the 21st of August 1820), on the dates on which the notes aforesaid fall due. Also the further sum of 24 dollars 63 cents, to be credited as aforesaid on this day. The above named bond is the only one due me from said Miller.

Is. Curd."

These receipts were exhibited by Miller with the bill of injunction filed by him in June 1823, in the case of Miller v. Argyle's ex'or and others, reported in 5 Leigh 460, wherein he sought to obtain an allowance for an alleged defect of title to two parcels of the land, one of 100, the other of 16½ acres. He stated in that bill, that he "had gone on to settle towards the discharge of his" third "bond, as per receipts of the said Isaac Curd, the sum of 9257 dollars 13 cents;" and further said, that from a statement made by him of the transac-

tion between said Argyle's executor and himself, estimating his loss at 116½ acres, Argyle's estate would be indebted to him 1435 dollars 88 cents, to carry interest from the 25th of December 1822. That statement was as follows:

5 "William Miller to Isaac Curd executor of Frederick Argyle deceased, Dr.

1817, August 21.	
To 1033 acres of land purchased at \$27 per acre.....	27,891 00
Cr.	
By two thirds of purchase money paid....	18,594 00
	9,297 00
To interest from 25th December 1817 to the 25th December 1822.....	2,769 10
	12,066 10

Cr.

1820, October 20.	
By cash.....	1,500 00
By interest from 20 October 1820 to 25 Dec'r 1822.....	198 75
1821, April 6.	
William Guerrant's bond due this day.....	400 00
By interest from 16 April 1821 to 25 Dec'r 1822.....	40 00
1822, January 21.	
William Guerrant's note due 25 Dec'r 1821.....	1,777 50
By interest from 25 Dec'r 1821 to 25 Dec'r 1822.....	106 65
William Guerrant's note due 25 Dec'r 1822.....	2,777 50
By cash.....	24 08
By interest from 21 January 1822 to 25 Dec'r 1822.....	1 85
	6,821 98
	5,264 12

Wm. Guerrant's note due 25 Decem-ber 1822.....	2,777 50
Deduction from one year's interest.....	166 65
	2,610 55
Due W. Miller,	\$ 1,435 88"

6 "The four bonds of William Guerrant to Miller, which the latter assigned to Curd, were given upon a sale by Miller to Guerrant, at 15 dollars per acre, of 555½ acres of the land bought by Miller from Argyle's executor. And Guerrant alleging that he had paid off the two first bonds, and that the title was defective to 100 acres of the land which he had bought, to wit, the same 100 acres in respect to which Miller had alleged a defect of title, an injunction was awarded Guerrant (upon a bill filed by him in September 1823) to restrain proceedings under his deed of trust as to 2000 dollars. But afterwards an affidavit of Joshua P. Hunnicutt, the deputy surveyor of Goochland, having

"The purchase money of 116½ acres of land at \$7 dollars per acre amounted to 8145 dollars 50 cents, and 5 years interest thereon to 943 dollars 65 cents, making together this sum of 4099 dollars 15 cents. Deducting 4089 dollars 15 cents from 5264 dollars 12 cents, there would have been a balance against Miller of 1174 dollars 97 cents. But then by bringing into the account 2610 dollars 55 cents for Guerrant's fourth bond, and deducting therefrom the 1174 dollars 97 cents, a balance would appear to be due Miller of 1485 dollars 58 cents, which corresponds within a few cents with the balance mentioned in this statement.—Note in Original Edition.

shewn that only about 72 acres of the land to which the title was alleged to be defective, was comprised in Guerrant's purchase, the court, on the 17th of March 1824, dissolved his injunction except as to the sum of 1080 dollars, that being the price of 72 acres at 15 dollars per acre.

Subsequently, to wit, on the 25th of September 1824, judgments were obtained by Curd against Guerrant on his two last bonds. One judgment was for 2777 dollars 50 cents with interest from the 25th of December 1822 till paid, and the costs, but to be credited by 209 dollars 19 cents received 2d November 1822, by 200 dollars 20th October 1823, and by 2116 dollars 19 cents on the 24th of April 1824. The other judgment was for 2777 dollars 50 cents with interest from the 25th of December 1823 till paid, and the costs, but to be credited by 1080 dollars by injunction, and the balance of this judgment was to be discharged by the payment of 1704 dollars 16 cents with legal interest thereon from 25th September 1825* till paid.

While Miller's injunction case was pending in the county court of Goochland, the following addition seems *to have been made to the statement exhibited with his bill.

"1822, December 25.	
By balance due Wm. Miller this day as above	1,426 88
By interest thereon from 25 Dec'r 1822 till paid.	
3 acres 1 rood 23 poles more of Glebe land as per J. P. Hunnicutt's survey at \$27 per acre	66 15
By interest on 66 15 from 25 Dec'r 1817 till 25 December 1823	19 84
	1,511 87
By interest from 25 December 1823 till paid 25th September 1825	251 10
	<u>\$1,772 97"</u>

On the 28th of December 1830, while the appeal of Argyle's executor from the decree obtained by Miller in his injunction case was pending in the superior court of chancery, Miller filed, as exhibits in the latter court, a copy of the record in Guerrant's injunction case (which was still pending), copies of the judgments obtained by Curd against Guerrant on his two last bonds, and the following assignment: "I assign the balance due on my judgments against William Guerrant in Goochland superior court of law, to William Miller, without recourse to me, this 9th day of November 1825. Is. Curd." The superior court of chancery, in January 1831, reversed the decree of the county court, and entered a decree dissolving Miller's injunction and dismissing his bill. Miller then appealed to this court, and the decision on his appeal is reported in the before mentioned case of *Miller v. Argyle's ex'or and others*, 5 Leigh

460. It was pronounced the 19th of November 1834; and upon a copy thereof being transmitted to the circuit court of Henrico, the cause was heard in that court the 11th of November 1835. The executor of 8 Argyle now *admitted that the 16½ acres of land, which had been recovered of Miller by a superior title, was a part of the land sold by the executor to Miller, for the title to which the executor was responsible; and it was decreed that the injunction be perpetuated as to 440 dollars of the principal of the debt, that being (as the decree stated) the value of 16½ acres of land at 27 dollars per acre, and Miller was declared entitled to a credit therefor as of the 25th of December 1817. For the rest, the counsel of Argyle's executor took a decree which declared in general terms, that "as to the residue of the sum" contracted by Miller to be paid "and which may remain unpaid," the injunction be dissolved and the bill dismissed; and then proceeded to dispose of the subject of costs.

This decree dissolving the injunction, in general terms, for what remained unpaid, was merely a foundation for a new suit to ascertain how much was unpaid.

In January 1836, a bill was filed in the circuit court of Goochland by John M. Trevilian and ——— his wife, and others, legatees of Frederick Argyle deceased, against Miller, Isaac Curd, Benjamin Anderson and Thomas Curd (the trustees in Miller's deed of trust), John W. Argyle, and the widow and infant children of a deceased legatee, setting forth, that according to a statement made from that of Miller exhibited in his injunction suit, it appeared that if there were credited against the third bond the price of the 16½ acres, the cash credited in Miller's statement, and all the four bonds of Guerrant, there would still be due from Miller on the 16th of June 1823, when his injunction was obtained, the sum of 2136 dollars 34 cents, with legal interest from that date on 2074 dollars 12 cents part thereof. That the complainants know nothing of the payments credited to Miller in his statement, and therefore do not admit them. That they have reason to believe that a

9 *large portion of one at least of Guerrant's bonds has not been paid off, viz. the 1080 dollars as to which Guerrant's injunction yet stands; and unless Miller can shew that he has paid off this sum to Curd, it remains, with its interest, as a debt due from Miller, Guerrant having left this commonwealth many years since, notoriously insolvent. That Miller refuses to furnish any statement of the amount due from him, or to enter into any settlement or make any payment unless and until his bond is produced. That the statement made from his, as before mentioned, has been submitted to him for revision and correction, if erroneous; but he has refused to correct or respond to it in any manner, other than by a demand of his bond. That the complainants, not having the bond, are unable to produce it. That, many years

*Why this judgment, rendered the 25th of September 1824, was, as to the balance, to be discharged by a sum of money bearing interest from the 25th of September 1825, does not appear from the record.
—Note in Original Edition.

since, it was transferred to John W. Argyle, to collect for himself and the others interested. That Isaac Curd and John W. Argyle have removed from the commonwealth, and the complainants do not know where the bond is, or whether it has been lost or destroyed. That the complainants have been recently informed, that when Curd was about to leave the commonwealth, upon some settlement between him and Miller, the bond was surrendered by him to Miller. That they are advised it is their right to have a full and true statement from Miller touching the said bond, and the payments made by him, and the time and manner of such payments. That deeming at least 3154 dollars 12 cents due, with interest from the 25th of December 1822, they were willing to receive that sum, and called upon Benjamin Anderson, one of the trustees under the deed from Miller, to advertise and sell so much of the land as might be necessary to raise that sum, intending of course to have the cooperation of the other trustee; but Anderson positively declined to advertise or sell, for want of the bond. Two of the complainants made oath, that so much of the

10 bill as depended *upon their knowledge was true, and so much as depended upon the information of others they believed to be true.

Miller filed a demurrer to the bill, assigning for cause, that it did not charge that John W. Argyle had lost the bond, nor was there filed with the bill any affidavit of that fact.

The demurrer being overruled, Miller filed an answer, stating that he paid towards the discharge of the principal of the third bond, as was agreed by Curd and him, the sum of 1500 dollars on the 30th of October 1820, and 7757 dollars 13 cents on the 21st of January 1822, per receipts; and crediting in addition 445 dollars 50 cents for the 16½ acres, the principal of the bond was overpaid by 405 dollars 63 cents; which last mentioned sum, and the further sum of 94 dollars 16 cents due him from Curd for costs recovered against him and for clerk's fees, are to be deducted from the interest that accrued upon the main sum before it was extinguished. That no other credits are claimed by him. That the bond was assigned by Curd to John W. Argyle, for him to collect the balance due on it for his own use and benefit, and not for the use and benefit of the heirs of Frederick Argyle deceased, as charged in the bill. That on the respondent's refusing payment to John W. Argyle on account of the supposed deficiency in the land, Argyle returned the bond to Isaac Curd. That Curd had possession of it in the fall of 1825. That it was then his property, and the respondent believes it is at this time his property, as he has had no notice of the bond being assigned by Curd to any person whatever since that time. That the charge of the respondent's having possession of the bond is false, he not having had possession of it since he executed and delivered it to

Curd. That the respondent is under the impression, that if the heirs of Frederick

Argyle deceased have a claim against 11 any person on account of *the said bond, it is against Isaac Curd and his sureties, and not against the respondent; but he does not know what is the state of accounts between them and Curd, and does not know or admit that Curd is indebted to them a single cent, or that they have a right to call upon any person for any thing on account of said bond. That, finding the plaintiff Trevilian had not his bond, he had determined to have nothing to do with him on the subject, and deemed it not necessary to respond to his enquiries, or those of any other person, unless he was authorized by Curd to settle the matter, or produced his bond. That he conceives the complainants have no kind of right to call upon him for an exhibition of his accounts with Curd, or to ask any question about the time, place or means, when, where and how he may have paid off any debt which he may have owed to Curd; that he is advised they allege no shadow of right to claim any thing of him on account of Guerrant's bonds assigned by him to Curd; and that as it appears that Curd himself has settled that matter, and transferred his judgments against Guerrant to the respondent, no foundation is laid in the bill to support any enquiry touching a discovery about the said bonds, or the manner in which they have been paid and satisfied. He avers, "that in no settlement ever made between the said Isaac Curd and him, was the matter of his injunction disposed of or meddled with. That matter was then in court, and remained to be disposed of as might be adjudged in court. "The matter," he says, "of Guerrant's injunction for the 1080 dollars, and all other matters concerning Guerrant's debt, have long since all been paid off and satisfied. Not one cent is due on that account."

The infant defendants answered by guardian ad litem. The cause was proceeded in as to Isaac Curd and John W. Argyle in the manner prescribed by law as to absent defendants. And as to the other defendants the bill was taken for confessed.

12 *The circuit court ordered that Miller rendered before a commissioner an account of the sums paid by him in part of the purchase money of the land, and the times at which and the manner in which the said payments were made, so as to shew the balance due from him. A report being made under this order, and exceptions filed thereto by both parties, the court, on the 19th of October 1837, re-committed the report with the exceptions to the commissioner.

Under this order of recommitment an account was stated, whereby the price of the 16½ acres, the cash paid by Miller, and the two first bonds of Guerrant, were all deducted from the principal, and there was likewise credited against the principal so much of Guerrant's

third and fourth bonds as appeared by the judgments thereupon to have been paid previous to the reassignment from Curd to Miller. Exceptions were again filed; and the cause came on to be heard the 19th of October 1839.

The circuit court was of opinion, that Miller was entitled to credit for the whole amount of the bonds assigned by him to the executor, on the days when they respectively became due; but that the credit should not be applied to the extinguishment of the principal, so as to leave the balances unproductive in whole or in part: and the court, adopting, in lieu of a report by a commissioner, a statement prepared by the court in conformity with its opinion, decreed accordingly.

From this decree, on the petition of Miller, an appeal was allowed.

Leigh for appellant. Miller states his belief that Curd was not indebted one farthing to the plaintiffs on account of this trust. And there is not any account taken, or directed, or asked for, of Curd's administration of the trust found. Miller's statement ought, under such circumstances, to be taken as correct. At all
13 *events, upon the record as it stands, without any account between Curd and his cestuis que trust, or between Miller and Curd, it is impossible to decide that Miller is not to have credit for the payments mentioned in Curd's receipts.

There is then but the single question as to the application of the payments. And on this point the case of Pindall's ex'x &c. v. The Bank of Marietta, 10 Leigh 481, is a conclusive authority in favour of Miller, unless, as to this matter, a distinction can be established between the transactions of individuals, contracting each in his own right, and similar transactions between an executor, legally selling the trust subject, and his vendee.

Grattan for appellees. As to Miller's allegation of his belief that Curd the executor was not indebted to the legatees of his testator, it is enough to say that there is no proof whatever even tending to justify that belief.

The second receipt shews that two of the notes of Guerrant mentioned therein were not due at the date of that receipt. Even if money paid by Miller could properly be applied to the principal of the debt, there is no ground to hold that notes or bonds not yet due, taken as payment, can be so applied. Miller, too, was well aware that Curd was dealing improperly with the trust property. And a purchaser of trust property, confederating improperly with the trustee, and obtaining the trust subject for an inadequate value, will not be allowed to retain the advantage he has thereby acquired, as against the parties interested in the fund. Graff and others v. Castleman &c., 5 Rand. 195; Broadus and others v. Rosson and wife and others, 3 Leigh 12; Fisher v. Bassett and others, 9 Leigh 119; Keane and others v. Robarts and others, 4 Madd. C. R. eng. edi. p. 332,

am. edi. p. 177; Wilson v. Moore, 1 Mylne & Keene 126, 6 Cond. Eng. Ch. Rep. 14 530. Moreover Miller *was himself the cause of the difficulty which Curd experienced in collecting Guerrant's bonds. The injunction of Miller produced the difficulty. And that injunction was upon a ground which this court adjudged to be available only as to a very small part of Miller's purchase money.

Grattan also argued to shew that credit ought to be withdrawn from Miller for parts of Guerrant's third and fourth bonds; to wit, the 1080 dollars as to which Guerrant's injunction was pending, and the balance due upon the judgments against Guerrant at the time of the reassignment from Curd to Miller.

[Leigh. As it seems the cause is to be argued upon the merits on every point, I now apprise the gentlemen on the other side, that I shall take an exception to the jurisdiction of equity to decree against Miller on a bond upon which there was full remedy at law. I shall further insist that the plaintiffs are not entitled to recover without proof of the assignment of the bond, notwithstanding the bill was taken for confessed as to Curd the alleged assignor.]

Stanard for appellees. If the plaintiffs had merely set forth the loss of the bond, and that they had it not, the bill, being sworn to, would have given jurisdiction to equity. Atkinson v. Leonard, 3 Brown's Ch. Rep. 218; Toulmin v. Price, 5 Ves. 238; Cabell's ex'ors v. Megginson's adm'rs, 6 Munf. 202; Shields v. The Commonwealth, 4 Rand. 541. The case of Taliaferro v. Foote, 3 Leigh 58, may perhaps be relied upon on the other side. But in that case there was no affidavit of loss, and the statement in the bill was very vague and unsatisfactory: it was not stated that the bond was lost, or was out of the power of the plaintiff, or even that any enquiry had been made for it. But in this case the bill was filed neither by the obligee
15 nor the assignee of *the bond, both of whom were out of the commonwealth.

The plaintiffs are cestuis que trust who are entitled to the proceeds of the bond, but have no control over it, no means of enforcing its production, nor any remedy upon it at law. And their object is to obtain a discovery and account of the payments made by the obligor, and a decree for the balance appearing to be due.

Miller is called upon to say what payments had been made by him to the executor, or to any person entitled to receive the money. He answers merely that he has paid 7000 dollars and upwards, as per receipts, and denies the right of the plaintiffs to call upon him for any discovery of his payments, or of his settlement with Curd the executor. There is not a particle of evidence to prove any payment, except the receipts of Curd the executor, and Miller's assignment to him of the bonds due from Guerrant. And the question then is, how far those receipts and that assignment are

evidence to prove such payments by Miller to Curd? There is nothing in the terms of the receipt for Guerrant's bonds, to entitle Miller to a credit for the amount, until it should be paid by Guerrant. And the evidence shews that two of the bonds were not paid to Curd. Guerrant, it appears, enjoined the recovery upon them to the amount of 1080 dollars. At the utmost, Miller could only be entitled to a credit for the balance which remained after deducting the 1080 dollars. But in November 1825, Curd reassigned to Miller the balance. This assignment does not purport to be for value received; and that it was not for value received, may be inferred from the fact that it was "without recourse." If the assignee relies upon the assignment as one for value, he ought to prove the consideration; the onus probandi is on him. There is not only no such proof, but every thing in the record conduces to prove that the assignment was without any payment by Miller. Miller had enjoined Curd from proceeding on

the trust deed given by him for the purchase money, and that injunction was then pending. If he succeeded in it, the amount already received by Curd on Guerrant's bonds was more than he was entitled to receive; and therefore if Curd had attempted to enforce payment of the assigned bonds against Guerrant for the balance due on them, Miller (who was Guerrant's vendor of the land for which the assigned bonds were given) might himself have enjoined Curd from collecting that balance. On the other hand, if Miller failed in his injunction suit, Curd had full remedy to recover the balance of the purchase money by proceeding under Miller's own trust deed. If it is to be supposed that Miller paid off the balance due on the bonds of Guerrant at the time of the reassignment, then it is to be supposed that he actually paid off the whole balance of the original purchase money to Curd, at the very time when he was suing in chancery, and had obtained an injunction, to be relieved from the payment of that money to the amount of 116½ acres of the land. As to the 1080 dollars enjoined by Guerrant, it would be absolutely ridiculous to suppose that Miller, on the reassignment, paid that sum. Miller states in his answer, that "the matter of Guerrant's injunction for the 1080 dollars, and all other matters concerning Guerrant's debt, have long since all been paid off and satisfied; not one cent is due on that account to Isaac Curd nor to one else." What is the just, the only construction of this averment? It is that Guerrant had paid to Miller himself the sum of 1080 dollars; for there is no evidence that a single dollar of it was ever paid to the plaintiffs, or to Curd, or any other person for them.

Upon the other question, let it be supposed (for the sake of argument) that the payments were actually made in money by Miller at the dates when the bonds become due. The case of *Pindall's ex'x &c. v. The Bank of Marietta* admits, that in the

ordinary case of creditor and debtor dealing in their own right, the creditor may refuse to receive a payment tendered with direction to apply it to the principal of an interest-bearing debt. He may agree so to apply it or not. The question here is, whether a stipulation so to apply a payment is legal and valid, when the nominal creditor is a trustee for others, and the debtor knows that he is dealing in that manner with the funds of the trust? The plain duty of Curd under the will was to sell the land, collect the purchase money, and put it out at interest for the benefit of the cestuis que trust. This duty was not performed in respect to the bond which fell due the 21st of August 1820. The trustee had no right to indulge his own feelings of kindness towards the purchaser of the trust subject, by delaying the collection and investment of the purchase money, or by accepting payments under a stipulation to apply them to the principal of the debt. Such benevolence could only be exercised at the risk and to the detriment of his cestuis que trust. It has been now supposed that the will, justly construed, required the trustee to collect the purchase money, and invest the whole of it, principal and interest, in some productive fund: let it be, however, that the trustee was not bound to call in the purchase money, but was authorized to leave it on security in the hands of the purchaser: he was at least bound to leave it as an interest-bearing fund, and had no imaginable right to stipulate for applying payments to extinguish the principal of the fund, leaving the interest (however large the amount accrued) a dead, unproductive stock. Miller, the purchaser, had full notice of the trust. For he not only purchased under it, but the will itself was recorded in the court of which he was clerk at the time of his purchase. The cases of *Fisher v. Bassett* and others, and *Keane* and others *v. Roberts* and others, which were cited by Mr. Grattan, shew the doctrines of courts of equity on this subject.

*But this is not the case of a payment of money. The receipt acknowledges the assignment by Miller of Guerrant's bonds; and the only sensible construction of the receipt is, that the amount of the bonds, if paid when they should become due, was to be credited against the principal of Miller's debt. The bonds were not paid when they became due; and the failure of Guerrant to pay them was the consequence of Miller's own act in enjoining Curd's proceeding on his trust deed. Shall Miller be allowed to make this application of the amount of the bonds, when not only the natural increase of the fund by accruing interest is thereby prevented, but through his means, the recovery of the stipulated payments on account of the principal itself is suspended from 1823 to 1835,—at which last period Miller's injunction was dissolved? If the transaction evidenced by the receipts had

been between Curd and Miller in their individual rights alone, (instead of being a dealing with the funds of a written and recorded trust,) it would be most inequitable that Miller should be allowed, under such circumstances, and after such a lapse of time, to avail himself of the stipulation that the payments were to be applied to the principal of the debt.

Lyons on the same side. The fact that the bond was lost is itself sufficient to give jurisdiction to equity. 1 Madd. Ch. Prac. 24, 5. But 2. the bill shews that the bond had been assigned by Curd to John W. Argyle for the benefit of the plaintiffs; and shews not only that he was a trustee for them, but that this trustee was a nonresident. And 3. it states that the trustee in Miller's deed of trust had refused to proceed to execute the trust. 1 Madd. Ch. Pract. 459; 2 Smith's Ch. Pract. 325, 352.

In regard to Curd's duty as trustee, reference may properly be made to the authorities in respect to the duty of agents, and the limitations on their powers
19 *when acting in the discharge of the business of their principals. Hogg v. Snaith and others, 1 Taunt. 347; Smock v. Dade, 5 Rand. 639, and Wilkinson & Co. v. Holloway, 7 Leigh 277. Can the rule regulating the application of payments between ordinary creditor and debtor (about which there is no dispute) be fairly and justly applied to payments made by a debtor to a trustee? Cases shewing that a dealing by a third person for the assets of a decedent's estate, with notice of the trust, and of misapplication (actual or intended) on the part of the executor or trustee to whom the payment is made, is a fraud on the part of the purchaser and cannot be sustained, have been already cited. The court is farther referred, in respect to the same principle of equity, to 2 Williams on Ex'ors 609-12, and Field v. Schieffelin, 7 Johns. Ch. Rep. 157 (a case of a guardian dealing improperly with the estate of his ward). In Stevens v. Barringer and others, 13 Wend. 639, it is decided that after payment of the principal of a debt, an action will not lie for the interest. Supposing that case to be properly decided, there may be a total loss of the interest in this case in consequence of the application stipulated for by Miller in respect to his payments, should that stipulation be held binding.

Lyons also argued as to the effect of the reassignment from Curd to Miller of Guer-rant's bonds, and insisted that the proper inference was that nothing whatever had been paid for that reassignment.

Leigh in reply. The gentlemen on the other side have taken unnecessary trouble in citing authorities to shew that equity has jurisdiction to set up a lost bond. The objection here is, that no ground is furnished by the bill for the jurisdiction of equity on that score: there is no allegation in the bill that the bond has been lost or destroyed, or that any enquiry was made for it in the custody where it would

20 naturally be found—that *of John W.

Argyle or Isaac Curd. But the refusal of the trustee in Miller's deed of trust to act is also relied on. To sustain the jurisdiction on this ground, the fact of such refusal must be proved: and there is no proof of it. The bill is taken for confessed as to the trustee Anderson, but his confession is no evidence against Miller. [Allen, J. Cannot the cestui que trust, at his option, treat the deed of trust as a mortgage, and go into equity to have it enforced?] It was so argued in Ambler & others v. Warwick & Co., 1 Leigh 201, but the judges did not take that view; they decided the case on its special circumstances.

But suppose that equity can take jurisdiction. The assignment to John W. Argyle for the benefit of the plaintiffs is averred in the bill: and that averment must be proved, and proved as it is alleged. Miller's answer may be taken as an admission that the bond was assigned to Argyle by Curd: but how does it appear that it was assigned to him for the benefit of the plaintiffs? The circumstance of the bill being taken for confessed as to John W. Argyle cannot avail against Miller. The assignment must be proved, unless admitted by the assignor and the parties against whom relief is sought. Corbin v. Emmer-son, 10 Leigh 663.

Miller refused to settle when applied to by Trevilian, unless the bond were produced. Looking to the ordinary motives which govern men in their transactions with one another, there can be no reasonable doubt as to the ground of that refusal. If the bond had been produced, it might have shewn, and probably would have shewn, that every credit claimed by Miller was authenticated and established by endorsements on the bond. Why was that bond not produced? Curd and John W. Argyle, though out of the state, were not beyond the reach of visit or communication from the plaintiffs. Yet no attempt was made to procure the bond, nor any enquiry made about it (so far as the
21 record *shews), either of Curd or

Argyle. Why was this? It is easy to suppose one inducement on the part of the plaintiffs, and difficult to suppose any other:—Curd was insolvent, (the argument on the other side so supposes,) while Miller was perfectly solvent, and had executed a deed of trust on a tract of land amply sufficient to secure the whole amount of the bond. It would no doubt be highly agreeable to the plaintiffs to take Miller's admission of his execution of the bond, and deprive him, by their own failure to produce it, of the benefit of the evidence which might be afforded by the endorsements upon the bond (in all probability the only evidence in existence) of his satisfaction of it. [Lyons. Miller never ventured, in the court below, to make a suggestion of any such ground for requiring the production of the bond.]

There is no pretence for saying that Mil-

ler is not entitled to credit for the sum of 1080 dollars enjoined by Guerrant. The result of Miller's injunction suit shews that this sum ought not to have been enjoined. Curd has not assigned it to Miller. Guerrant's injunction suit is still open; and if Curd has not been paid this amount, he can yet get it. But Miller says it has been long since paid and satisfied.

As to the balance on the judgments which was reassigned; when we see that Curd had power, through Guerrant's trust deed, instantly to enforce the payment of this balance, and no motive to assign it but for money, and see also that he has assigned it without noticing the receipt which he had previously given, it is not to be conceived that he should have made such assignment without having received actual payment of the balance. Counsel on the other side rely upon the circumstances of the reassignment being without recourse. That circumstance is of no force to shew that the assignment was without consideration.

It frequently occurs where value has
22 been paid. And the reassignment *in this case being to Miller the original debtor and first assignor, it was natural and proper, and conformable to the ordinary course of business, that Miller, even if he paid the whole of the original debt which remained due to Curd, should take back the subject he himself had assigned, without recourse to Curd. If such recourse had not been excluded by the terms of the reassignment, Curd would have been a guarantor, without consideration, of Guerrant's debt to Miller.

Was it a fraud on the part of Curd the trustee, participated in by Miller the purchaser of the trust subject, to stipulate that the payments should be applied to the principal of the debt? What was the subject to be so applied? It was bonds due from Guerrant to Miller, secured by Guerrant's deed of trust. Curd the trustee, by taking the assignment of these bonds, acquired a further security (the personal security of Guerrant) for the payment of Miller's debt. Can it be contended that this transaction, leading to the acquisition of additional security, was a fraud on the trust, or even an improper or unwise exercise of the trustee's discretionary power? There is not the smallest particle of proof that Curd either acquired, or designed to acquire, any personal advantage by the transaction; nothing to shew that it was not a judicious and beneficial arrangement, in fact and design, for the interest of the cestuis que trust. It is notorious,—a part of the history of the country,—that the price of lands fell rapidly and greatly between 1817 and 1823: and Miller's trust deed, though ample security when given, might have become wholly inadequate at the time he assigned these bonds of Guerrant. The question is whether the acquisition of the bonds by a stipulation to apply the proceeds to the principal, was, under these circumstances, a fraud, for which Miller is to be charged with interest notwithstanding that

stipulation. If it were shewn that Curd had
23 gained or purposed any actual advantage to himself, there might be some pretence for holding Miller responsible. But nothing of the kind appears. And it is only on the assumption of such advantage gained or purposed, that the appellees' counsel can assimilate this case to those which they have cited respecting the fraudulent misapplication of funds of a cestui que trust or principal, by the trustee or agent. In *Graff and others v. Castleman &c.*, 5 Rand. 195, and *Fisher v. Bassett and others*, 9 Leigh 119, there was an actual application, known to the purchaser at the time, of the trust funds to the individual benefit and use of the trustee. In *Hogg v. Snaith and others*, 1 Taunt. 347, *Smock v. Dale*, 5 Rand. 639, and *Wilkinson & Co. v. Holloway*, 7 Leigh 277, the party misapplying or commuting the debt was a mere attorney, having only a naked power to collect, and possessed of no authority or discretion to compromise, commute, or make any other arrangement on behalf of his principal, much less to make such arrangement in execution of a design to apply the proceeds to his own use.

ALLEN, J. The appellant, in argument, has objected to the jurisdiction of a court of equity to grant relief upon the case made in the bill. It seems to me, the relation which the plaintiffs bore to the subject entitled them to the aid of a court of equity under the circumstances of this case. By the will of the testator, his executors were empowered to sell his lands, and after providing for the support of the widow and children, the residue of the money arising from the sale of the lands was to be put out at interest, and the portion of each to be paid on attaining the age of twenty-one. The executor sold the lands, and took bonds payable to himself, and a deed of trust to secure the payment. Upon the last of these bonds a large balance is claimed to be due. The executor and trustee has removed from the commonwealth. The
24 bill avers, that many years *since, the bond was transferred to John W. Argyle, one of the legatees, to collect for himself and the others interested; that John W. Argyle has removed from the state; and that the complainants do not know where the bond is, or whether it is lost or destroyed. John W. Argyle is made a defendant, and the bill, both as to him and Curd the executor, is taken for confessed. The answer of Miller, though it denies that the bond was assigned to John W. Argyle for the benefit of the other legatees, admits that when payment was refused, John W. Argyle returned the bond to Curd the trustee, who had it in his possession in 1825, and that it was then, and, as respondent believes, still is his property. The legatees had no legal right which they could assert in a court of law. As beneficiaries, and so entitled to this fund, equity alone could give them relief. Whether the bond is lost or destroyed, or is still in possession

of the trustee, it is not pretended that the proceeds, if there be any thing due, are not the property of the legatees. The trustee, the legal owner, has removed from the commonwealth; and having failed to perform his duty by collecting the money, the legatees are of necessity driven into a court of equity, to assert their equitable title.

The debt was secured by a deed of trust, and the bill avers that the trustee has refused to act; and as to him the bill is taken for confessed. It is unnecessary to determine whether every creditor by deed of trust, like a mortgagee, has a right to call his debtor into a court of equity at his pleasure. Here it is averred that the trustee refused to act, and the bill is taken for confessed; and whether this would be considered as evidence, so as to affect the other defendant, or not, is immaterial in this case, as it is perfectly clear upon the facts, that it would have been improper for the trustee to sell until some proceeding was had to ascertain the amount due. The

beneficiaries were ignorant of the
25 *state of the accounts; the debtor refused to give them any information; and in this state of the affair, a sale by the trustee would have been irregular. If he had attempted to sell, a court of equity would have restrained him at the instance of the debtor. There can be no valid objection to the jurisdiction of the court, when invoked by the creditor in the first instance to ascertain the amount of the incumbrance, in a case where, at the instance of the debtor, the court would have arrested the trustee until the amount had been determined. I think that on both grounds the jurisdiction is clear.

Upon the merits, it is objected that the amount due cannot be determined until accounts are taken between Curd and his cestuis que trust, and between Miller and Curd. So far as Miller's interests are involved, an account between Curd and his cestuis que trust would seem to be unnecessary in this case. Curd has set up no claim to the proceeds of this bond. He is a party to the suit, and his rights will be bound by the decree. There seems to have been no question made in the case, that Curd held this bond in his fiduciary character alone. It cannot be a matter of any importance to Miller, how the accounts may stand between this fiduciary and the beneficiaries. If Miller owes the money, he is bound to pay it to some person, either to the trustee or the legatees; and as all are parties, any payment made under the decree will protect him against all claims hereafter.

As to the account between Miller and Curd, the bill was filed to adjust that, and it has accordingly been taken. The question as to the amount due arises upon the various aspects in which the account has been presented by the commissioner. The plaintiffs have not controverted the right of Curd to receive payments; they do not seek to charge Miller with money upon the
26 ground of misapplication by their trustee; they allege *their willingness

to allow credit for all payments made to him, and have filed their bill to obtain from the defendant a disclosure of those payments. The demand was most reasonable, but has not been met with the frankness and candour to which it was entitled. The right of the plaintiffs to call for an exhibition of the accounts of payment is denied. Instead of the fair disclosure which common honesty required this debtor to make to these legatees seeking to gather up the fragments of their father's estate mismanaged by their trustee, he contents himself with the general averment of payment. His answer, instead of explaining what seemed doubtful, appears designed to involve the transactions between Curd and himself in still deeper obscurity. The plaintiffs and the court are driven to the necessity of making up the account from such facts as were within their reach and furnished by the record. If it does not contain a full exhibition of all the transactions between Curd and the defendant, it is not for the latter to complain; it was certainly in his power to give a full explanation, if he had thought proper to do so. It has been argued that the defendant has a right to insist on the production of the bond before any account is stated, because the endorsements on the bond may shew what credits ought to be allowed. The defendant has made no such allegation in his answer. He in fact admits that he is entitled to no other credits than for the deficiency in the land, the amount of the receipts, and some small claims for costs and fees. The evidence of his payments he has in his own hands. The difficulty arises from the subsequent acts of the parties in regard to some of the claims mentioned in these receipts: and on this point he has chosen to leave us in the dark.

[The judge then detailed minutely all the facts, and stated his inferences from them. A considerable space (about 7 pages) would be occupied by this portion of
27 *the opinion; and the reporter omits it, because the facts will be found in the statement which he has made, and the reasoning of the judge was upon the particular circumstances, and not illustrative of any principle of law. The conclusion to which he came will appear by the decree, in which he and the other judges concurred.]

It remains to determine how the credits are to be applied.

It is not controverted that in ordinary cases the party who pays money has the power to apply it as he chooses. The rule has usually been applied where the creditor held different securities. But in the case of *Pindall's ex'x v. The Bank of Marietta*, 10 Leigh 481, there was but one debt; and judge Cabell, delivering the opinion in which the other judges concurred, says, that "a debtor owing a debt consisting of principal and interest, and making a partial payment, has a right to direct its application to so much of the principal in exclusion of the interest, and the creditor, if he

receives it, is bound to apply it accordingly." It is argued that this rule of law is founded on the supposed agreement of the parties; that a contract, express or implied, lies at the foundation of it. It is said that the creditor is not bound to receive the payment, unless he be permitted to apply it first to the interest; that this is his right. But as he may waive his rights, he may agree to a different application; or if he receives the payment with directions so to apply it, the law implies the agreement from the act of receiving. And from this it is argued, that though persons sui juris may make such agreements, fiduciaries dealing with the trust estate have no such power; and that a person dealing with them with notice cannot be permitted to affect injuriously the rights of those interested in the estate, by such an application of payments.

To whatever source the power of the debtor is traced, whether to a supposed
28 contract implied from the act of "receiving payment with directions as to the application, or to a distinct rule of law independent of such contract, would seem to make no difference as to the result. The law sanctions the power, either as just in itself, or arising from a fair and legal contract, and therefore to be enforced. When, therefore, the debtor here stipulated for such an application, he exacted nothing which the law forbids to others in his situation. The right is that of the debtor; he may decline making the payment, unless it is applied as he directs: and I do not perceive how this right is to be affected by the character of the creditor. If the bond had been given to the testator in his lifetime, the debtor's right, as against him, would be clear. Can his death, in consequence of which the executor receives, change the obligation or impair the rights of the debtor? The right is one of some value; as for instance in a case like the present, where the bond was for nearly 10,000 dollars, on which, when it became payable, nearly 1800 dollars of interest was due. Suppose the debtor, having the principal, and wishing to stop interest, insists on so applying the payment: if the creditor refuses to receive it, the debtor can put his money to interest, and so provide a fund to meet the interest on his debt as fast as it accrues, until he obtains the means to extinguish it entirely. But if the payment is applied to the interest, a balance of principal is left, and the debt accumulates again. And how is the creditor injured? The interest on his debt is not an interest-bearing fund. If he refuses to receive the money and apply it to the principal, his interest remains as it was, a dead capital. If he does receive it, as money is worth the interest, he is receiving interest on precisely the amount he would have been receiving it upon if the money had not been paid. And how does the fact of his being a fiduciary vary this state of things? Whilst the debt remained unpaid, he was receiving interest on the principal alone:

29 *by receiving the principal and reinvesting, the estate is not injured. To hold that the power to direct the application in such cases does not exist, would in effect be to decide that every debtor to a fiduciary must pay interest on the interest of his debt. If there were any agreement to give time or indulgence, the case might be different. But here nothing of that kind is suggested. If an executor or other fiduciary, after receiving a payment with a direction to apply it to the principal, neglects or delays to collect the interest so as to make it an interest-bearing fund, the cestui que trust, in a proper case, might charge him for such a breach of duty; and an agreement with the debtor to commit such a breach, might charge him. But here the debt was due. Notwithstanding the receipt, the executor might the next day have proceeded to enforce payment of the balance, principal and interest, by a suit, or a sale under the deed of trust. If he improperly delayed, the debtor is not liable for his neglect. There may have been, and (in the absence of all proof to the contrary) it is to be presumed there were good reasons for the conduct of each in this case. By the direction of the will, the money was to be put out at interest. It was well secured by the bond of the purchaser, and the deed of trust. The executor may have thought it to be for the benefit of all to let the debt rest in that condition. There is some hazard in lending money. Experience has shewn that investments, even in government securities, are sometimes precarious. It was equally the interest of the debtor to relieve himself from this consuming moth, though few men in our country could at once command the means of discharging so large a sum. By retaining the money and using it, he would at least be realizing as much interest as was accumulating against him on the same amount of the debt; and therefore he properly insisted, that if it were received, he should derive the like advantage from it, by applying *it to the principal; in the mean time leaving it to the executor, in the discharge of his duties, to enforce payment of the balance at once, or permit it to remain. The same reasoning applies to the bonds of Guerrant. While Miller retained them, the interest equalled the interest of a like amount of his principal, and when the executor received them, he was entitled to the accruing interest on them; the operation being precisely the same as if the money had been paid to the executor and at once loaned out, attended with this advantage, that whilst Miller continued bound as assignor, the executor acquired the additional security of Guerrant's bonds. In any view I can take of the transaction, it appears to me that the agreement was perfectly legal, and could only affect the estate injuriously, in this or any case, by an improper delay of the executor to enforce payment of the residue. For this, if any such delay occurred, Miller is not responsible. It has

been argued, that after Miller assigned, he impeded the collection by his injunction. The bill did not injoin the executor from proceeding to collect the bonds of Guerrant; it sought to prevent a sale by the trustee for the balance due. Miller's bill and injunction interposed no obstruction to the proceedings against Guerrant.

It seems to me, therefore, that the cases which have held the debtor liable for aiding in a fraudulent misapplication of the funds of the estate to the debts of the trustee, have no bearing on this case. In insisting on the application of the payments to the principal, the debtor exercised no more than a legal right. In agreeing to it, the executor subjected the estate to no loss. The interest would have remained a dead fund, if he had refused to receive the payment. The loss, when any loss is sustained from such an application, results from the subsequent improper delay of the executor in proceeding to enforce payment of the balance. For such improper delay, the executor may under certain

31 *circumstances be held liable; but the debtor is not responsible, unless he has entered into an agreement to procure such improper indulgence, and the payment has been made in pursuance thereof. I think the court erred in disregarding the agreement of the parties here.

The decree drawn by judge Allen was concurred in by the other judges, and entered in the following terms:

This court is of opinion that the circuit court erred in deciding that the appellant Miller was entitled to credit for the whole amount of the bonds of Guerrant assigned to Isaac Curd the executor of Frederick Argyle; and that there was error in deciding, that, under the agreement of the parties, and the circumstances of this case, the debtor was not entitled to apply the payments evidenced by the receipts dated the 30th of October 1820 and the 21st of January 1822, to the principal of the debt. The decree is therefore reversed with costs, and the cause remanded, with instructions to recommit the report to a commissioner, to audit, state and settle the accounts upon the following principles.

The commissioner is to charge Miller with the amount of the last bond, deducting therefrom the price of the 16½ acres of land as of the date of the bond, and also allowing all the other credits allowed in the commissioner's second report, made under the order of October 19, 1837, recommitting the former report; and also a further credit, as of the 25th of September 1825, for the excess due at that time on the judgments assigned, over the sum of 1772 dollars 97 cents,* the amount claimed by Miller as having been overpaid; the reassignment of the judgments being evidence that such excess was paid by Miller to Curd as a consideration for the reassignment. And

*This sum of 1772 dollars 97 cents is the same mentioned in the addition to Miller's statement. That addition will be seen ante, p. 7.—Note in Original Edition.

32 Miller is to be also allowed a *further credit for the sum of 1080 dollars in-joined by Guerrant, in the event of his shewing, by satisfactory proof, that this sum has been paid to Curd or the legatees of Frederick Argyle; but not otherwise.

And in stating the account, all payments received under the two receipts before mentioned, and also the amount assumed to have been paid by Miller, as the difference between the sums before referred to, at the settlement in September 1825, should be applied to the principal of the debt, according to the terms of the receipts, as of the times when the notes on which payments were received fell due: that is to say, where the entire note was paid, crediting the principal of the note paid, as of the date it fell due, against so much of the principal of the debt; and where but part of the note was paid, crediting the payments, and the payment supposed to be made in consideration of the reassignment at the settlement in 1825, against the principal, as of the dates of such payments, actual or assumed.

And the commissioner is to report the said accounts to the circuit court, together with any special matter deemed pertinent by himself, or required by either of the parties to be stated, in order to a final decree.

33

*M'Key &c. v. Garth.

April, 1848. Richmond.

[40 Am. Dec. 726.]

(Absent BROOKS, J.)

Executions—Sale under—Case at Bar.—Whilst on the one hand, where an officer holding two executions sells under the second, the title of the purchaser is good against the plaintiff in the first, and the remedy of the latter is against the officer, so on the other hand the purchaser at such sale cannot invoke the lien of the first execution, in aid of a title acquired at a sale made under the second. Therefore, where a slave was levied upon under a *f. fa.* delivered to a constable before any conveyance of the slave by the debtor, and other executions issued after such conveyance, under which (and not under the first *f. fa.*) the evidence tended to prove that the slave was sold, it was HELD, in an action brought by the grantee in the conveyance against the purchaser at the sale, that the title of the purchaser must be referred to the process under which the sale was made. Accord. *Eckhols v. Graham & others*, 1 Call 492.

By deed bearing date the 4th of June 1823 and admitted to record in the office of Albemarle county court on the same day, John Norvell conveyed to Andrew M'Key and Henry Chiles five slaves, one of whom was a girl named Mary, and another a boy named Randolph, and also other personal property, in trust for the purpose of securing the payment of certain debts therein mentioned.

*See monographic note on "Executions" appended to Paine, Surv., &c., v. Tutwiler, 27 Gratt. 440.

On the 6th of April 1824, M'Key and Chiles brought an action of detinue in the circuit court of Albemarle against William Garth, to recover Randolph. The cause was tried in May 1835, upon the general issue.

At the trial, the plaintiffs relied upon the deed of trust before mentioned, and the defendant relied upon a purchase at a constable's sale made under a writ or writs of fieri facias against John Norvell, which he contended created a lien

34 upon the property before the date *of that deed, and overreached the title conveyed by it. In support of this ground, the defendant introduced a fieri facias issued the 25th of May 1823, by a justice of the peace for Albemarle county, in favour of Ben. Johnson against John Norvell for 11 dollars 27 cents with interest from the 27th of December 1821 till paid, and 30 cents costs, (which was directed to the constable of the said county,) with endorsements thereon by James Thomas the constable, shewing that it came to his hands on the day of its date, and was levied by him the 17th of June 1823 on one negro girl Mary and one boy Randolph; and the said defendant also introduced the deposition of Thomas the constable to the following effect: that on the 17th of June 1823, while acting as constable of Albemarle, he levied the said execution (which had been in his hands from the 25th of May 1823) on the said boy Randolph; that he took the boy home, intending to keep him until the day of sale, but he ran away, and could not be found until after the August court, which was the time appointed for the sale; that after that time, to wit, about the 15th of August 1823, he found the boy at work on Norvell's plantation, and retook him for the same debt, and others which had afterwards come to his hands. The deposition continued as follows: "At the October court, he was regularly advertised and sold under that execution and others, and was purchased by William Garth at the price of 150 dollars. Before the day of sale the first execution ran out of date, and the magistrate renewed it, under which renewed one, in the name of Johnson, the sale was made; and the balance of the money after paying that execution was applied to the payment of the remaining executions, and there was not enough."

After the cause had been argued and the jury sent out to consult of their verdict, they returned into court, and asked the court to instruct them upon this point: whether, if the fi. fa. of the 25th of

35 May 1823 had *been levied in due time by the constable upon the slave, and he had escaped and been retaken, the constable could, after the return day of the fi. fa., legally sell the said slave without a new execution? The court instructed the jury that no new execution was necessary in such case; that in truth, in such case, no new original execution could issue; that a venditioni exponas might have issued, but was not necessary; and that if the

constable had applied for and obtained of the magistrate new executions, under the mistaken opinion that they were necessary, and had supposed himself selling under such new executions, the plaintiff in the first fi. fa. did not thereby lose the lien of the first levy, but the jury should regard the sale as having been made under and by virtue of that fi. fa. and the levy thereof, so as to give to the creditor therein the full benefit of the lien thereby created. To this opinion the plaintiffs excepted.

A verdict being found and judgment rendered for the defendant, on the petition of the plaintiffs a supersedeas was awarded.

Grattan for plaintiffs. Although, when a fieri facias has been levied, a second fieri facias in the same case is so far illegal that it may be quashed on the motion of the defendant, yet if the same be not quashed, but the officer proceed to levy and sell under it, the levy and sale are valid and cannot be questioned by third persons; and in such case the lien of the first execution is lost, and neither the execution creditor nor any third person can avail himself of it. *Eckhols v. Graham* and others, 1 Call 492. Here the fact appears by the deposition of the officer, that he levied and sold under the second fieri facias in favour of Johnson, and under other executions, all of which, including Johnson's second fi. fa., came to the hands of the officer after the deed (under which the plaintiffs claim)

36 had been made and recorded. *The officer does not pretend that he sold under Johnson's first fi. fa. And it being well settled that an officer, having two executions in his hands, may sell under both or either at his pleasure, the purchaser must hold his title as he receives it from the officer, whatever may be the rights of the plaintiff in the first execution to the proceeds of sale.

Peyton for defendant. Although, in the abstract prefixed by the reporter to the case of *Eckhols v. Graham & others*, it is stated that "if plaintiff sues a second execution before the property taken under the first is disposed of, he waives the first, and destroys the lien on the property taken under the first," yet in truth no such question arose or was discussed in that case. There the lien created by the levy of the first execution was gone; but it was because of the execution of the forthcoming bond, and the restoration of the property to Bandy: and *Graham* and *Trigg* succeeded in virtue of their purchase evidenced by their bill of sale, and not in virtue of *Trigg's* purchase at the sheriff's sale. It cannot be fairly argued from this adjudication, that the seizure and sale under a void and illegal process will be valid. Here the second execution was sued out by the constable without authority from the plaintiff, and the question in the court below was, whether the right of a plaintiff could be affected, without his knowledge or consent, by the illegal and unauthorized act of the constable. It cannot be, that

from such an act as this, a waiver by the plaintiff of his right is to be presumed. To affect a party on the ground of waiver, he must not only do the act relied upon as such, but must also be fully cognizant, at the time, of his rights in the matter.

Grattan in reply. The case of Eckhols v. Graham and others shews that the court placed its decision upon the ground that another execution had issued; and it is ³⁷ a very strong authority. For the second execution issued after a forthcoming bond had been taken, and the defendant might certainly have had this second execution quashed as improperly issued. Yet the court held that the issuing the second execution was a discharge of the lien created by the first.

The constable could only take out the second execution as the agent of the creditor; the justice could only give it to him as agent: and the creditor has sanctioned the act of the constable subsequently, if not before, by receiving the money made by a sale under it. The fact is, that in these cases of warrants before justices, the practice is for the constable to act as the agent of the plaintiff; and this practice is recognized by the legislature. *Seas. Acts 1825-6, ch. 19, p. 21; Suppl. to Rev. Code, p. 201.*

But suppose the lien of the first execution had continued after the second issued; is the purchaser entitled to the benefit of that lien? The cases clearly establish that there may be a valid sale by a sheriff under a second execution, though he has in his hands at the time an execution entitled to be preferred; and that in such case the purchaser under the second execution will hold the property against the plaintiff in the first, and the only remedy of the latter will be against the sheriff. *Smallcomb v. Cross &c., 1 Ld. Raym. 251; Hutchinson v. Johnston, 1 T. R. 729.* If then Johnson's second *fi. fa.* was, as the judge instructed the jury, void, and the sale under it void also, yet as there were other executions under which the sale was made, and the evidence of the officer shews that he did not sell under Johnson's first *fi. fa.*, the sale under those other executions was valid, and the purchaser must be considered as holding under them. Whether, therefore, Johnson's second *fi. fa.* was valid or void, the purchaser cannot be considered as purchasing under his first *fi. fa.*

³⁸ *ALLEN, J., delivered the following as the opinion of the court:

This court is of opinion that as evidence had been introduced tending to prove that a second execution had been taken out by the constable, under which, and other executions in his hands, the sale was made; however the question might have been as to the lien of the first execution, in a controversy between the plaintiff in said execution (alleging that the second execution was taken out without his consent) and the constable, yet in this action between the purchaser at the sale and a claimant of the property, the title of the purchaser

must be referred to the process under which the sale was made. That whilst on the one hand, where the officer holding two executions sells under the second, the title of the purchaser is good against the plaintiff in the first, and the remedy of the latter is against the officer, so on the other hand the purchaser at such sale cannot invoke the lien of the first execution, in aid of a title acquired at a sale made under the second. The court therefore erred in instructing the jury that they must regard the sale as having been made under and by virtue of the original *fi. fa.*, though they might have been satisfied, from the evidence, that the sale was in fact made under and by virtue of the second *fi. fa.* and other executions in the hands of the officer.

The judgment is therefore reversed and the cause remanded, with instructions to set aside the verdict and award a new trial of the issue, on which so much of the said instruction as is herein pronounced to be erroneous is not to be repeated.

39 *Williamson's Ex'or v. Howard.

May, 1843. Richmond.

(Absent CABELL, P., and BROOKS, J.)

Guardian and Ward—Accounting—Setting Up New Claim in Appellate Court.—The administrator of an intestate is also guardian of one of the distributees. Upon the termination of the guardianship, a bill is filed against the guardian and his sureties, to recover what is due upon the guardianship account. An amended bill is afterwards filed against the administrator and his sureties, to recover what is due on the administration account. Reports are made of both accounts. But, for reasons appearing to the court, the guardianship account is recommitted; and then, by consent of parties, the administration account is also recommitted. A further report is made upon the guardianship account, and none upon the administration account. Whereupon the cause is heard as to the guardian and his sureties, upon the further report so made, and a decree is entered against them for the sum deemed by the court to be due upon the guardianship account. From this decree an appeal is taken by a party interested to get rid of or reduce the amount. In the appellate court it is urged by the appellee, that the balance stated as due on the guardian's account should be augmented, by incorporating in it the appellee's share of the balance due on the administration account. **Held**, this claim cannot be sustained: 1st, because the case was heard and the decree rendered between the parties to, and on the claim made by, the original bill for the settlement of the guardianship account, as contradistinguished from the administration account, the settlement of which was sought by the amended bill: 2dly, because the case was not prepared for hearing as to the administration account; it standing, as to that account, on a consent order recommittting the same, and the record of course furnishing no account on which

*See monographic note on "Guardian and Ward" appended to *Barnum v. Frost*, 17 Gratt. 398.

a definite charge or decree in respect to the administration account could be made: 8dly, because no claim was made in the court below by the appellee, to bring into the guardianship account any charge against the guardian arising out of the administration account.

Appellate Practice—Affirmance of Decree—Costs.†—

Slaves conveyed by deed of trust to secure what may be due from the grantor as guardian, are afterwards attached by a creditor of the grantor, and under the attachment are sold, subject to the prior lien of the deed of trust. In a suit by the ward, a decree is made for the sum due upon the guardianship account, and the decree directs

40 the trustees to retain the slaves until the amount *of the decree is satisfied, and then to surrender them to the purchaser at the sale under the attachment. On an appeal by the purchaser, the objection is taken that the decree ought to have provided for the sale of the slaves, so that out of the proceeds the amount of the decree might be paid, and the surplus paid to the appellant. **Held**, the appellant has no right to have the decree reversed for this cause, but the same should be affirmed, with the addition thereto of a decree for the sale of the slaves; and the appellant should be decreed to pay the costs.

Same—Same—Excessive Charge for Board and Clothing.—

Case in which it was considered in the appellate court, that a guardian, who had been culpably in default in failing to render any account of his receipts or disbursements, was allowed by the court below more for the board and clothing of his ward, than he was entitled to; but as a particular sum payable by the ward had not been charged in the court below, it was deemed best to consider that as an equivalent for the excess of the charge for board and clothing, and (saving the parties the delay and expense of restating the guardian's account) to terminate the case by affirming the decree.

Joseph Mosby died about the year 1808, leaving a widow, Lucy Mosby, and three children, Robert W., Nancy, and Judith. The widow and her son Robert administered on the estate.

On the 18th of November 1812, Nancy having in the mean time married Jesse Owen, and Judith being still an infant, a bill was exhibited to the county court of Powhatan by the widow for a division of the estate, and commissioners were thereupon appointed to allot to her a third part, and divide the other two thirds amongst the children. Such allotment and division were made soon afterwards. The report of the commissioners of the division of the slaves did not bear date until the 20th of May 1814, and their report of the division of the land did not bear date until the 16th of August 1815, and neither report was confirmed until the day last mentioned. But the slaves were in fact divided early in 1813, and Robert W. Mosby, who was guardian of his sister Judith, held or hired

her share of the slaves during the years 1813, 1814 and 1815. The land was 41 *also divided in February 1813, and the guardian had, or ought to have had, possession of it during those years.

In April 1815, Judith Mosby married John C. Howard; and in December of that year, a suit in chancery was commenced by them in the county court of Powhatan, against Robert W. Mosby as late guardian of said Judith, and Jesse Owen and Henry Anderson his sureties, to recover what was due upon the guardianship account.

An amended bill was afterwards filed, asserting the rights of the complainant Judith as a distributee of the estate of her father. Lucy Mosby having married Peter Lesuer, Lesuer and wife and Robert W. Mosby and the sureties in the administration bonds were made defendants, an account of the administration was asked, and a decree sought for what might appear to be due.

Pending the suit, John C. Howard died, and the cause proceeded in the name of the female complainant. Robert W. Mosby and Lucy Lesuer also died, and the case was revived against their respective administrators. On the motion of Robert Anderson executor of Mary Williamson, he was also made a defendant. His interest will appear hereafter.

Under an order made the 15th of March 1821, accounts were returned both of the administration and of the guardianship, to which exceptions were filed on both sides. For reasons appearing to the court, the guardianship account was, by an order entered the 21st of January 1829, recommitted with the exceptions thereto, to the commissioner who made it, for reexamination and correction. "And by consent of parties," it was at the same time ordered that the report of Mosby's accounts as administrator be recommitted to the said commissioner, for a further examination and settlement thereof.

In December 1829, the commissioner made a report upon the guardianship account. He was not furnished with vouchers

42 to enable him to make out a regular *account of disbursements by the guardian; and the charges against the guardian for the yearly value of his ward's land and slaves were founded upon the depositions of witnesses. The report contained four alternative statements. To this report, exceptions were filed by Anderson as executor of Mary Williamson.

The nature of the interest of Mary Williamson's executor appeared in another suit, brought in December 1828 by Jesse Owen and Nancy his wife, who (as has been stated) was also a daughter and distributee of Joseph Mosby. The bill of Owen and wife, after mentioning that upon the death of Joseph Mosby certain slaves were allotted to his widow for life, set forth, that she had lately died, leaving the said slaves and their increase; that Robert W. Mosby conveyed his interest in the said slaves to trustees, for the purpose of indem-

†Appellate Practice—Decreeing Costs of Appeal to Appellee.—See foot-note to *Blessing v. Beatty*, 1 Rob. 287, and monographic note on "Costs" appended to *Jones v. Tatum*, 19 Gratt. 720. The principal case is cited in *Marks v. Hill*, 15 Gratt. 422.

nifying Henry Anderson and the complainant Jesse Owen, as the sureties in the bond given by said Robert as guardian of Judith Howard, which trust deed was duly recorded; that subsequently to said conveyance, the said Robert removed to the state of North Carolina, and Mary Williamson sued out an attachment in chancery against him, and so proceeded in said suit, as to have the undivided interest of said Robert in the said slaves decreed to be sold for the payment of her debt, subject however to the prior lien created by the said trust deed; that a sale was made under the said decree, and the interest of said Robert purchased by the said Mary Williamson, of whom the said Robert Anderson is now executor. Judith Howard, Anderson as executor of Williamson, and the trustees in the said deed, were made defendants to this bill, and the prayer of it was that commissioners might be appointed to lay off and allot the said slaves among the parties entitled thereto.

This suit of Owen and wife was heard by consent upon the bill and the answers thereto, and by like consent the court made a decree appointing commissioners
43 *to divide the slaves into three equal parts, and to allot one part to the plaintiffs Owen and wife, one other part to the said Judith Howard, and the remaining third part to the trustees in the deed aforesaid, until the objects of the said trust deed were satisfied. The commissioners divided the slaves into three lots, numbered 1, 2, and 3, and assigned number 1 to the trustees, number 2 to Judith Howard, and number 3 to the plaintiffs Owen and wife; and they provided that, for equality of partition, the owner of lot number 2 should pay 13 dollars 33 cents to the owner of number 3, and 23 dollars 33 cents to the owner of number 1. By an order made in January 1829, the trustees were authorized to hire out the slaves allotted to them, either by the month or for a longer time not exceeding one year, as he might think best. But afterwards by another order made the 21st of July 1830, on the motion of the defendant Anderson, the trustees were directed to deliver the said slaves to the said defendant, to be held by him subject to the deed of trust aforesaid, and were further directed to pay over to him the bonds taken by them for the hires of the said slaves, or the amount thereof, after deducting all expenses incurred in relation thereto.

On the 22d of July 1830, the two causes came on together. The decree set forth that the first was heard only as to the administrator of Robert W. Mosby, and Jesse Owen and Henry Anderson the sureties in Mosby's bond as guardian, and that it was heard upon the report of the commissioner "made under the order of the 21st of January 1829, directing an account of the said Robert W. Mosby's guardianship of Judith Howard the plaintiff," and upon the exceptions filed by the defendant Anderson to that report. The court did not adopt

altogether any one of the four statements of the guardianship account made by the commissioner, but caused the said account to be reformed, so as to charge

44 *the guardian with the rent of the land and the hire of the slaves of the plaintiff in the first suit, at the price of 35 dollars for the land and 150 dollars for the slaves, for each of the years 1813, 1814 and 1815, making in the whole 555 dollars; and so as to credit the guardian with 70 dollars for the clothing of the plaintiff for 1813, 140 dollars for her board and clothing for 1814, and 75 dollars for her board and clothing for 3 months in 1815, in which year she was married, making together 285 dollars; thereby leaving 270 dollars as the sum due to the said Judith Howard from the said Robert W. Mosby as her guardian, on the 31st of December 1815. And thereupon the court decreed that the administrator of Mosby, out of the estate of his intestate in his hands, and the defendants Jesse Owen and Henry Anderson, pay to the plaintiff in the first suit the said sum of 270 dollars with interest from the 31st of December 1815, and the costs by the said plaintiff and her deceased husband expended. And the order of the preceding day was so far amended, as to restrain the trustees in the deed of trust from delivering over to the defendant Anderson the slaves allotted to them, until the decree this day rendered in the first suit should be fully satisfied, and the lien created by the trust deed upon the said slaves thereby discharged; after which the said property, or any balance which might remain, was directed to be forthwith surrendered by the trustees aforesaid to the said Mary Williamson's executor.

On the petition of the defendant Anderson as executor aforesaid, the superior court of chancery for the Richmond district allowed an appeal from this decree.

Under the act of April 16, 1831, the appeal was transferred to the circuit court of Henrico.

In that court on the 29th of November 1831, by consent of the appellant and of the appellee Judith Howard, an order was made directing the surviving trustees
45 in *the deed of trust, or one of them, to sell the slaves allotted to the said trustees. Sale was made accordingly, and the net proceeds thereof were 1120 dollars 38 cents. Of this sum, 300 dollars was directed to be put out at interest, subject to the future order of the court; and the residue, being 820 dollars 38 cents, Anderson was allowed to receive, upon his giving security to repay the same within sixty days after an order requiring such repayment.

After the act of 25th February 1837, (Sess. Acts of 1836-7, ch. 61, p. 38,) forming a separate circuit of the county of Henrico and city of Richmond, the causes came on to be heard the 25th of July 1837, before the court for this circuit. On consideration whereof, the court, being of opinion that the decree pronounced in the court

below on the 22d of July 1830 was right so far as the same ascertained the amount due from Mosby as guardian of Judith Howard, and was only erroneous in not directing a sale of the slaves conveyed by the said Mosby to trustees to indemnify his sureties, for that error reversed the decree, and retaining the causes for further proceedings, declared that out of the proceeds of sale of the said slaves, the said Judith Howard was entitled to receive the sum of 270 dollars with interest from the 31st of December 1815 until paid, and that the appellant Anderson, as executor of Mary Williamson, was entitled to receive the residue. A report was afterwards made by the acting trustee, of the state of the fund; and then a further decree was made the 30th of March 1838, in conformity with the principles above declared, whereby there was adjudged to the said Judith Howard not only the said 270 dollars with interest as aforesaid, but also her costs in the county court of Powhatan and in the appellate court.

On the petition of Anderson as executor of Mary Williamson, an appeal was afterwards allowed to the court of appeals.

46 *The cause was argued by Harrison for the appellant, and Patton for the appellee. The points made in the argument are sufficiently indicated in the following opinion.

STANARD, J. The claim that was earnestly and ably urged on the part of the appellee, to have the balance of the guardian's account augmented, by incorporating in it the appellee's share of the balance of the administration account, consisting of the surplus profits of the real and personal estate of the father of the appellee while held by his administrators, cannot in this case be sustained in this court.

1st, Because this case was heard and the decree rendered between the parties to, and on the claim made by, the original bill for the settlement of the guardianship account, as contradistinguished from the administration account, the settlement of which was sought by the amended bill.

2dly, Because the case was neither heard nor prepared for hearing as to the administration account; the case, at the time of hearing, standing in that respect on a consent order recommitting the administration account, and the record of course furnishing no account on which a definite charge or decree against Robert Mosby in respect to the administration account could be made.

3dly, Because no claim was made in the court below by the appellee, to bring into the guardianship account, to her credit, any charge to her guardian arising out of the administration account.

The objection of the appellant, that the costs on his appeal from the county to the superior court of chancery were improperly decreed against him, rests on this, that the decree of the county court was reversed, and ought to have been reversed,

by the superior court. The propriety of that reversal is vindicated on two grounds.

47 *First, That the decree did not provide for the sale of the slaves, so that the proceeds of the sale might be appropriated to the indemnity of the sureties of the guardian, and the surplus paid over to the appellant.

Though this seems to have been the ground of the formal reversal of the decree of the county court, it was not an adequate cause of reversal; and if it were, that reversal is one not for the benefit of the appellant, but for the benefit of the sureties of the guardian. The decree of the county court had, in respect to the disposition of the slaves, done every thing that the appellant could desire. Under it the appellant would have got complete title to and possession of the slaves, on his paying the amount decreed to be paid by the sureties; and he could not justly complain that the possession of the slaves was withheld from him until the sureties were indemnified. The omission of the county court to decree the sale of the slaves to provide the indemnity, withheld from the sureties a part of their remedy, and could not be justly complained of by the appellant. The addition of that by the superior court to the decree of the county court was for the benefit of the sureties; and in that respect the action of the superior court was not a matter of relief to the appellant, but to the sureties. In strictness, so far as this matter was involved in the appeal, the proper decree of the superior court would have affirmed that of the county court, and have added thereto the further decree of sale.

The other objection to the decree of the county court, and also to that of the superior court, is, that the amount decreed to the appellee is too large.

That fact on which this objection in part rests is not as has been supposed by the appellant. He has supposed that the division of the estate was not finally made until the year 1814 or 1815, and that the guardian did not hold the ward's share of the land and negroes during the years 1813, 1814 and 1815, the years for which rents and hires are charged.

48 *Though the confirmation of the reports of the division of the slaves and land does not appear to have been made before the year 1815, I think it appears with sufficient certainty that the slaves were in fact divided early in the year 1813, and that the guardian held or hired his ward's share during the years 1813, 1814 and 1815; and that the land was divided in February 1813, and the guardian had, or ought to have had, possession of it during those years.

As to the amount of hires and rents, my opinion is that the guardian has not been overcharged, especially as he has failed to render any account: and in respect to the credits to him for the board and clothing of the ward, I incline to the opinion that more has been allowed, than, 'under the

circumstances of his culpable default, and failing to render any account of any disbursement, he was entitled to. But as the sum of 23 dollars 33 cents, payable by the appellee to equalize the share of the appellant in the division of the dower slaves, has not been charged to the appellee, I deem it best to consider that as an equivalent for the excess of the charge to the appellee for board and clothing, and (saving the parties the delay and expense of restating the guardian's account) to terminate this case by affirming the decree.

The other judges concurring, the decree was accordingly affirmed.

49 *Lathrop v. Lumpkin and Others.

May, 1848, Richmond.

(Absent CABELL, P.)

Action on Sheriff's Bond—Return—Amendment—Evidence—Case at Bar—In debt on a sheriff's bond, two breaches are assigned: 1. that the sheriff had levied an execution of the relator against an administrator, on slaves of the decedent, but negligently suffered them to be eloiigned and carried off; 2. that the sheriff might have levied the execution on such slaves, but neglected so to do. At the trial, the plaintiff, to shew the issuing of the execution, and the reception and disposition thereof by the sheriff, was under the necessity of giving in evidence not only the execution with the return originally made thereon, but also an amendment of that return, made by leave of court. This amendment had been made not by obliterating the first return and substituting another in its place, but in a more proper manner by making an addition to the first return; and the return thus constituted of that originally made, and of what was afterwards added, was upon its face contradictory in itself. HELD, that the defendant had a right to rely upon said return as prima facie evidence in his favour; that the plaintiff, on the other hand, was at liberty to disprove any part of it, as well by intrinsic evidence furnished by the return itself, as by evidence aliunde; that it was competent for the defendant in like manner to sustain any part of the return; and that it was the province of the jury to decide, upon the whole evidence furnished by the return or otherwise, whether or not the execution was levied by the sheriff upon the property of the intestate in the hands of the administrator, and the same thereafter eloiigned and lost by the negligence of the sheriff; or whether or not the sheriff might have levied upon such property in the hands of the administrator, but neglected so to do.

On a judgment obtained in the circuit court of King and Queen county, by Fayette Lathrop against William Gibson as administrator of John A. Longest, a writ of fieri facias issued the 6th of November 1834, returnable to the first monday in January following, upon which the sheriff

of that county made the following return:

"On the 10th day of December 1834, I found in possession of William E. Gibson administrator of John A. *Longest deceased two female slaves, (a woman named Sarah and one child) which slaves were the property of the said John A. Longest at the time of his death. And on the same day I levied this execution upon the said slaves, they being the only property I could find of John A. Longest deceased. At the time of making the levy, the said Gibson stated that he had sold those slaves to John M. Abraham of King William county, and produced the account of sales of said Longest's property, shewing that the said slaves had been sold to said Abraham and were no longer the estate of John A. Longest: that he had only hired them for the year. Under these circumstances, being doubtful of the propriety of removing them, I left them with Gibson upon his promise to keep them until I could get advice. I went the same day to the house of James Smith the attorney for the plaintiff, and informed him of the circumstances, and enquired of him whether I ought to take away the slaves or not: and said Smith advised me to take possession of the slaves. I then employed R. B. Bagby, who was present when I made the levy, to go to Gibson's, take the slaves, and secure them to be sold to satisfy this execution. When Bagby arrived at the house of Gibson, the slaves had been carried off. Bagby wrote to me immediately, informing me he had failed to get the slaves. I directly made diligent search and enquiry, and soon ascertained that the slaves were in possession of said John M. Abraham; and I have been unable to get them. I went to see Abraham, and he said the slaves were his property; that he bought them several months before. John Lumpkin D. S. for Hugh Campbell."

Afterwards, by virtue of an order of the said court entered on the 4th of May 1837, the following amended return was made:

"By leave of the court for that purpose first obtained, I hereby return, that the annexed execution came to my

51 *hands on the 11th day of November 1834, and while it was in my hands I heard it rumoured that two negroes, one woman named Sarah and a girl named —, which were the property of John A. Longest deceased in his lifetime, were still in the possession of William Gibson his administrator, and unsold by him. After hearing this, I, on the 10th day of December 1834, met the girl in the road near the house of the said Gibson. I carried her back to the said Gibson's house, intending to investigate the matter, and if satisfied that the said negroes were still the property of John A. Longest's estate, to levy upon the same to satisfy this execution. Upon reaching the house of the said Gibson, he assured me that he, as administrator of the said Longest, had actually sold the said negroes and received the money for them; and exhibited to me the account

*Amendments.—On this subject, see generally, monographic note on "Amendments" appended to Sعاد v. Coleman, 7 Gratt. 300.

of sales of the perishable property of the said Longest, made by him as administrator, upon which account of sales I found these negroes entered as having been sold to John M. Abraham. The account of sales, I thought, was kept in the handwriting of Mr. Thomas Jordan. After this investigation, I did not feel satisfied to levy the execution upon the said negroes, but left them, without having levied upon them, in the possession of said Gibson, saying to him, that I would see Mr. Smith, the plaintiff's attorney, and if he thought that I ought to levy upon them, I would return and do so; and requesting him in the mean time to keep them until I returned, which he consented to do. Upon seeing Mr. Smith, he advised me to take the negroes into possession. After that, I could never find them; nor could I find any property within my bailiwick upon which to levy this execution. John Lumpkin D. S. for Hugh Campbell."

On the 15th of December 1837, an action of debt was brought in the same court, in the name of the governor of the commonwealth, for the benefit of Fayette Lathrop, *against Francis Rowe, John Lumpkin, and others, on a bond executed the 10th of March 1834 by Rowe, and the other obligors as his sureties, with a condition for the faithful execution and performance by Rowe of the office of sheriff of King and Queen county, during his continuance therein.

The declaration, as amended, assigned two breaches. The first alleged, that at the time and after the execution of Lathrop was delivered to the sheriff, goods which were of the said John A. Longest at the time of his death, of great value, to wit, two female slaves (a woman called Sarah and one child) had come to the hands of the said William Gibson as administrator, and that John Lumpkin, as deputy for the said Francis Rowe, levied the said execution on the said slaves, but negligently and unlawfully suffered them to be eloiigned and carried off. The second breach alleged, that when the execution was in the hands of the sheriff, there were in the hands of Gibson as administrator two female slaves, which were of the goods of Longest at the time of his death, upon which the said execution might have been levied, and that Lumpkin, though it was completely in his power to have levied said execution on said slaves, omitted and neglected so to do.

Rowe died before the writ was served. The other defendants, upon whom process was served, pleaded, 1. conditions performed; upon which issue was joined: and 2. that before and at the time when the execution came to the hands of Lumpkin as deputy for Rowe, Gibson the administrator of Longest had administered and converted all the goods which were of Longest at the time of his death, and which had at any time come to his hands to be administered.

At the trial, which took place the 5th of May 1842, the plaintiff gave in evidence

the execution with the returns made thereon as before mentioned. And thereupon the counsel for the plaintiff moved the 53 court to instruct *the jury, that they should disregard the amended return of the sheriff, where the same was contradictory to the first; and that upon the amended return, though true, the plaintiff was also entitled to recover. The court refused to give these instructions, and on the contrary instructed the jury that the amended return of the sheriff, when contradictory to the first return, was to be respected, and to be regarded as *prima facie* true; and that upon the amended return, if true, the plaintiff was not entitled to recover. To which opinions the plaintiff excepted.

Verdict and judgment being rendered for the defendants, on the petition of Lathrop a supersedeas was awarded. The petitioner assigned the following errors:

"1. Your petitioner is advised that the instruction of the circuit court to the jury at the trial was erroneous, because, on the amended return, the law was for your petitioner. The return states that the property was Longest's in his lifetime; that it remained in the hands of his administrator (the defendant) until the officer having your petitioner's execution in his hands went to the defendant's house, took one of the slaves in the road and carried her back, and left her and the other slave in the defendant's possession, upon his promise to keep them there until the sheriff's return,—went away, and suffered them to be eloiigned. The execution bound the slaves from its delivery to the sheriff, if they were the property of the intestate. It was levied on them. Actual seizure was not necessary, if they were in the power and view of the officer. *Bullitt's ex'ors v. Winston*, 1 Munf. 269; *Haggerty v. Wilber*, 16 Johns. R. 287. But here was an actual seizure. At least there might have been a levy, and it was misconduct in the sheriff if he did not make it. The slaves, as to your petitioner, were the property of the defendant's intestate. The statement of the defendant that he had sold them, if true, imports nothing. His possession of them after an *absolute sale, unexplained, made the sale fraudulent and void as to creditors. *Mason v. Bond & Co.*, 9 Leigh 181.

"2. The direction by the court that the jury should regard the second return as true, where it conflicted with the first, was erroneous. The first return, made when no suit had been brought, or possibly was ever anticipated, and in the regular course of the sheriff's duty, admits a clear liability on the part of the sheriff. The second was made after this suit was instituted,* and is evidently cautiously worded, so as to defeat the liability flowing from the first. Now the amended return was liable to con-

*This is a mistake. The suit was brought the 16th December 1837, and the return was amended the 4th of May preceding. (Reporter.)

dictum by evidence aliunde on the part of the plaintiff, and if both returns had been put to the jury for what they were worth, on the whole evidence they might justly have inferred that the statements of the first return were, under the circumstances, more entitled to credit than those of the second, and were sufficient to contradict the second. They had a right so to decide. At the court, in determining that the statements of the first return were insufficient for that purpose, and were worth less evidence than those of the second, not only formed an erroneous conclusion on the matter of fact, but clearly invaded the province of the jury.

"3. No issue was joined on one of the pleas."

The cause was submitted without argument, by Daniel for the plaintiff in error, and Griswold for the defendant in error.

BALDWIN, J., delivered the following as the opinion of the court:

The court is of opinion, that the amendment of the sheriff's return having been made not by obliterating the first and substituting another in its place, but in a more proper manner by making an addition to the first return, which original and amended returns are to be regarded as constituting but one return—the return so constituted is upon its face contradictory in itself: that the same was necessarily given in evidence on the part of the plaintiff, to shew the issuing of the fieri facias for the relator, and the reception and disposition thereof by the sheriff: that the defendant had a right to rely upon said return as prima facie evidence in his favour: that the plaintiff, on the other hand, was at liberty to disprove any part of it, as well by intrinsic evidence furnished by the return itself, as by evidence aliunde: that it was competent for the defendant, in like manner, to sustain any part of the return: and that it was the province of the jury to decide, upon the whole evidence furnished by the return or otherwise, whether or not the execution was levied by the sheriff upon the property of the intestate in the hands of the administrator, and the same thereafter eloiigned and lost by the negligence of the sheriff; or whether or not the sheriff might have levied upon such property in the hands of the administrator, but neglected so to do. The court is therefore of opinion that the circuit court properly rejected the instructions asked for by the plaintiff, but ought not to have given the instructions substituted therefor. The judgment is therefore reversed with costs, and the cause remanded, with directions to set aside the verdict, to give the parties, on the application of either, leave to amend their pleadings and make up more correctly the issues contemplated by them, and to award a new trial, upon which the instructions given upon the former trial are not to be repeated.

56 *May & Another v. The State Bank of North Carolina.

May, 1848, Richmond.

(Absent CABELL, P.)

[40 Am. Dec. 726.]

Pleading—Matters of Abatement—What to Show.*—

Matter of abatement either shews the action to be abatable, or that it is de facto abated. The former usually exists at the time of the suit; the latter for the most part occurs during its progress. The first must be pleaded in technical form, and at a proper stage of the cause. The last may be, but need not be, pleaded; and when apparent, or made known to the court, will be declared by its order in any stage of the suit. Examples illustrating this distinction, stated in the opinion of BALDWIN, J.

Same—Corporations—Expiration of Term of Existence—

Execution—Estoppel—Case at Bar.—If a corporation become extinct by the expiration of the term of its corporate existence, pending a suit at law for a corporate demand, and that fact be brought regularly before the court in which the suit is pending, the action must terminate. It is equally clear that if, after judgment in favour of a corporation, the corporation becomes extinct by the expiration of the term of existence granted by the charter, no execution on such judgment can regularly be sued out in the name of the corporation, and if one be sued out, it is liable to be quashed, on shewing the fact of the extinction of the corporation before the emanation of the execution. On the other hand, if an original judgment be rendered in favour of a corporation, as it could not be regularly rendered unless the existence of the corporation continued, the necessary intendment from the rendition of it is, that the continued existence of the corporation was either proved or admitted; and if execution be sued out on the judgment, the defendant, being by this intendment estopped to deny the existence at the time of the judgment, would not, on a motion to quash the execution, be admitted to controvert this intendment, and proof on such motion of the extinction of the corporation before judgment, would be inadmissible or unavailing. Per STANARD, J.

Same—Same—Same—Case at Bar.—In an action

by a corporation, a special verdict was rendered, which found, that by the act creating the corporation, it was to continue until the 1st of January 1830, and that by a subsequent act the charter was extended until the 1st of January 1835. Other facts were found in relation to

*Pleading—Pleas in Abatement.—In Quarrier v.

Peabody Ins. Co., 10 W. Va. 521, it is said, as pleas in abatement, including pleas to the jurisdiction, tend to delay, great accuracy and precision are required in framing them. They must be certain to every intent and without any repugnancy. And all the old strictness and precision of the common law, both as to form and substance is still required in such pleas. See *Hortons v. Townes*, 6 Leigh 47; *May v. State Bank of North Carolina*, 2 Rob. 56.

†Corporations—Expiration of Term of Existence.—

The principal case is cited in foot-note to *Rider v. Wilson & Albemarle Factory*, 7 Leigh 154. See also, monographic note on "Corporations (Private)" appended to *Slaughter v. Com.*, 13 Gratt. 707.

57 the merits of the *claim, upon which the circuit court, on the 24th of October 1831, gave judgment for the defendants. An assignment of the claim was made by the corporation on the 6th of December 1831. Whereupon, to wit in June 1832, a supersedeas was obtained to the judgment, upon a petition in the name of the corporation. In April 1837, the court of appeals reversed the judgment, and entered judgment for the plaintiffs; and in May 1837, judgment was entered in the circuit court in pursuance thereof. Execution being then issued, one of the defendants gave a forthcoming bond with surety, which was forfeited. Upon this bond a motion was made for award of execution in the name of the corporation, and the defendants produced the acts before mentioned, to shew that the charter expired on the first of January 1835; and this prima facie evidence of the extinction of the corporation was not met by any countervailing proof on the other side; but it was insisted that the judgment of the appellate court imported that the corporation was in existence at that time, and estopped the defendants from shewing the contrary. **Held**, that according to *The Bank of Alexandria v. Patton* and others, 1 Rob. 490, had the attempt been made when this case was in the appellate court, to arrest further proceedings therein on the ground that the charter had expired, it would have been fruitless; and as the judgment of the appellate court could not have been prevented by shewing that the charter had expired, so there cannot be a legal intendment of the existence of the corporation, from the fact of the judgment being rendered. The forthcoming bond and the execution under which it was taken were therefore quashed, and the assignee left to proceed in equity to obtain the benefit of the judgment: *dissentiente BALDWIN, J.*

After the decision of the court of appeals in the case of *The State Bank of North Carolina v. Cowan &c.*, 8 Leigh 238, judgment was entered in the circuit court of Mecklenburg county, on the 12th of May 1837, in pursuance thereof, and execution issued upon that judgment, in strict conformity therewith, against the goods of William B. Cowan, Richard May, James Smith and Francis Jones. Under the execution, property belonging to May was taken to satisfy the same, and he gave a bond for the forthcoming thereof at the day of sale, with John A. Smith as his surety; which bond was forfeited.

58 *Upon this bond a motion was made in the circuit court of Mecklenburg at October term 1837, by the president and directors of the state bank of North Carolina, against the obligors therein.

The defendants proved that James Smith and Francis Jones, two of the defendants named in the execution, were dead at the time the judgment was rendered by the court of appeals; and offered in evidence authenticated copies of the following acts of the legislature of North Carolina, to wit, an act passed in 1810, creating a corporation by the name and style of the president and directors of the state bank of North Carolina, to continue until the first day of January 1830, and an act passed in 1811,

extending the charter of incorporation until the first day of January 1835; and the said defendants insisted that the charter of the bank expired on the first day of January, 1835, and for this reason, and because two of the defendants named in the execution were dead at the rendition of the judgment in the court of appeals, asked the court to overrule the motion, and to quash the execution and bond. But the court gave judgment awarding execution upon the bond, and the defendants excepted.

The defendants presented a petition for a writ of supersedeas to the said judgment, and with their petition exhibited a transcript of the record, which contained a copy of an execution issued on the said judgment, with the following endorsement thereon: "This *fi. fa.* issues for the benefit of E. B. Hicks, by virtue of an assignment from the plaintiffs filed with the papers in the original suit." On reference to the transcript of the record of the original judgment, which was before the court of appeals at the time of the decision reported in 8 Leigh 238, the assignment is found copied at the end thereof, and bears date the 6th of December 1831. That record also shews that the original judgment by the circuit court of Mecklenburg in favour of the 59 defendants, *was rendered the 24th of October 1831, and the supersedeas thereto was allowed in June 1832. The acts of the legislature of North Carolina, shewing the time for which the charter was granted in 1810, and for which it was extended in 1811, appear also to have formed part of the special verdict on which judgment was given.

A supersedeas was awarded, according to the prayer of the defendants' petition.

Macfarland for plaintiffs in error. The case of *Rider v. The Union factory*, 7 Leigh 154, is a conclusive authority to shew that the judgment of the circuit court was erroneous, if in point of fact the charter of the bank had expired. The only question in the case must be a question of fact, whether there was sufficient proof of the expiration of the charter. To shew this fact, there was all the evidence which the case admitted; for the charter was given in evidence, and it thereby appeared that the period for which the bank was incorporated had expired. It appears by the record, that on this ground of the apparent expiration of the charter, the application to quash the execution and bond was made; and it does not appear that there was any controversy in the court below as to the fact of such expiration.

The execution was also irregular, because some of the defendants against whom it issued were dead at the time of its emanation. The proper course was to suggest their deaths on the record, and issue the execution only against the defendants who survived.

Rhodes for defendants in error. There can be no difficulty upon the last point. The controversy in the original suit was

brought up to this court by supersedeas, and judgment was entered here for the bank. The execution necessarily conformed to that judgment, *and was properly issued against all the defendants therein, without enquiring whether all of them were alive or not. Our act of assembly expressly requires that the execution shall conform to the judgment, and the practice is to sue out execution without regard to the death of one of several defendants after judgment. In such cases the sheriff is to ascertain which of the defendants named in the execution are alive at the time of issuing it, and is to forbear serving it except as to them. Accordingly in this case, precisely that has been done, which would have been done if the deaths of the deceased defendants had been suggested on the record.

Upon the other point, it does not appear that the bill of exceptions contains all the evidence adduced on the motion. Not only does this not appear, but it does appear affirmatively that there was no plea or defence regularly made; that the defendants merely submitted to the court certain fragments of evidence, and asked judgment that the motion of the plaintiffs be overruled and the bond and execution quashed. The truth and accuracy of the copies of the acts passed by the legislature of North Carolina respecting the bank, are not denied; but it is insisted that whatever may be the prima facie inference from those laws, as to the expiration of the bank charter, the intendment of this court must be (in the absence of any plea, or any notice of the ground on which the motion was to be resisted, and with the judgment of the court below in favour of the plaintiffs) that there was other evidence on the point, and evidence sufficient to justify the judgment. It is not pretended that the acts given in evidence by the defendants were all the acts affecting the corporate existence of the bank. At all events, the most that can be ascertained from the acts so given in evidence is, that the charter may have expired. But the expiration of the charter does not necessarily infer the nonexistence of the bank after the period when the charter

61 expired. **[Brooke, J. After the expiration of the charter had been shewn by the defendants, ought not the plaintiffs to have shewn by proof on their part, that the bank was still legally in existence?]* Here there was no plea or specific notice of defence on the ground of the nonexistence of the bank. It is a well established principle that pleadings must give the opposite party notice, by direct averment, of the point insisted on. *Stephen on Pleading* (1st ed.) 384, and case there cited. This principle applies to the case of a motion, even though written pleadings be dispensed with; for the necessity of precise notice, and the danger of surprise, are the same. If such notice had been given, it might have appeared that the principle of the *Mayor & C. of Colchester v. Seaber*, 3 Burr. 1866, was applicable. That case shews

that after a corporation has become disabled to act, it may be so revived by a new charter as to retest a right of action on a bond executed and due before the disability occurred.

But here the appellants were estopped from denying the existence of the bank, and its power to enforce against them the judgment of this court. For that judgment was in 1837, two years after the alleged expiration of the charter. *Williams v. The Bank of Michigan*, 7 Wend. 539, is a case in which a judgment was held to estop from denying the legal existence of the plaintiffs. And *The Dutchess Cotton Manufacturing Co. v. Davis*, 14 Johns. 238, is a case of like estoppel by the execution of a bond. In 6 Bac. Abr. title Pleas and Pleadings, letter I. div. 11, p. 322 of Lond. ed. of 1832, it is said (citing Comb. 446), that if upon a writ of error it be assigned for error that the plaintiff died before the trial, and issue be thereupon taken, the plaintiff in error, by his pleading to the action, is estopped to give in evidence that the plaintiff died before the action brought.

62 *Moreover it appears that the claim in this case has been assigned. And according to *The Bank of Alexandria v. Patton and others*, 1 Rob. 499, if it appear that the claim in controversy in this court upon an appeal by a bank has been assigned to third persons, the expiration of the charter pending the appeal is no ground to dismiss the case. If the assignee of an expired corporation were not permitted to use the corporate name, his right would be extinguished. It will not do to say that the assignee may resort to equity. When he goes there, he must make the assignor a party; and this he could not do in respect to an extinct corporation.

Macfarland in reply. In motions on forthcoming bonds, the practice is to dispense with pleadings in writing, and the law is well settled that they are unnecessary. Upon the case as it appears by the evidence, the legal existence of the bank had ceased; and the appellate court is not to exercise its ingenuity in speculating whether there might not be a possible state of facts to justify the judgment of the court below. The appeal is a complaint against the judgment of the court below upon that state of facts, and that only, which appears on the record. True it is, that in this case the bill of exceptions does not expressly state that the evidence therein set forth was all the evidence adduced on the motion; nor is it necessary that it should. A party is only bound to make out a prima facie case; if there be evidence to countervail his prima facie case, it is for the party who relies on the countervailing evidence to have it spread on the record. Suppose a release by the plaintiffs in the motion had been produced, for the whole debt secured by the forthcoming bond, and the bill of exceptions had stated the production of the release, and proof that it was executed by the plain-

tiffs; could it be held that a judgment in favour of the plaintiffs must be presumed right, merely because the
 63 *effect of the release might by possibility have been rebutted by proof that it was obtained by fraud or duress, and there is no express statement in the record that such rebutting proof was not produced?

In *Jackson's adm'r v. The Bank of Marietta*, 9 Leigh 244, 5, on non assumpsit pleaded, and a demurrer to the evidence adduced by the bank, it was held indispensable to prove the incorporation; and though it was manifest that the corporate existence of the plaintiffs was not in question in the court below, the judgment in favour of the bank was reversed. In the motion for award of execution on a forthcoming bond, when the defendant resists the award, he gives to the plaintiff as distinct a notice that all the proofs necessary to sustain the case are demanded, as he does in assumpsit by the plea of non assumpsit.

But it is contended that the judgment of this court precludes the defendants from contesting the corporate existence of the bank. On reference to the report in 8 Leigh 238, it will be found that the only question considered by the court was a question of usury in the contract: no question was made as to the legal existence of the bank. And the judgment of the court of appeals does not shew or necessarily establish its existence at that time. That judgment might have been properly rendered, though there had been full proof that at its date the corporation had expired. Under such circumstances, the defendants in this motion could not be precluded from the defence made by them, even if the defendants in the original suit and in this motion were the same. But they are not; one of the defendants here being a mere surety in the forthcoming bond. Neither is there an estoppel by the execution of the forthcoming bond. That admits merely the existence of the obligees who have assumed the name stated in the bond: it cannot be held to admit that by that name they are incorporated. If the admission could
 64 be carried *to that extent, the action

of the legislature in granting charters to artificial bodies, by which the privilege of suing is conferred, might in all cases be superseded by the mere act of individual parties. It is true that in *Henriques v. The Dutch West India Company*, 2 Ld. Raym. 1532, it was argued by counsel that the execution of the bail bond was a conclusive admission that the corporation was legally existing, and qualified to sue in the english courts. But the decision of the court did not at all turn on any question of estoppel.*

*Note by the reporter. In *The Welland Canal Company v. Hathaway*, 8 Wend. 480, the plaintiffs gave in evidence a receipt signed by the defendant, in these words: "Received from Wm. Hamilton Merritt, agent for W. C. C. the sum of £250 currency." It was found that the letters W. C. C. stood for and

Suppose, however, that the defendants were precluded from denying the existence of the corporation at the date of the bond; on what principle can it be contended that they were precluded from denying the existence of the corporation at the time the motion was made? Such defence is in no manner a contradiction of the bond. Nor

can it be a valid objection to the evidence
 65 *offered in support of this defence, that it shews or tends to shew the nonexistence of the corporation at a period previous to the execution of the bond, and previous to the affirmation by this court in 1837. If an execution issue upon a judgment in the name of a plaintiff who was dead at the time of the recovery, the giving a forthcoming bond on that execution would not preclude the obligor from a motion to quash the execution and bond upon that specific ground.

As to the asserted assignment of the claim by the bank, supposing that fact to appear by the record of the original suit (though it does not appear in the report of the case) still it furnishes no just ground for continuing the suit in the corporate name, after the corporation has expired. No one is interested in enforcing the demand except the assignee, and he has a remedy in a court of equity. It is argued that when the assignee goes into equity to claim the subject assigned, his assignor will be an indispensable party. But if the assignor be a corporation which has become extinct, the assignee will be unable to make the assignor a party, and this inability will be an adequate excuse for his failure to do so. It is obvious then that the assignee would not, in a court of equity, lose the benefit of his assignment by the extinction of the corporation; while on the other hand his rights might be seriously affected, perhaps lost, by suffering the money to be collected under process from a court of law in the name of the extinguished corporation.

were understood to mean the Welland canal company, and that William Hamilton Merritt was the agent of the company. And it was contended for the plaintiffs, that the receipt of the defendant, and his contract with the agent of the company, ought to estop him from denying their legal existence; or at least were prima facie evidence of the fact, subject to be rebutted. The dictum of THOMPSON, C. J., in *The Dutches Cotton Manufacturing Co. v. Davis*, 14 Johns. 245, and the case of *Henriques v. The Dutch West India Company*, 2 Ld. Raym. 1532, were both cited and examined, and the conclusion arrived at by the court was, that the defendant had neither admitted the legal existence of the plaintiffs as a corporate body, nor done any thing by which he was estopped from denying it. In *The First Baptist Society v. Rapalee*, 16 Wend. 605, the contract was with "the trustees of the first baptist church;" and on the question whether the defendant was estopped to deny that the plaintiffs were a corporation, the court said it was enough to refer to *The Welland Canal Company v. Hathaway*, and especially to the reasoning of the chief justice, to shew that this contract was any thing but an estoppel.

BALDWIN, J. This is an attempt, by motion, to defeat a judgment, for matter of abatement which occurred prior to the judgment. The defendants in the action resist the process of execution, chiefly on the ground that the charter by which the plaintiffs were incorporated expired at a certain period; and that period, it appears by their own shewing, was antecedent
66 *to the rendition of the judgment.

The defence, it will be seen, is not upon the merits, but against the merits, and supposes that the merits ought not to have been considered. And the only enquiry that need be made in regard to this objection is, whether it comes in due time and by a proper mode of proceeding.

Matter of abatement either shews the action to be abatable, or that it is de facto abated. The former usually exists at the time of the suit; the latter for the most part occurs during its progress. The first must be pleaded in technical form, and at a proper stage of the cause. The last may be, but need not be, pleaded; and when apparent or made known to the court, will be declared by its order at any time, in any stage of the suit. A few examples will illustrate this distinction, and serve to throw light upon the question before us.

Misnomer of the plaintiff or defendant in the writ and declaration must be pleaded in abatement; and if not so taken advantage of, the cause proceeds to judgment and execution, according to the erroneous designation of the party. The execution must strictly pursue the judgment, and be warranted by it; and therefore if a defendant be sued by a wrong name, and omit to take advantage of the misnomer, he may be arrested on a ca. sa. by such wrong name. 1 Archb. Pract. 304; Crawford v. Satchwell, 2 Str. 1218. The plaintiff in that case brought trespass and false imprisonment by the christian name of Archibald: the defendant justified under a capias ad satisfaciendum upon a judgment against Arthur, and averred that the plaintiff in the then action was the same person who was sued in the former by the name of Arthur: and on demurrer the court held it a good plea, the defendant having missed his time for taking advantage of the misnomer, which should have been by pleading it in the first action. And the court said that in the case of a bond given in a wrong name, the obligor must be sued by that wrong name, and the execution must pursue it.

67 *So also if a feme covert sue as a feme sole, and her coverture be not pleaded in abatement, she recovers judgment (if successful upon the merits) as a feme sole, which judgment may be enforced by process of execution in exact conformity with it. This proposition is manifestly correct upon principle, and the case of Wortley v. Rayner, 2 Doug. 637, goes beyond it. In that case a verdict was found for the defendant on a plea of coverture, and a writ of fieri facias sued out for the costs, commanding the sheriff to levy

and pay them to the defendant and her husband. A rule was granted to shew cause why the writ and proceedings thereon should not be set aside for irregularity; it being a maxim that a person not a party to the record cannot be benefited or charged by the process, without a scire facias. Cause was shewn; but the rule was made absolute, the court being clearly of opinion that the proceedings were irregular: and Ashhurst justice said, the wife might have had process in her own name, because the plaintiff having declared against her as sole, he was concluded from denying it.

And to come nearer the present case, if the plaintiff be dead at the time of action brought, this can only be alleged by plea in abatement, and a judgment, if recovered against the defendant, is in the name of the dead plaintiff; and process of execution may be sued out and acted upon in his name.

In these and other instances that might be given of matter for which the writ is merely abatable, the defendant is liable to an estoppel not only by force of the judgment, but also by reason of his failure to object the false designation, or the disability, or the nonexistence of the plaintiff at the time of action brought; which omission is considered a waiver of the objection on his part. It is this latter consideration which prevents the judgment from being erroneous; for the court is consequently not bound judicially to know the fact: and
68 *hence it is that such judgment by a false name, or for a married woman or a dead person, cannot be reversed or impaired, by writ of error or any other proceeding whatever.

On the other hand an abatement de facto, for matter of abatement occurring after the commencement of the suit, rests on a somewhat different principle. I need only notice the case of death of the plaintiff or defendant after action brought. In such case the action, though well brought, cannot properly proceed when one of the parties has become extinct. The objection may come from either side, at any stage of the cause, and need not be pleaded in any shape or form. It is equally incumbent on both sides to give information of the fact to the court; and it is at their peril that those who conduct the demand or the defence take judgment for or against the dead party. To give effect, however, to the abatement, it must be declared by the act of the court; for though, in the language of the books, the cause is abated de facto, yet the abatement must be judicially pronounced. But whether so pronounced or not, it is equally error to render judgment for or against a dead man. If the death appears upon the face of the record, it is error in law; if it does not so appear, it is error in fact: and in either case the judgment may be reversed by writ of error; in the former, by a writ of error in an appellate court; in the latter, by a writ of error coram vobis in the same court.

Such is the uniform rule of the common

law in abatements de facto by the death of a party pending the action, at any time before final judgment. It applies to all cases, whether before or after a decision upon the merits, whether the cause of action does or does not survive to the representatives of the deceased party; and whether the death be that of a sole plaintiff or defendant, or of one of several joint plaintiffs or defendants. In these respects the rule has been modified *by

69 statutory provisions, but not so as to affect the principle upon which the doctrine rests. By statute 17 Car. 2, ch. 8, § 1, (substantially adopted into our code) the death of either party between verdict and judgment shall not be alleged for error. Upon the construction of this statute, and by the express provision of ours, the judgment is entered for or against the party as though he were alive. 2 Tidd's Pract. 848, 1024; 1 Rev. Code, ch. 128, § 38, p. 498. Hence the necessity of reviving the judgment by scire facias before execution can be sued out upon it. *Earl v. Brown*, 1 Wils. 302. For as the judgment is general for or against the party as if he were living at the time it was entered, so the scire facias must follow the judgment, and recite it as if it had been entered in his lifetime. 2 Wms. Saund. 721. By the statute 8 and 9 Will. 3, ch. 11, § 6, if the plaintiff or defendant happen to die after interlocutory and before final judgment, the action shall not abate, if originally maintainable by or against the executors or administrators of the party dying, but may be revived by scire facias. Our statute 1 Rev. Code, ch. 128, § 38, p. 497, is in conformity with this, but broader, as it extends to death at any time before verdict rendered. Though the statute provides that the action shall not abate, it of course means that it shall not abate so as to be incapable of revival; and does not authorize a judgment for or against the dead man, (which would be as much error as it was before,) but for or against his executors or administrators after revival by scire facias. 2 Tidd's Pract. 1027. And by the same statute of Will. 3, § 6, which ours pursues (1 Rev. Code p. 498), if there be two or more plaintiffs or defendants in a personal action and one or more of them die, if the cause of action shall survive to the surviving plaintiff or plaintiffs or against the surviving defendant or defendants, the writ or action shall not be thereby abated; but such death being suggested upon the record, the

70 *action shall proceed at the suit of the surviving plaintiff or plaintiffs against the surviving defendant or defendants. Such was, in most cases, the rule of the common law before the statute; and it was error before, as it is since, to give judgment for or against any one of the joint plaintiffs or defendants who may have died. 3 Bac. Abr. 11, title Abatement, letter F.

But though it is error to render judgment for or against a party who has died pending the action, it by no means follows that the

judgment is void. On the contrary, it is valid and effectual to all intents and purposes until reversed by a writ of error, and can be in no wise impeached or impaired in any supplemental or collateral proceeding. In *Jourden v. Denny*, 2 Bulstrode 241, in which such a judgment was reversed, Coke said, "If judgment be given against a dead person, this is not void, but to be reversed by a writ of error, for there ought to be a court, a plaintiff, and a defendant; nominatim, that it is not to be avoided by averment, but by a writ of error." The estoppel is not so extensive as in the case of death before action brought; for there, as already stated, even a writ of error is precluded. But it repels all averment or evidence (except by writ of error) of an essential fact, virtually affirmed by the judgment; to wit, the continued existence, at the time, of the party for or against whom the judgment was rendered. The estoppel, however, is only in support of the judgment, and does not obstruct its most convenient and beneficial execution. The judgment may therefore be revived for or against the representative of the deceased party, by a scire facias suggesting the death subsequently to the judgment; which suggestion the estoppel prevents from being traversed, for that would be equivalent to an averment that it occurred before. But a scire facias is not at all essential, and execution, if in due time, may be sued out in the names of the parties on the 71 record. *Nor is there any practical inconvenience in this, as may be inferred from the rules authorizing the levy &c. of a *fi. fa.* notwithstanding the death of either party after it has been sued out or tested. 1 Rob. Pract. 511; 1 Wm. Saund. 219f.

That there can be no averment or evidence of the death before judgment of a party for or against whom it was rendered, in any supplemental or collateral proceeding, whether it be a new action, or a scire facias to obtain execution, or consequently in avoidance of execution, is very clear upon authority. In 1 Rolle's Abr. 742, the following strong cases are put: "If the tenant in a *cui in vita* dies seized pending the writ; and, after, judgment is given against him, which is erroneous; and, after, the recoveror sues execution against the heir, and he brings an assize; he shall not avoid this judgment against his father, by saying that his father died pending the writ; for the judgment is not void, but only voidable."—"If a man recover in an ejectione firmoe, and then his executor sue execution per scire facias against the recoveree, the recoveree cannot avoid the judgment, nor stay execution, by saying that the testator died between verdict and judgment, or the like, but is put to his writ of error: and by the clerks, such pleas have been divers times disallowed."—"So if a man recover land in any real action, and then sue execution against the heir of the recoveree per scire facias, it is no plea for the heir to say that his father died

pending the writ, but he is put to his writ of error."—"If a man recover against the principal, and sue a scire facias against the bail, they cannot say that the principal died before judgment, for that is to avoid the judgment by plea which is contrary to the record." It is correctly stated in 1 Rob. Pract. 585, (in conformity with the decision in *M'Farland v. Irwin*, 8 Johns. R. 78,) as a settled rule, that the defendant cannot plead any matter to a scire facias

on a judgment, which he might
72 *have pleaded to the original action, or which existed prior to the judgment. In *West v. Sutton*, 2 Ld. Raym. 853, the case was this: "The plaintiff sued out a scire facias upon a judgment in assize obtained against the defendant for the office of marshal in the king's bench. The defendant pleaded in abatement that the plaintiff was an alien enemy &c. But by the whole court, the plea is ill, because this matter ought to have been pleaded in the original action." It appears from 1 Bac. Abr. 184, title Aliens, letter E. that it might have been so pleaded, either in abatement or in bar; and from *De Bret v. Papillon*, 4 East 502, that if the plaintiff had become an alien enemy after the action brought, it need not have been pleaded at all, but there might have been a judgment against him on that ground without plea.

Thus it will be seen that according to the principles of the common law, a disability of the plaintiff to prosecute his action, whether occurring before or after its commencement, cannot be relied upon after judgment as a defence against the process of execution. It is in vain to argue that the disability is a general one embracing all process whether before or after the judgment, and that it is no good objection to the evidence that it proves a continued disability, extending before as well as after. The answer is that the disability is not a substantive fact, but a consequence of the fact of death, natural or legal, which must have occurred at a precise period of time; that the estoppel excludes proof of its having occurred at a date prior to the judgment; and that its occurrence since is in the very teeth of the evidence. The argument was overruled in *Lambert v. Cameret*, coram Holt, C. J., at nisi prius, Comberbach's R. 446. In that case, it is true, the death occurred before action brought; but the principle is the same where it occurs pending the action; the only difference, as

73 already shewn, being, that in the former the estoppel is *inclusive, and in the latter exclusive, in regard to a writ of error. The case was this: "An action was brought in K. B. in the name of Cameret against Lambert, and verdict and judgment for the plaintiff in that action: now Lambert brings a writ of error coram vobis, and assigns error in fact that Cameret died before the trial of that issue, viz. tali die &c. The defendant in error, per A. B. attornat. suum, saith that he was live, et adhuc in plena vita existit; et hoc petit quod inquiratur per patriam. And

now the plaintiff in error (*Lambert*) gives in evidence that the defendant in error (*Cameret*), being a seaman, died several years ago; before the action brought. Holt said, Here you are estopped to give in evidence the plaintiff's (*Cameret's*) death before the principal action brought, for then by your plea you admitted him to be alive. Sir B. Shower pro quer. in err. We are indeed estopped to plead that he died before the action brought; but sure we may give it in evidence, for if he were dead before the action, he must needs be dead before the trial. Holt, C. J., contra: You are estopped in evidence. But here the defendant in error saying, et adhuc in plena vita existit, et hoc &c. seems to have let the plaintiff in error loose from the estoppel; whereas if he had said, absque hoc that he died between the action brought and the trial, he would have hampered him." The drift of the case is, that the continued disability consequent upon death cannot be relied upon in evidence, where the fact of death at a given period is within the range of the estoppel: unless, indeed, the estoppel has been waived by bad pleading.

These principles of the common law must govern the case before us. The charter of the bank expired pending the action, and before the rendition of the judgment upon which the process in question issued. The extinction of a corporation by efflux of time cannot be distinguished, as regards disability, from that of an individual by death. Both are placed

74 upon the same *footing by Tucker, P., delivering the opinion of the court in *Rider v. The Union Factory*, 7 Leigh 154, and by judge Stanard, delivering the opinion of the court in *The Bank of Alexandria v. Patton &c.*, 1 Rob. 499. The estoppel of the judgment is equally applicable to both cases. See the remarks of the chancellor in the New York court of errors, in *Williams v. Bank of Michigan*, 7 Wend. 541-2, upon the case of *Henriques v. Dutch West India Company*, 2 Ld. Raym. 1532, in which he shews, that where a judgment has been recovered in the name of a corporation, the corporate existence of the plaintiffs cannot be denied upon a scire facias against the bail.

The circumstance that the expiration of the charter was between the verdict and the final judgment cannot influence this question; for the statute of 17 Car. 2, ch. 8, § 1, already noticed, has no being upon the present case. By that statute (1 Bac. Abr. 12, title Abatement, letter F.) it is enacted, "that in all actions, personal, real or mixed, the death of either of the parties between verdict and judgment shall not be alleged for error;" and by ours, in accordance with it, (1 Rev. Code 498,) "in all actions, real, personal or mixed, if either party should die between verdict and judgment, such death shall not be pleaded in abatement, but judgment shall be entered as if both parties were living." The terms of this statutory provision, it will be seen, are only applicable to the natural death of

an individual, and do not embrace the expiration of an incorporated company. There is no construction according to the spirit or equity of the statute, which would extend it to the present case. The spirit of the statute was to prevent the action from being defeated after a decision upon the merits, even in cases where the right of action dies with the person; and this was accomplished by making a death between verdict and judgment, in point of law, and against the fact, a death

75 after judgment, so as thereby *to authorize a revival for or against the representative of the deceased party. But to extend the statute to corporations would be to produce directly the opposite effect, namely, to defeat the action after a decision upon the merits; inasmuch as there can be no representative of an expired corporation, and of course no revival by scire facias. There is no equity in such a construction: on the contrary it is fraught with the grossest injustice, for the result is that the creditors and stockholders of the expired corporation are deprived of all redress, though the justice of the corporate demand has been established by the verdict of a jury. To bring about such a result by the construction of a statute beyond its letter, would be an utter perversion of all reason and justice. I am not aware of any authority which, by a freedom of construction, has extended the provision of the statute beyond its express terms. On the contrary, the statute 8 and 9 Will. 3, ch. 11, § 6, authorizing a revival in case of death after interlocutory and before final judgment, has been held not to extend to cases where the party dies before interlocutory judgment, though after the expiration of the rule to plead. *Wallop v. Irwin*, 1 Wils. 315.

The cause of the defendants is not at all aided by the proceedings which were had on the supersedeas to the original judgment in their favour upon the special verdict. The effect of those proceedings was to suspend and reverse that judgment, and produce a judgment de novo in favour of the plaintiffs. The original judgment was rendered in October 1831: the bank obtained a supersedeas thereto in June 1832: the charter expired in January 1835: the supersedeas was heard in April 1837; when this court reversed the judgment, and proceeding to give such judgment as the circuit court ought to have rendered, gave judgment for the plaintiffs for the debt demanded &c. which judgment was entered in the circuit court in May 1837. This

76 *judgment, rendered after the expiration of the charter, notwithstanding affirmed the then continued existence of the bank. It was a judgment de novo, having no relation to any period antecedent to its date. A judgment of affirmance relates to the time of the judgment affirmed, by removing the objections to it and establishing its original validity. A simple judgment of reversal has a like relation, by destroying the judgment reversed,

and rendering it utterly null and void from the beginning. But a judgment de novo for the appellant, upon reversal of the adverse judgment, has no connexion in point of time with the latter.

That the final judgment thus recovered by the plaintiff is not liable to contradiction, either directly or indirectly, nor to reversal by a writ of error, having been rendered by the highest judicial tribunal, is not a subject for regret, as it works no injustice. If the defendants are without remedy, it is because they have sustained no wrong. This alone would be a sufficient answer to the ancient writ of audita querela, which is an equitable action to be relieved from some oppression or injustice in the proceedings, where the party has had no day in court, nor can have a writ of error. 2 Wms. Saund. 148 a. b. c.; 3 Bac. Abr. 56; Error, A.; 1 Id. 424. Much less can the party avail himself of the modern substitute by motion, where the execution is in due time, is in conformity with the judgment, and there has been no abuse of that process, nor release or discharge of the demand. If the court, under such circumstances, could have the power to quash on motion, it would assuredly be merely discretionary; and it would be a strange exercise of discretion to sustain the motion in a case like this. Even before judgment the court, after a decision upon the merits, may refuse to arrest the proceedings on the ground of a supervening disability, upon the authority of *Vanbrynen & others v.*

77 *Wilson*, 9 East 321, in which case the plaintiffs had become *alien enemies since the verdict, but the court refused to stay the judgment and execution, saying, if the defendant had any remedy at law, he might avail himself of it. Arguments founded on the supposed disability on the part of the plaintiffs, after the money shall have been made by the execution, to coerce payment of it from the ministerial officer, or others into whose hands it may come, can avail the defendants nothing. That is a matter in which they have no concern. All they have to do is to pay this honest debt to the proper officer of the law, without troubling themselves about its ulterior disposition; leaving it, if there be any difficulty, to the vigilance of the legislature to devise, or the astuteness of the courts to ascertain, an adequate remedy for an undoubted right, by which those entitled in the stead of the bank, as creditors, stockholders or purchasers, may make the fund available. In truth, however, in the present case, there is no difficulty in this matter; for it appears from the record on the original appeal, that after the judgment for the defendants, before the expiration of the charter and before the supersedeas was awarded, the bank assigned its demand to Edward B. Hicks; for whose benefit the execution on the final judgment for the plaintiffs has been endorsed by the clerk, as appears from the record on the present appeal. His right therefore to receive the

money when made upon the execution, cannot, I presume, be doubted. On the other hand, if the process of execution upon the judgment be defeated, he will be driven, and that by a mere technicality, to the tedious, uncertain and precarious remedy of a new action or a bill in equity. And what can be more technical than a distinction founded upon the mere circumstance that the assignee is not the formal, but only the substantial plaintiff, for whose benefit the execution is endorsed, who has a right to control it, and who is entitled to its proceeds?

78 *I have said that the final judgment in the cause affirmed the continued existence of the bank at the time of its rendition. I do not thereby mean the continued existence of the charter; which is evidence of the fact, but not the fact itself. The fact itself is a legal conclusion, compounded of law and fact. A corporation may have a legal existence notwithstanding the expiration of its charter. The legislature may thereafter confer it for a particular purpose, such as the recovery by suit of its just demands; or a judicial tribunal may infer such remaining capacity, however erroneously, from common law principles. The legal conclusion of the judgment overrules all conflicting evidence and argument. And evidence of the expiration of the charter before the judgment was rendered either disproves the then legal existence of the bank, or it does not: if the former, it is inadmissible, if the latter, unavailing, as a defence against the execution of the judgment. The strongest evidence after judgment, against the existence of the bank before, amounts to nothing; for it has to encounter every intendment of law and fact to the contrary, and if that were not so, every intendment of an adjudication against both law and fact; and either way the result is decisive. After judgment, the defendants can only be permitted to prove a supervening disability; and that is not pretended. This defence after judgment is in truth a renewal, in part, of that which was made before. Suppose it appeared from the record, that the defendants, pending the cause, had, by plea or motion to abate the action, alleged the extinction of the bank by expiration of the charter, and that the court overruled the objection, because such was not the fair construction of the charter, or of the act supplemental thereto, or because in its opinion a suit does not abate by the expiration of the charter; could the same question be renewed after judgment, by

79 *a plea to the forthcoming bond, or a motion to quash the execution? And this is substantially the true state of the case. The statutes of N. Carolina establishing the bank and constituting its charter were set forth in the special verdict; and thus presented directly the question, whether judgment could be rendered for the plaintiffs after the expiration of the charter. We may not know whether the question was presented in argument at the bar, or not.

It is enough that it was presented by the record, and of course adjudicated by the court. This is indeed more than enough; for the effect of the judgment would have been precisely the same, whether the question had appeared on the record or not; since a judgment precludes all questions against its effect and operation, not only which were, but which might have been made in the cause. And if a plaintiff be competent to recover judgment, I cannot understand how, things remaining the same, he can be incompetent to obtain execution to enforce it. I presume it would hardly be contended that an estoppel must be pleaded and cannot be relied upon against the evidence, where the defence is not by pleading, but by evidence only; or that it is to be disfavoured where it goes to sustain the merits of the cause.

The obstacles suggested in argument to suing out the process of execution, for want of the agency of some one authorized to act for the plaintiffs, seem to me merely imaginary. The authority of the attorney at law recovering the judgment is not extinguished by the demise of his client: the assignee entitled to the money has a right to issue and control the execution: and after the execution has issued, as in the present case, it is surely not competent for the defendants to allege that it was not issued by the plaintiffs.

I am wholly at a loss to perceive how, in a case like this, the regularity of the execution can be impeached, without impeaching the validity of the judgment, 80 at least for the purpose of execution; and if it be not good for that purpose, it is good for nothing as a judgment in the cause, being incapable, from its very nature, of revival, and if not wholly nugatory, utterly abortive so far as regards the powers of the court which rendered it. Such a judgment would, to my mind, be extremely anomalous.

If the doctrine of the appellants be correct, it is very remarkable that no case has been produced by their learned counsel, and I presume none can be found, in which an execution has been quashed on the ground of the demise of the plaintiff before judgment, or in which an audita querela was sued out to prevent or set aside an execution on that ground; and that the writ of error should in such cases be the habitual and only recognized remedy. To tolerate such a practice would, I apprehend, impair much the force and dignity of judgment, and not unfrequently lead to the renewal of controversies already had in the action, or a reservation of them till after an unsuccessful trial upon the merits; controversies which might sometimes involve questions of law and fact extremely troublesome and perplexing, occasioning great delay (as in the present case) in what ought to be the final administration of justice, and wholly unfit for the informal and summary remedy by motion. On the other hand, I cannot perceive any inconvenience in repelling such tardy efforts in abatement, or that do-

ing so could occasion injustice in any imaginable case.

It will be seen that the whole argument against the regularity of the execution, in whatever form or shape presented, turns upon the assumption of the expiration of the charter more than two years before the rendition of the judgment; and if I have succeeded in shewing that evidence of the fact is inadmissible, or if admitted avails nothing, against the effect and operation of the judgment, then there is, as I con-

81 ceive, an end of the *question. There is no foundation in authority for the idea that it is necessary, under any circumstances, to sue out a scire facias after judgment, because of matter which occurred before. The rule relative to marriage or death, and formerly but not now to bankruptcy, that where a new person is to be benefited or charged by the execution of a judgment, there ought to be a scire facias to make him a party to the judgment, (2 Tidd's Pract. 1021; 2 Archb. Pract. 93,) applies, *ex vi termini*, only to cases where the new interest accrues after the judgment, and not where it accrues before. The change of interest (where it operates at all), when before judgment, goes to the action, and when after judgment, to the execution. And the rule never applied to assignment by act of the party, whether before or during the action, or after judgment. The statute 17 Car. 2, ch. 8, it is true, in case of the natural death of a party between verdict and judgment, renders a scire facias, not by express terms but by necessary consequence, indispensable; because it makes what was at common law a death before judgment, a death after judgment. But it by no means follows that at common law, where a party died before the action, or pending the action, whether after or before verdict, a scire facias was necessary to have execution. If it had been, it is strange that there is no case at common law to that effect, and that the question should never have arisen until and upon the statute. In truth, at common law there could be, pending the action, no scire facias upon a death before judgment, because the action abated; and it would be remarkable if that which, before judgment, could not be employed to revive the action, should, upon the identical fact, become indispensable afterwards to revive the judgment. Suppose the scire facias should state truly, that the party died before the action, or before the judgment; could it be sustained on demurrer? And does the law re-

82 quire that the scire *facias should suggest falsely a death after judgment, when in truth it occurred before? Again, if it be true, as suggested in the case of *Rider v. The Union Factory*, that upon the extinction of a corporation its personal estate goes to the commonwealth, it furnishes no reason for quashing an execution upon a judgment obtained by the corporation during its legal existence (as in this case the judgment itself establishes), but the reverse, for it would deprive the

commonwealth of that remedy; and surely it can have no application to a case where the debt was assigned by the corporation before its extinction.

Thus, according to my view of the subject, where an execution is in due time and conforms to the judgment, it cannot be abated for any matter which occurred before. That the judgment of this court for the plaintiffs upon the special verdict was the final judgment in the cause, I think there can be no room to question. The writ of error, it is true, is a new action; but it is brought to have the proper judgment. "Where a judgment is given for the plaintiff, and the defendant brings error, there shall only be judgment to reverse the former judgment; for the suit is only to be eased and discharged of that judgment: but where the plaintiff brings error, the judgment shall not only be a reversal, but the court shall also give such judgment as the court below should have given; for his writ of error is to revive the first cause of action, and to recover what he ought to have recovered by the first suit, wherein erroneous judgment was given." *Parker v. Harris*, 1 Salk. 262. And where the judgment of the court below is against the plaintiff on a special verdict by which the debt or damages are ascertained, (as in this case,) the appellate court, in case of reversal, gives a new and complete judgment for the plaintiff to recover the debt or damages. 2 Wms. Saund. 101 x. Where the damages are not assessed, the judgment is of course interlocutory;

83 *and a writ of enquiry is not only awarded by the king's bench when that is the appellate court, and the subsequent proceedings had there, but, being also a court of original cognizance, the execution issues from that court, as it does where the first judgment was final. *Ibid.* and 101 z.; 1 Rob. Pract. 673. And so by our practice and statute law, the court of appeals renders, on such reversal, such judgment final or interlocutory as the court below ought to have rendered, and its judgment may be entered by the clerk below in vacation as well as in term time, and if final, execution in either event may be sued out thereupon. 1 Rob. Pract. 672. There can be no doubt, therefore, that the judgment of this court was the final judgment between the parties, though repeated by the circuit court upon the remittitur, and although the execution issued from the court below, as it does in England when the appellate judgment is in the house of lords or exchequer chamber; in which respect, and in regard to the proceedings after an interlocutory judgment, this court, not being a court of original cognizance, is governed by the rules which prevail in the courts last mentioned.

The judgment of this court was not the less final, because the charter of the bank expired pending the writ of error. If, for that or any other reason, this court had abated the appellate suit, such abatement would not have extended to the original

action, which was determined by the judgment therein; and the only effect of the abatement would have been to extinguish the supersedeas, leaving the judgment to which the writ of error had been granted in full force. But the appellate cause was not abated, and could not be, however strong the reason, without the order of this court. This court, instead of directing an abatement, proceeded to hear and decide the cause; reversed the judgment of the court below; and gave a new and complete judgment for the plaintiffs. That judgment has the same effect and operation,

84 tion, *whether it was right or wrong: and if it could even be regarded as a mere mandate to the court below to proceed to final judgment between the proper parties, the result would not be different; for the circuit court has proceeded to final judgment, in conformity, as it conceived, to such mandate; and if not between the proper parties, that is error for which the judgment can only be impeached by writ of error. If neither the judgment of this court for the plaintiffs, nor that of the circuit court in conformity therewith, is to be regarded as the final judgment, I am utterly at a loss to understand what is the present condition of the cause; and if either be the final judgment, what authority or control can now be exercised over it by the circuit court.

But I cannot doubt that the course of this court in declining or omitting to abate the writ of error, and proceeding, after reversing the judgment for the defendants, to final judgment for the plaintiffs, was perfectly correct; nor can I conceive how it can be regarded otherwise, without repudiating the principles recognized in the case of *The Bank of Alexandria v. Patton & c.* above cited. In that case a bill in equity was filed by the bank, to set aside a voluntary conveyance made by its debtor, and subject the property conveyed to the satisfaction of its demand. The chancellor, upon a hearing of the merits, dismissed the bill of the plaintiffs, who appealed to this court. Pending the appeal, the charter of the bank expired, and the appellees moved the court, on that ground, to abate the appeal. But it being conceded that the bank, pending the original suit, and before the expiration of the charter, had made an assignment of its claim, this court refused to abate the appeal, and proceeded to hear and decide the cause. The decree of the chancellor was affirmed; but if it had been reversed, then this court, in its discretion, would have given the proper relief upon the 85 merits, or *settled the principles of the cause, and remanded it for further proceedings in the court below. The reasons for the decision will be found stated in the opinion of judge Stanard, in which a majority of the other judges concurred. It was by that opinion held, that in Virginia a writ of error or appeal in no case abates by the death of either party, where the cause is capable of being revived for

or against his representatives; that the established rule in such cases requires the revival of the appellate cause by scire facias; that where, upon the extinction of one of the parties, as of a corporation by expiration of its charter, there is no legal representative or successor for or against whom the appellate cause can be revived, the court will, upon the principles and authority of *Rider v. The Union Factory* above cited, abate the writ of error or appeal, unless it appear that the rights involved in the cause passed by assignment to living persons before the legal extinction of the party on the record, in which case the court, to prevent a failure of justice, will not abate the writ of error or appeal, but proceed to a hearing, and a judgment or decree, between the parties on the record. It will be seen that the present case and the one cited were, in regard to the preliminary question, precisely the same; except that one was an action at law, and the other a suit in equity. The ruling principle of both was to remove a formal impediment to the administration of justice. This was to be accomplished, in the first place, by refusing to abate the appeal, and examining the merits of the cause; and if the merits should be ascertained to be in favour of the appellant, then by proceedings adapted to the respective forums. The plastic powers of a court of equity allow the introduction of the equitable claimant as a party in the cause, and suggest the remanding of the suit to the court below, after settling its merits, to enable him to become the plaintiff by a supplemental 86 bill. The more *rigid rules of a legal forum do not permit this, and require the progress to final judgment and execution in the name of the formal party. This, and nothing more nor less, was the direct and inevitable effect of not abating the writ of error; unless, after overruling the abatement of the writ of error, and reversing the judgment of the court below, this court, in proceeding to give such judgment as that court ought to render, had abated the original action. This it ought to have done, if the bank was to be defeated by the expiration of its charter; and this it might have done upon the authority of *Hook's adm'rs v. Hancock*, 5 Munf. 549. There, in an action of slander, this court reversed the judgment rendered for the plaintiff in the court below, for error on the trial of the issue; and then abated the original action, on the ground that the defendant having died subsequently, the action no longer survived against his representatives. But instead of this course, which was obvious if this court intended to defeat the recovery, it rendered final judgment for the plaintiffs, to prevent the recovery from being defeated; and now the effort of the defendants is to abate that judgment in effect, by preventing its execution. Such a course imputes to this court a mere mockery of justice and an utter trifling with its own authority. With judicial knowledge of the fact that the charter of the bank had

expired, it renders a direct, peremptory and unconditional judgment for the recovery of the debt, interest and costs; foreseeing that this exercise of its supreme power was to be disregarded and set at naught by the very court whose judgment it had reversed; and thus deciding, in one and the same breath, that the recovery should not and should be defeated, or that its own conscious error should be corrected by the summary and informal action of the subordinate jurisdiction.

I will not say that where a party dies pending an appeal, in a case capable of revival, and the cause notwithstanding 87 by inadvertence passes through the appellate court without revival, it may not still be revived in the court below, upon the remittitur. I believe the practice in the circuit courts is otherwise, and very properly so. But where the suit is incapable of revival, and the demise of the party appears to the appellate court upon the record, or is made to appear by extrinsic evidence, and that court, without abating the appeal, proceeds to reverse the judgment, and then, instead of abating the action, proceeds to a final judgment *de novo* in the cause, I consider it beyond the power of the court below to impose the impracticable condition of revival, or in any wise to defeat or obstruct the execution of the judgment. In the present case the appellate court, in rendering final judgment, was not confined to the consideration of what judgment the court below ought to have rendered at the time of the action of that court, independently of that which ought yet to be rendered; but being bound by its own recognized doctrine to consider the question of abatement, had to regard all proper evidence on the subject, whether furnished by the record, or evidence *aliunde*. And here it was furnished by the record, shewing upon its face the expiration of the charter; and no countervailing evidence, such as a subsequent enabling statute, was offered, as there might have been; for, as was held by the opinion delivered in *The Bank of Alexandria v. Patton &c.* such incidental questions are open to enquiry by the requisite means. The case, to my mind, stands precisely upon the same footing as if it had never been taken to the appellate court, and judgment had been rendered for the plaintiffs by the circuit court after the expiration of the charter.—I think this plea in abatement comes too late.

The view of the subject thus presented renders it unnecessary to consider the objections taken by the appellee's counsel to the mode of presenting and reserving 88 *the question in the court below.

And it surely cannot be necessary, upon the other supposed error alleged by the appellants, to wit, that the execution was irregular in embracing two of the defendants who had died before the judgment, to say more, than that it was not the less a judgment against those defendants, and as the execution conforms to the judgment, it is an objection which goes to the latter,

and not to the former: and the rule is perfectly well settled, that the execution must embrace all the defendants named in the judgment, though some of them have died, and the officer proceeds upon the execution as if the names of the decedents were not included therein. 1 Rob. Pract. 575.

My opinion is that there is no error in the judgment of the circuit court, overruling the motion to quash the first execution and the forthcoming bond, and awarding execution upon the bond.

ALLEN, J. The authorities bearing on the questions presented by this case have been fully reviewed by judge Baldwin. They clearly establish, that where matter in abatement existed prior to the suit, advantage must be taken of it by plea in proper time, and that after judgment the party is estopped, and cannot avail himself of it by a writ of error: and that where such matter occurs pending the suit, if not suggested or brought to the notice of the court before judgment, though a writ of error *coram nobis* in some cases may be prosecuted, the judgment until reversed estops the party from alleging the fact. And as a consequence from these principles, in all proceedings based upon the judgment and tending to enforce it, the party is concluded from availing himself of this error in the judgment. Thus the *scire facias* to revive is a mere continuance of the proceedings, and it is not competent for the heir or personal representative of the original defendant to set up his death 89 before judgment, in *order to defeat the plaintiff. The judgment unreversed has established the fact to be otherwise. And hence the well settled rule, that the defendant cannot plead any matter to the *scire facias* on a judgment, which he might have pleaded to the original action, or which existed prior to the judgment. So in a *scire facias* upon a recognizance of bail, the bail cannot require evidence of that which was necessary to entitle the plaintiff to recover in the original action, because the *scire facias* is a continuance of the proceedings. That is the amount of the decision in *Henriques v. The Dutch West India Co.*, 2 Ld. Raym. 1532. It was a proceeding on the recognizance of bail, and the plaintiffs were not required to produce proof of their incorporation; but the reporter says he was informed by lord King, before whom the original action was tried, that on the trial of that case the proof was required. So with regard to alienage and coverture, the disability is personal; but judgment having passed, the defendant is concluded; and the parties continuing to exist, the execution follows the judgment. These principles, however, respect the validity and effect of the judgment, in a proceeding to enforce it, and based upon it: but their application to the question now under consideration is not so distinctly perceived. That respects the regularity of the process. If the state of facts existing at the time the process issued be such as

to render it unlawful, the process is void. And this irregularity may frequently appear by extrinsic circumstances. As where the execution issues against a defendant who is dead, the death does not appear on the face of the writ, but appears by evidence aliunde. *Woodcock v. Bennet*, 1 Cowen 739.

It is argued, that to impeach the regularity of the execution, in a case like this, is to impeach the judgment for the purpose of execution; and that as there can be no revival, if it be not good for that purpose, it is good for nothing in the cause.

90 This might be conceded, *and yet not affect the question. If by the common law the debts of a corporation, either to or from it, are extinguished by its dissolution, (as laid down in *Rider v. The Union Factory*, 7 Leigh 156,) the fact that the debt is due by judgment cannot operate to save it. And if, by a renewal of its charter, it is restored to all its rights and liable for all its obligations, (2 Kyd on Corporations 516,) it may, when so renewed, revive and obtain the benefit of the judgment. If the personalty of an expired corporation goes to the commonwealth, or if there has been a valid assignment before the dissolution, in either case the judgment may be enforced, if not at law, by a proceeding in equity. And by whatever mode enforced, the judgment establishes conclusively the validity of the debt and the right of the party to recover, at the time of its rendition. With as much force it might be argued, that as at common law, and before a scire facias was given to revive after the year and day, there could be no revival, the judgment was of no validity. And yet in such case the judgment, in an action of debt upon it, cannot be assailed for any matter which might have been pleaded to the original action.

At common law, the death of a sole plaintiff or defendant abated the suit. 2 Tidd's Pract. 1168. The statute of 17 Car. 2, ch. 8, provided that the death of either party between verdict and judgment should not be alleged for error. Under this statute, judgment is entered for or against the party as though he were alive. *Weston v. James*, 1 Salk. 42. But there must be a scire facias to revive it before execution. *Earl v. Brown*, 1 Wilson 302. In the case just cited, the plaintiff died after verdict and before judgment: judgment was entered and execution taken out, without any scire facias sued out by the plaintiff's representative; and the whole court held, that though by the 17 Car. 2, ch. 8, the judgment was regularly entered, yet the *fi. fa.*

91 issued *irregularly, for there ought to have been a scire facias. That is a much stronger case than the one under consideration; for the death of the plaintiff (a natural person) does not extinguish the debt. But the scire facias in that case is supposed to be rendered necessary by the statute of 17 Car. 2, because the judgment is general for or against the party as if he were living at the time it was entered, and the scire facias must follow the judg-

ment, and recite it as if it had been entered in his lifetime. If, before the statute, a judgment were entered against or for a dead man, the same result would follow the judgment, until reversed, would be evidence that the party was living; the scire facias would so recite it; and the defendant would be estopped on the scire facias from shewing the contrary. That being the case, in what sense can it be contended that the statute rendered the scire facias necessary? Where it authorizes a judgment to be entered as though the party were living, the same effect should be given to it as where the judgment was so entered erroneously. And if in the latter case an execution might have been taken out in the name of the parties on the record, a fortiori would such an execution have been regular where the judgment itself was legalized. The scire facias could only have been rendered necessary, because the common law required it, and the statute, whilst curing the error in the judgment, left the parties to their common law remedies to enforce it. And the case referred to is a decisive authority, that, by the common law, the judgment must be revived in the name of the proper representative. No case has been adduced establishing a contrary position. But we have cases without number, deciding that if the plaintiff dies after judgment, there cannot be execution before a scire facias in the name of the representative. *Com. Dig. title Pleader*, 3 L 1; 1 Rolle's Abr. 900, pl. 15, 20. But if the plaintiff dies after execution, in

92 that case the sheriff *may go on and levy the money, and if there be no executor or administrator, the money is to be brought into court. *Thoroughgood's case*, Noy's Rep. 73. As between the parties, the execution has relation to its teste, (*Tidd's Pract.* 915,) and if tested before the party's death, is regular, though issued afterwards. *Cro. Car.* 459. But if tested after the plaintiff's death, it is irregular. *Heapy v. Parris*, 6 T. R. 368. How would this question so frequently have arisen, if, by the common law, execution might be sued out by or against a party where the death occurred before judgment? There could be no good reason for a distinction, whether the party died before or after the judgment, so far as the regularity of the process was involved. The rule which has always prevailed is laid down in *Pennoir v. Brace*, 1 Salk. 319, that where a new person is to be better or worse by the execution, there must be a scire facias, because he is a stranger, to make him a party to the judgment; as in the case of an executor or administrator. And hence the necessity of a scire facias in all cases of death before execution. Here the corporation is extinct: that it cannot have benefit by the execution is evident; and whoever is to be the better for it, should in some form be brought into the case. If the forms of proceeding at law interpose difficulties, the party may have redress in equity.

If then there is no authority for the

position assumed, that in case of death before the judgment, a scire facias was not essential, and execution might be sued out in the names of the parties on the record; but on the contrary the common law did, whenever there was such change of parties, require a scire facias; the whole argument derived from the doctrine of estoppel and the adjudication of the fact, falls to the ground. The estoppel applies only where the attempt is made to impeach the validity of the judgment for that cause. In such

93 case the party is precluded by the judgment from denying the fact.

And that is the effect of the decision in *Comberbach's Rep.* 446. The proceeding there was to reverse the judgment by writ of error coram vobis. The plaintiff having died before action brought, the defendant, by pleading to the action, waived the objection and admitted him to be alive. If therefore the plea to the assignment of error had simply averred that the plaintiff in the original action was alive at the time the action was brought, and relied upon the record, the plaintiff in error would have been estopped. But even that case proves that the technical estoppel must be pleaded in such way as to preclude the party from shewing the contrary. The defendant in error averred by his plea the continued existence of the party to the time of the judgment; and this let the plaintiff in error loose from the estoppel. He was permitted to shew by evidence that the party was dead at a time when, by the record, he was deemed to be alive; and by so doing, to avoid the judgment. But in a case where the judgment is not impeached; where the motion raises merely the question whether the process is irregular in itself or in the mode of issuing it, (a question to be determined with reference to the state of facts existing at the time the process issued,) it would be carrying the doctrine of estoppel, and the intentment of an adjudication, to a great length, if the defendant is to be precluded from shewing that at that instant of time no party was in existence capable of suing out process, because such existing disability is a consequence of another fact, which occurred before final judgment.

The case of *The Bank of Alexandria v. Patton &c.*, 1 Rob. 499, is supposed to have some bearing on this question. In that decision I concurred, for the reasons assigned in the opinion delivered, and also because I felt satisfied that in this court there was no necessity for a revivor in any case; that though it might be convenient,

94 when a death occurred, to apprise the parties interested of the pendency of an appeal, there was no absolute necessity for it, and it was the duty of this court, whenever justice required it, to determine the questions appearing on the record, and leave the parties to proceed thereafter as their interests might require and the law permit. The court held in that case, that before the act of 1806, appeals and writs of error did not abate by

the death of either party, but his representative or the other party might revive by scire facias; and that even this practice did not require such revivor at the time of the judgment or decree of this court, if the death had occurred subsequent to the argument. The difficulty of proceeding in error unless there were existing parties, legal or natural, at the time of the hearing and judgment, was therefore not insuperable. When, as in that case, there was a suggestion that rights might be compromised unless the decree, if erroneous, were removed out of the way, it was competent for the court to act on the decree in the name of the parties on the record. The power was considered essential to prevent injustice: and the case was put, of a decree or judgment of the court below in favour of the corporation against the appellant, and a subsequent dissolution of the corporation; when, if the appeal must necessarily be abated, the recovery would be left in force, and the appellant liable to be charged with it at the suit of an assignee. The court in the present case, in rendering judgment on the special verdict, decided upon the facts as there presented, and with reference to the time when presented. The correctness of the judgment of the inferior court was the matter for consideration: and on the facts as presented to that court, and passed upon by it, no impediment to a final judgment existed. The corporation was then in being, and entitled to recover. And this court, by its reversal, and the entry of such judgment as that court should have given,

adjudicated that fact and nothing
95 *more. Had the dissolution of the corporation been suggested here, and rights might have been compromised on one side or the other by abating the appeal, this court, under the authority of *The Bank of Alexandria v. Patton &c.* would have refused to abate, and proceeded to render the judgment it did. It passed no judgment upon matters which supervened after the special verdict, and the judgment on it by the court below. Its action was confined to the correction of the error in that judgment, as of the time it was pronounced, without considering or deciding what would be the effect of any subsequent events upon the rights of the parties. The charter might have been renewed after the appeal; but this would be matter extrinsic to the record. In such case the appeal ought not to be abated. But if the rights of the parties are to be considered as determined as of the time of pronouncing the judgment in the appellate court, the court must, by abating the appeal, decide that the corporation has expired, or, if it notices the extrinsic evidence, the judgment would be rendered not upon the record as it came from the court below, but upon that in connexion with matter for the first time exhibited in this court.

The argument pressed upon us as to the merits of the case, and the inconvenience, is not entitled to much weight if the law is obligatory. But in truth, where is the in-

convenience or hardship complained of? If the corporation had expired by efflux of time after judgment, I presume there could be no pretence that an execution could issue in its name; for in that case, this technical doctrine of estoppel would not apply. There would be no judgment determining, against the fact, that that was existing which had ceased to exist. Yet in such case the judgment would remain, as in this, entitled to all the respect of a judgment, whenever enforced in a proper way by the party entitled to enforce it. But on the other hand,

serious inconvenience, if *not gross injustice, might and probably would flow from establishing the principle contended for. Is any man who can succeed in inducing the clerk to issue an execution on a judgment standing in the name of an expired corporation, to be permitted to enforce payment? If the sheriff collects the money, to whom is he to pay it? It is suggested, that there is an assignee: but how is his right to be determined on an *ex parte* proceeding, without notice to any party interested in controverting his claim if erroneous? The debtor has an interest in seeing that the money he owes is paid into the proper hand. By requiring the party (whoever he may be) claiming to be entitled to the benefit of the judgment, to enforce it in the proper mode, the injustice which may be committed by permitting execution to issue in the name of the extinct corporation, is guarded against, and the rights of all secured.

It seems to me that the court should have overruled the motion for a judgment on the forthcoming bond, and quashed the execution.

STANARD, J. It is not questioned that if a corporation becomes extinct by the expiration of the term of its corporate existence, pending a suit at law for a corporate demand, and that fact be brought regularly* under *the judicial cognizance of the court in which the suit is pending, the action must terminate. It is equally free from doubt, that if, after judgment in favour of a corporation, the corporation becomes extinct by the expiration of the term of existence granted by the charter of incorporation, no execution on such judgment can regularly be sued out in the name of the corporation, and if one be issued, it is liable to be quashed, on shewing the fact

of the extinction of the corporation before the emanation of the execution. On the other hand, I do not question that if an original judgment be rendered in favour of a corporation, as it could not regularly be rendered unless the existence of the corporation continued, the necessary intentment from the rendition of it is, that the then continued existence of the corporation was either proved or admitted; and if execution be sued on the judgment, the defendant, being by this intentment estopped to deny the existence at the time of the judgment, would not, on a motion to quash the execution, be admitted to controvert this intentment, and proof on such motion of the extinction of the corporation before judgment would be inadmissible or unavailing.

Assuming the foregoing propositions as unquestioned or unquestionable, the enquiry is, by which of them should the case in judgment be ruled? The case that the record presents is that of a corporation plaintiff existing at the time of the original judgment in the court below, and at that time, according to the judgment of the court of appeals, entitled to judgment against the *defendants, but whose charter expired pending the proceedings and before the final judgment in error: and this expiration of its corporate existence is the matter alleged for quashing the execution which issued on that judgment. If the expiration of the charter of incorporation pending the proceedings in error, and the subsequent judgment in error notwithstanding that expiration, be properly assimilated to an original judgment after the expiration of the charter, then, according to the second assumed proposition, the judgment precludes the enquiry into the existence of the corporation at the time of its rendition; and therefore forbids or nullifies the proof of the nonexistence of the corporation at the time of the judgment in error, and consequently at any antecedent time. The material question then is, can this assimilation be properly made?

The principle which the second proposition rests is, that the expiration of the charter before original judgment was a fact on which the defendant might have protected himself from the judgment, and if properly brought to the judicial cognizance of the court, would have denied to the court judicial capacity not only to render the

*Note by the reporter. The case of *Agnew v. The Bank of Gettysburg*, 2 Harr. & Gill 478, shews the necessity of bringing the fact before the court in a regular way. This was an action of assumpsit brought the 30th of July 1824 by the bank against Agnew, and the plea was the general issue. At the trial on the 15th of February 1826, the plaintiffs, to shew that when the suit was commenced they had a right to sue, gave in evidence letters patent whereby it appeared that at the time the suit was brought they were an existing corporation. But the same letters patent shewed that the charter was limited to the first day of April 1825, and so had expired between the time of bringing the suit and the time of

trial. The defendant prayed the court to instruct the jury that from the evidence the plaintiffs were not entitled to recover. This instruction the court refused to give; and verdict and judgment being rendered against the defendant, he appealed. The court of appeals of Maryland was of opinion that the defendant could not, under the general issue, have given in evidence the dissolution of the charter subsequent to the institution of the suit; and this being so, that he could not be allowed to avail himself of the fact to nonsuit the plaintiffs, merely because it appeared in the letters patent which the plaintiffs were compelled to adduce. The court therefore affirmed the judgment.

judgment, but to proceed in the cause; and the legal intendment is, that the fact of the continued existence of the corporation was conceded or proved. Is such the predicament of the case in error? Does the judgment in error necessarily import that the parties are existing at the time of its rendition, so as to create an estoppel to the denial of that fact, in proceedings in execution of the judgment? This enquiry must be answered in the negative. It has been the constant practice of this court, where natural persons are the litigant parties, to proceed to judgment as though such persons were living, if the death occurs between the argument of the case and the judgment, though the judgment be rendered months or even years after the death: and on the return of such a judgment

99 *to the court below, it could hardly be contended that the successful party could proceed to have it executed without process of revivor in the court below. In the case of a corporation whose existence may have terminated pending appeal or writ of error, and to which there is no legal succession nor can be a legal representative, but whose rights, at least in equity, may have passed to others by assignment for value during its existence, the appellate proceedings are continued to judgment or decree in the appellate court, irrespective of the fact that the corporate existence has terminated. Such was the decision of this court in the case of *The Bank of Alexandria v. Patton &c.* According to that decision, had the attempt been made, when this case was in the court of appeals, to arrest further proceedings in error, and thereby intercept the judgment that was rendered, on the ground that the charter of the corporation had expired, it would have been fruitless. The court would, notwithstanding such objection, have proceeded to a decision, and would have rendered such judgment as the court below ought to have rendered. As the expiration of the charter would not have prevented the rendition of the judgment, there cannot be a legal intendment of the then continued existence of the corporation from the rendition of the judgment, as in the case of an original judgment. The judgment in error, in respect to this question, has relation to the time of the judgment of the court below, being the judgment that ought to have been rendered by that court; and execution on that judgment, if sued out in the name of a party who may have ceased to exist pending the appeal or writ of error, is as liable to be objected to on that ground, as it would be if the judgment on which it issued had been rendered by the court below when its original judgment was rendered. There can be no estoppel to the allegation and proof of the

100 expiration of the *corporation, resulting from a judgment which, so far from implying either concession or proof of its existence at the time of its actual rendition, would have been rendered though

there had been the allegation and proof that at that time its existence had terminated.

The evidence that was offered to show that the corporation had ceased to exist at the time the execution issued in its name was, I think, prima facie proof thereof, and, uncontrolled by other proof, ascertained that fact: and that being ascertained, it established that the execution on which the forthcoming bond was taken issued irregularly, and the court ought to have overruled the motion for award of execution on the forthcoming bond, and to have sustained the motion to quash that execution and the bond taken under it. This would have left the judgment rendered by this court to the fate to which the extinction of the corporation consigned it. If any party, by virtue of a transfer from the corporation during its existence, was beneficially entitled to the avails of the judgment or the subject involved in the controversy, though that party could not have a legal remedy by suing out execution in the name of a nonentity, an expired corporation, I do not doubt that his equitable title would be protected by a court of equity, and his claim to the avails of the judgment enforced in that forum against the party chargeable.

BROOKE, J. I think the case of *Rider v. The Union Factory*, 7 Leigh 154, ought to govern this case, as I thought it ought to have governed the case of *The Bank of Alexandria v. Patton &c.*, 1 Rob. 499. It differed from the rest of the court in the last mentioned case, because I could not see that an ex parte exhibition of a deed of assignment by the bank before the expiration of its charter, (not to be found in the record, and not noticed in the plead-
101 ings) could be made the ground of a decision in this court. The charter of the bank having expired, the assignment could not be contested here by that institution, nor by the defendants, who had no notice of it in the record. Had the bill been in the name of the assignees instead of the bank, that might have been a ground for relief though the charter had expired. In the present case, I cannot distinguish between the expiration of the charter of the state bank of North Carolina after the judgment of his court, and before it. In the former event, there could be no doubt that the motion on the forthcoming bond would be overruled, and the execution and bond quashed. Nor can I understand how the supposed estoppel of the judgment is to be availed of. It is said by the court in *Rider v. The Union Factory*, before referred to, that upon the expiration of its charter, a corporation can neither hold property, nor be responsible for any of its acts in the corporate character. It is a nonentity. As such, it can neither plead nor be impleaded. How then could the bank in the present case avail itself of the estoppel of the judgment? Where a natural person, party to a suit, has died before

judgment, his representative, in a case like the one before us, might insist on the estoppel of the judgment: and all the cases that have been cited are of that character. I believe no case can be found, in which the court has applied the estoppel of a judgment so as to enforce the judgment, on behalf of a dead party having no representative before the court, against the defendant. In any view of the case, I think the motion on the forthcoming bond ought to have been abated, and the execution and bond quashed; but without costs.

Judgment reversed, and execution and forthcoming bond quashed.

102 *Burnley's Representatives v. Duke and Others.

May, 1848, Richmond.

(Absent CABELL, P., and STANARD, * J.)

Legatees—Grants of Administration—Validity—Payments by Representatives of Deceased Administrator to Succeeding Administrator—When Good against Legatees—Liability to Legatees of Succeeding Administrator and His Sureties.—Pending a suit in chancery by legatees against an executor to recover their legacies, the executor died. Process was awarded to revive the suit against his administrator; and the administrator dying, process was issued and an order entered to revive the

suit against his representative. But afterwards that process was quashed and that order set aside, as early as 1811; and then, by consent of parties, the suit was revived against the administrator de bonis non of the executor, and by like consent it was entered that the cause was not to abate by the death of any of the parties. A personal decree was obtained in 1818 by the legatees against the administrator de bonis non, from which he appealed. Pending the appeal, he died. Whereupon, though the two former grants of administration on the executor's estate had been by the court of Orange, the court of Hanover now granted administration on the same estate, not in the form of a grant de bonis non, but of an original grant. At the instance of the legatees, a scire facias issued to revive the appeal against this new administrator, (calling him administrator de bonis non) which was duly executed, and in 1822 the decree affirmed. In the caption to the decree of affirmance, the name of the administrator de bonis non against whom the decree of the court below was entered did not appear as a party, but the new administrator was mentioned therein as appellant. In 1823, a bill of revivor and supplement was filed in the court below, convening before the court, and seeking to charge, the representatives of the first administrator and of the first administrator de bonis non. It turned out, that after the scire facias to revive the appeal had been executed, and before the decree of affirmance, the new administrator had, in the character of administrator de bonis non, brought suits and obtained decrees for the assets

*He had been counsel for the appellants.

†Jurisdiction—County Courts—Grants of Administration.—It is well settled, that the county court is a court of general jurisdiction in regard to probates and the grant of administrations; that it has jurisdiction in regard to the whole subject-matter; and that though it may err in taking jurisdiction of a particular case, yet the order is generally not void, but only voidable on citation or appeal, and cannot be questioned in any collateral proceeding. *Fisher v. Bassett*, 9 Leigh 119; *Burnley v. Duke*, 2 Rob. 102; *Schultz v. Schultz*, 10 Gratt. 358; *Cox v. Thomas*, 9 Gratt. 223; *Hutcheson v. Priddy*, 12 Gratt. 85; *Andrews v. Avory*, 14 Gratt. 229.

The principal case is cited on this point in *Schultz v. Schultz*, 10 Gratt. 379, 380, 382; *Hutcheson v. Priddy*, 12 Gratt. 90; *Andrews v. Avory*, 14 Gratt. 236; *Gibson v. Beckham*, 16 Gratt. 326; *Smith v. Henning*, 10 W. Va. 617.

See *foot-note* to *Andrews v. Avory*, 14 Gratt. 229.

In *Fisher v. Bassett*, 9 Leigh 119, it is decided that a grant of administration by the court of a county or corporation that was not authorized to grant it according to the provisions of the statute (the decedent in that case having been a foreigner, and having died abroad, and who had no residence in the corporation by the court of which the administration was granted, and no estate of any kind there), is not void, but voidable only: And it was accordingly held in that case that acts of and dealings with such administrator consummated before the letter granted to him were revoked or superseded could not be called in question. The doctrine of this case is repeated and affirmed by the principal case.

Same—Same—Same.—In *Ballow v. Hudson*, 13 Gratt. 661, the court said: "The cases in this court in re-

gard to grants of administration, although not bearing directly upon the question here, yet seem to illustrate the general principle that the judgment of a court of general jurisdiction over the subject is conclusive until it is avoided, or expires by its own limitation; and this although the facts of the particular case were not such as to give the court jurisdiction over that case. *Fisher v. Bassett*, 9 Leigh 119; *Burnley v. Duke*, 2 Rob. R. 102."

Grant of Administration—Jurisdiction—Validity of Grant.—It was held in the principal case, in conformity with *Fisher v. Bassett*, 9 Leigh 119, that where administration and administrations *d. b. n.* were granted by a court which, upon the facts, should not have taken jurisdiction, the grants were valid, the orders standing unreversed, and the grants unrevoked. And further that when the grant to the administrator *d. b. n.* expired by his death, and the estate was unrepresented, it was competent for the court which might in the first instance have rightfully exercised jurisdiction, to make a valid grant; and the sureties in the last administration bond were bound.

Liability of Sureties of Administrator d. b. n.—It was also held in the principal case, that though an administrator *de bonis non* cannot recover of a former administrator assets converted by him (because they are not unadministered assets, and therefore not within the scope of the commission of the administrator *de bonis non*), yet if he actually receive them, he and his sureties are accountable therefor. See the principal case cited in *Andrews v. Avory*, 14 Gratt. 244; *Gilmer v. Baker*, 24 W. Va. 92; *Hooper v. Hooper*, 32 W. Va. 528, 9 S. E. Rep. 938.

Wills—Probate Proceedings—Conclusiveness of.—The principal case is cited in *foot-note* to *Ballow v. Hudson*, 13 Gratt. 673, and *foot-note* to *Norvell v. Lessueur*, 33 Gratt. 232.

of the executor's estate in the hands of the representatives of the first administrator and of the first administrator de bonis non, against those representatives respectively, without opposition on their part; and the decrees so obtained were soon after satisfied. Those decrees were in 1820 and 1821, about six years before the decision in *Wernick's adm'r v. M'Murdo &c.*

103 *5 Rand. 51. HELD, 1. (In accordance with *Fisher v. Bassett and others*, 9 Leigh 119,) that the grants of administration by the court of Orange to the first administrator and the first administrator de bonis non, never having been reversed or revoked, must be considered valid grants, which conferred upon those administrators respectively all the powers of rightful administrators. 2. That when the grant to the first administrator de bonis non expired by his death, and there was no conflicting right in existence, it was competent for the court which might in the first instance, have rightfully exercised jurisdiction, to act on the subject; and Hanover court having acted when there was no such conflicting right, and its grant not having been reversed or revoked, that grant is valid, and the sureties in the administration bond taken by Hanover court are liable thereupon. 3. That as the legatees, after the death of the first administrator, dismissed his representative from the suit, it was lawful for that representative to pay over to the administrator against whom the legatee were proceeding, the unapplied assets of the executor's estate; and such payment, made in good faith and under the sanction of a decree of a court of competent jurisdiction, is a complete protection to such representative against the legatees, as to the money so paid. 4. That the decree in favour of the legatees against the administrator de bonis non was personal, only in respect to the assets in his hands, and (it being nowhere alleged that he had converted or wasted the same) such unapplied assets coming to the hands of his representative must in equity be regarded as unadministered assets of the executor's estate; and the representative of the administrator de bonis non having in good faith, and in pursuance of the decree of a court of competent jurisdiction, paid over the said assets to the administrator against whom the legatees revived the appeal, such payment protects the estate of the administrator de bonis non from the claim of the legatees. 5. That for the assets so paid over by the representatives of the first administrator and of the administrator de bonis non, the administrator to whom such payment was made, and the sureties in his official bond, are liable. 6. That the dismissal of the bill as to the representatives of the first administrator and of the administrator de bonis non should be without costs.

It is now fifty years since certain legatees of John Burnley filed a bill in the high court of chancery at Richmond, to recover their legacies from Zachariah Burnley, who took administration upon the estate

104 of John. *A report of the case when it was before this court on a former occasion, will be found, under the name of *Burnley's administrator v. Duke and others*, in 1 Rand. 108. To that report such addition will be made at this time, as is necessary to understand the questions now discussed.

On the 5th of March 1803, the suit abated by the death of the defendant Zachariah Burnley, and on the motion of the plaintiffs by counsel, a subpoena was awarded to revive it against Hardin Burnley junior his administrator. On the 4th of September 1809, the suit was entered abated as to the defendant Hardin Burnley administrator of Zachariah Burnley, by his death. On the 19th of that month, a scire facias was awarded to revive it against John M. Sheppard as administrator of Hardin Burnley: and on the 10th of September 1810, it was by consent ordered that the suit stand revived against him. But afterwards, to wit, on the 3d of September 1811, an order was entered, whereby,—after setting forth that by a clerical mistake the order of the 19th of September 1809 awarded process to revive against John M. Sheppard administrator of Hardin Burnley deceased, instead of Alexander M. Shepherd administrator de bonis non of Zachariah Burnley, and that in the scire facias and the subsequent order the same mistake occurred,—it was ordered that the said writ of scire facias be quashed, and that the orders of the 19th of September 1809 and the 10th of September 1810 be set aside. And on the motion of the plaintiffs by counsel, a writ of scire facias was thereupon awarded to revive the suit against Alexander Shepherd as administrator de bonis non of Zachariah Burnley. Subsequently, to wit, on the 12th of February 1813, the following order was entered: "By consent of the parties by their counsel, this suit, which abated as to Hardin Burnley administrator of Zachariah Burnley deceased by his death, stands revived

105 against Alexander *Shepherd administrator de bonis non of the said Zachariah Burnley deceased." Proceedings were then had to obtain an account of Alexander Shepherd's administration of Zachariah Burnley's estate, in the course of which certain orders were entered by consent, and among them the following: "And by the like consent, this cause is not to abate by the death hereafter of any of the parties."

In the meantime John M. Sheppard, as administrator of Hardin Burnley, had made various payments to Alexander Shepherd as administrator of Zachariah Burnley. On the 18th of August 1809, the latter received of the former 604 dollars 77 cents, found in a bag which had been deposited in bank, and was considered to belong to the estate of Zachariah Burnley. A suit was also instituted by the latter against the former, in the superior court of chancery at Richmond, in which, on the 25th of February 1811, it was entered of record that the plaintiff acknowledged to have received on that day, from the defendant, the sum of 2000 dollars; and on the 24th of September 1811, it was likewise entered that the defendant that day paid in court, to the attorney of the plaintiff, 1756 dollars. With these sums Alexander Shepherd was duly charged, in the account returned of his administration on the estate of Zachariah

Burnley; and there appearing due from him on that account 1613 pounds 16 shillings and 8 pence, with interest at 5 per centum on 1384 pounds 13 shillings and 7 pence, part thereof, from the 31st of December 1817, the court of chancery at Fredericksburg, on the 2d of May 1818, decreed that the said "defendant Alexander Shepherd, administrator de bonis non of Zachariah Burnley deceased," pay the same, in part of the legacies due to the plaintiffs who filed the original bill, and others who had been admitted to join with them in the progress of the suit.

106 *Pending the appeal of Alexander Shepherd from this decree, William D. Taylor was made a party to the case in the court of appeals, in the character of administrator de bonis non of Zachariah Burnley deceased. At the instance of the appellees, a scire facias issued for this purpose the 15th of April 1820, which was executed the 6th of May 1820. And on the 30th of March 1822, when the court of appeals pronounced its decree, the name of Alexander Shepherd did not appear in the caption to the decree as a party, but "William D. Taylor administrator de bonis non of Zachariah Burnley deceased" was mentioned therein as "appellant." By the decree of the court of appeals it was ordered, that the decree of the court of chancery be affirmed, and that the appellant, out of the estate of said Zachariah Burnley in his hands to be administered, pay unto the appellees damages according to law for retarding the execution thereof, and also their costs by them about their defence in the court of appeals expended.

While the case was in the court of appeals, to wit, on the 31st of August 1820, William D. Taylor as administrator de bonis non of Zachariah Burnley deceased filed a bill in the county court of Orange against William Shepherd as administrator with the will annexed of Alexander Shepherd, to which bill and answer was at the same time filed; and the cause coming on by consent to be heard, the court on the same day appointed commissioners to state an account between the parties. They made a report, based upon the account previously returned of Alexander Shepherd's administration on the estate of Zachariah Burnley; charging Alexander Shepherd with the same money, and shewing a balance due from him, at the date of the report, of 1882 pounds 8 shillings 11½ pence, of which 1385 pounds 3 shillings 7½ pence was principal money. The report was made the 23d of April 1821; and on the same day, both parties consenting that the court should act upon it,

107 *and neither party excepting to it, the same was approved and confirmed, and the court decreed that the defendant William Shepherd, out of the estate of Alexander Shepherd in his hands, pay to William D. Taylor as administrator de bonis non of Zachariah Burnley the said sum of 1882 pounds 8 shillings 11½ pence, with interest on 1385 pounds 3 shillings 7½ pence

from the date of the decree, and the costs of suit.

The decree of the court of appeals was entered in the court of chancery at Fredericksburg on the 19th of September 1822. Thereafter the suit was abated as to the defendant Alexander Shepherd by his death, and revived against William Shepherd his administrator. William Shepherd, as such administrator, filed an answer, setting forth the grant of administration de bonis non upon the estate of Zachariah Burnley to William D. Taylor; the abatement in the court of appeals as to Alexander Shepherd, at the suggestion of the appellees; the revival by them in the name of Taylor alone, as the administrator de bonis non of Zachariah Burnley, and the absence of any proceeding in the said court against the respondent as the legal representative of Alexander Shepherd: whereby, the respondent insisted, the appellees had released him from all liability under the said decree of the 2d of May 1818, and waived all their rights to come against him for satisfaction thereof. The respondent then set forth the proceedings by, and decree in favour of, William D. Taylor as administrator de bonis non of Zachariah Burnley against him as administrator of Alexander Shepherd, and stated that he had paid off that decree to William D. Taylor, and to Robert Taylor esq. his attorney. He insisted that these payments were, under the circumstances, proper and legal; and at all events that the plaintiffs should be compelled to exhaust their remedy against William D. Taylor and his sureties, before the respondent, or the estate of Alexander Shepherd, should be charged again with the payment of money which had been once fairly and fully paid.

At December rules 1823, the plaintiffs filed a bill of revivor and supplement, reviving the suit as well against William D. Taylor administrator de bonis non of Zachariah Burnley, as against William Shepherd administrator of Alexander Shepherd, and praying that the defendants, or some of them, may be decreed to pay the amount of the decree in favour of the legatees. By way of supplements, the bill farther set forth, that besides the money found due from Alexander Shepherd to Zachariah Burnley's estate, there was still a large balance due to the legatees, and the money due from Zachariah Burnley to the estate of John Burnley was more than sufficient to have satisfied that balance: that a considerable estate of the said Zachariah came to his representatives, who ought to have made good, out of the same, any waste of the said Zachariah; or the waste ought to be compensated by the representatives of the said Zachariah, or their sureties: that the administrator of the said Zachariah was Hardin Burnley, who received a large personal estate, and died largely indebted as such administrator: that after the death of Hardin Burnley, John M. Sheppard took administration of the said Hardin's estate; and upon the death of John M. Sheppard,

administration de bonis non on Hardin's estate was granted to Henry Pendleton: that considerable assets of the said Hardin have come to the hands of the said Henry Pendleton; and indeed the complainants have understood that a considerable payment was made by Henry Pendleton to William D. Taylor as administrator de bonis non of Zachariah Burnley. Henry Pendleton was therefore made a defendant; and William D. Taylor being insolvent, John Darracott and James Madison his sureties were also made defendants. And the bill, besides asking that the proper accounts might be taken, prayed that

109 Darracott and *Madison, as sureties of William D. Taylor, might be decreed to make good such portion of the assets of the said Zachariah that had come to the said William D. Taylor's hands, as he might be delinquent.

It turned out that while the case was in the court of appeals, to wit, on the 14th of June 1821, a decree was obtained in the superior court of chancery at Richmond, by William D. Taylor as administrator of the estate of Zachariah Burnley unadministered by Alexander Shepherd, against Henry Pendleton as administrator de bonis non of Hardin Burnley. The entry of the decree set forth, that, the plaintiff admitting that Alexander Shepherd, the former administrator de bonis non of Zachariah Burnley, received of John M. Sheppard, the administrator of Hardin Burnley, 600 pounds on the 23d of February 1811, and 526 pounds 10 shillings on the 24th of September in the same year, in part of the balance appearing by the report of a commissioner in the cause to be due from the estate of Hardin to the estate of Zachariah Burnley, the court, approving the said report, and allowing credit for those sums as paid at those dates, decreed that the defendant Henry Pendleton, as administrator de bonis non of Hardin Burnley, pay to the plaintiff 1268 pounds 7 shillings 4 pence (that being the balance due after allowing the said credits), with interest from the 24th of September 1811 till paid, and the costs of suit. Pendleton paid to Taylor, in part of this decree, 488 pounds 8 shillings on the 5th of January 1822, and on the 21st of February 1822 he paid the balance, then amounting to 1594 pounds 1 shilling 11 pence.

The payments to William D. Taylor, and his insolvency, now gave rise to questions of difficulty. The cause being revived against the administrators of Henry Pendleton, they filed an answer relying upon the validity of the payments made by him, in like manner as William Shephard had relied upon his payments

110 *as administrator of Alexander Shepherd. On the other hand, the sureties of William D. Taylor (or rather Madison one of them) sought to be exonerated from all liability for the money which he had received.

A copy of the order granting administration to William D. Taylor was filed. It was as follows:

"In Hanover county court, January 26, 1820. In the motion of William D. Taylor, a certificate is granted him for obtaining letters of administration of the estate of Zachariah Burnley deceased, he having taken the oath of an administrator, and with James Madison and John Darracott his sureties entered into and acknowledged a bond according to law, which bond is ordered to be recorded."

A copy of the bond was filed also. It was in the penalty of 15,000 dollars.

Madison, in his answer, stated, that he was informed and believed that Zachariah Burnley lived and died in the county of Orange, seized and possessed of a considerable estate, both real and personal, in the said county, and he had no knowledge of his possession estate in any other county: that administration upon his estate was duly and legally granted by the county court of Orange to Hardin Burnley: that upon the death of Hardin Burnley, administration de bonis non was duly and legally granted by the same court to Alexander Shepherd: and that upon the death of Shepherd, the grant was made to Taylor by the county court of Hanover. And the respondent insisted, that the court of Hanover had no right or jurisdiction whatever to grant such administration to Taylor; that the said grant, and the bond taken of Taylor and his sureties, were void; and that the sureties could not be charged by virtue thereof.

Pendleton's administrators, in their answer, said, that the grant of administration to Taylor was made by a court possessing power to grant administrations upon

111 *the estates of dead persons; that in the grant of the said administration, their said testator had no agency; and that when the same was made, and even when he paid Taylor, he had no information (they believed) which could induce him to entertain a doubt as to the propriety of the grant. They had understood (they said) that Zachariah Burnley, for some time before his death, had no fixed place of abode, but resided sometimes in the county of Hanover and sometimes in the county of Orange, and that he actually died in Hanover.

Depositions were taken, and exhibits filed, relative to the matters of fact upon which depended the regularity of the grant of administration on the estate of Zachariah Burnley by the county court of Hanover. But the ground on which the opinion of this court rests, renders it unnecessary to state the purport of the evidence.

As to Taylor and Darracott the bill was taken for confessed. Upon the death of William Shepherd, the cause was revived both against his executors, and against the administrator de bonis non of Alexander Shepherd. And when Henry Pendleton died, the cause, besides being revived against his administrators, was revived first against John T. Swann, and afterwards against John H. Steger, as administrators de bonis non of Hardin Burnley.

Steger, in his answer, insisted upon the validity of the payments made by the previous administrators of Hardin Burnley, and stated also that no assets had come to his hands. Madison dying, there was a revival against Lawrence Battaile sheriff of Caroline county, to whom the estate of Madison was committed.

On the 19th of October 1830, the court of chancery at Fredericksburg made a decree, directing an account of the administration upon the estate of William Shepherd, and an account of his administration upon the estate of Alexander Shepherd, (in taking 112 which last account, *the commissioner was directed to consider the payments made by William Shepherd to William D. Taylor as improper and of no avail, so far as the plaintiffs were concerned,) and directing also the administrator de bonis non of Alexander Shepherd to render an account of his administration, and the administrators of Henry Pendleton to render an account of theirs.

Afterwards the cause was removed to the circuit court of Essex, and came on to be heard before that court the 9th of October 1832, upon the report of the commissioner, which shewed that sufficient assets of William Shepherd's estate came to the hands of his executors to satisfy the plaintiffs' demand. Whereupon the court decreed that the executors of William Shepherd pay to the plaintiffs the sums decreed against Alexander Shepherd on the 2d of May 1818, subject to a credit for certain sums which, pending the suit, had been obtained by means of an injunction restraining Robert Taylor from paying over funds received by him as attorney for William D. Taylor. And the report further shewing that the administrators of Henry Pendleton had received of his estate more than enough to pay the balance due the plaintiffs on account of their legacies, after deducting what had been decreed against Alexander Shepherd, the court decreed payment by Henry Pendleton's administrators of the said balance. The court further decreed that William Shepherd's executors and Henry Pendleton's administrators pay to the plaintiffs their costs; that the bill of the plaintiffs be dismissed as to Darracott and Madison's administrator; and that the plaintiffs pay to those defendants their costs. And liberty was reserved to William Shepherd's executors to apply to the court for a decree against Taylor.

On the petition of William Shepherd's executors and Henry Pendleton's administrators, an appeal was allowed.

113 *Patton for appellants. On what ground can the sureties of Taylor, who have become bound for the money received by him as administrator, be exonerated? Does it lie in their mouths to say that the administration ought not to have been granted, and that Taylor, who has recovered and received the money, ought not to have recovered and received it? Can any thing be more universally true, than that when an administrator has asserted a

right in that character, and recovered money as such, he must account for that money as assets, to creditors or legatees of the deceased? Upon the principle of res adjudicata, creditors and legatees would be conclusively bound by a judgment against an administrator for a claim asserted against him, and they are as conclusively entitled to the benefit of a recovery of assets by him. Let it be conceded that the county court of Hanover was not the proper court to grant administration; still that is not material. For that court, having a general jurisdiction to grant administration, has also authority to determine whether the facts are such as make it proper that administration should be granted; and the correctness of its determination cannot be enquired into in this collateral way. This is settled by the decision in *Fisher v. Bassett* and others, 9 Leigh 119. The decision is, that although the grant of administration ought not to have been made, yet until revoked on appeal or citation, it confers all the rights resulting from a regular administration. Perhaps, however, it may be attempted to liken this case to the one upon which there was a difference of opinion among the judges in *Fisher v. Bassett*. It was a question there, supposing a grant of administration to be irregularly made and therefore voidable, what would be the effect of a subsequent grant by that court which would have had jurisdiction if the first grant had not been made. On this question, if it were involved here, perhaps nothing at all material could be added to what

114 *was said by judge Tucker. But the question is not involved in this case. Upon the death of Alexander Shepherd, the administration was vacant, and it was not in the power of the court which granted the administration to him, to act upon it by citation or otherwise. The administration being vacant, a grant by any court of general jurisdiction must be valid. The opinion of judge Parker, differing from that of judge Tucker on the question just adverted to, rested chiefly on *Griffith v. Frazier*, 8 Cranch 1, in which the subsequent grant was considered a nullity because there was an administrator in full life. The court there likened the case to the grant of administration on the estate of a living man. But here it would be necessary to go a great way farther, to hold the subsequent grant a nullity. The position would have to be maintained, that an administration irregularly granted is, after the death of the person to whom the irregular grant was made, sufficient to prevent a grant by the court which would have had jurisdiction but for the previous grant.

But passing from the question as to the validity of the grant of administration to Taylor, the payments to him were under regular decrees, which are conclusively binding unless impeached for fraud or collusion. Payment of money to an executor is valid, though he was acting under probat

of a forged will. *Allen v. Dundas*, 3 T. R. 125. Here the court is called upon to compel parties to pay money which they have once paid under the sanction of a court of competent jurisdiction. For the county court of Orange and the court of chancery at Richmond clearly had jurisdiction to act upon the bills presented to them, and to decree payment. It may be said, that what those courts did was in conflict with the law, as now settled in *Wernick's adm'r v. M'Murdo &c.*, 5 Rand. 51. It would be curious to apply the doctrine of that case to this, in which every dollar decreed against Shepherd was recovered by him

115 *as administrator de bonis non, from a previous administrator. If *Wernick's adm'r v. M'Murdo &c.* settles the law against us, it equally settles it for us. But the court never meant to settle, in *Wernick's adm'r v. M'Murdo &c.* that if an administrator de bonis non received assets from a predecessor in the administration, he and his sureties would not be liable. 5 Rand. 92, 3, opinion of Green, J. It may be said, that here the legatees had asserted their claim against Alexander Shepherd, and therefore his estate ought to be held liable to them. But the answer is, that so soon as he died, the legatees ceased their pursuit against him. They not only abandoned all claim against his representatives, but carried it on against Taylor. Not only by the consent of the appellees but by the decree of this court, Taylor is the party against whom their rights are to be asserted. Let it be admitted that it was a mistake, an oversight,—that it would be a hardship to deprive the legatees of what they are entitled to; would not the hardship be much greater if Shepherd's representatives were made to bear the loss? The case is analogous to that of a party standing by and seeing another purchase without making known his claim. Here the legatees have been active in inducing Shepherd's representatives to part with their money. So too as to Henry Pendleton's representatives. If Pendleton was chargeable, it was a representative of Hardin Burnley. And by the order of the 3d of September 1811, Hardin Burnley's representatives were discharged from all claim.

Harrison for the legatees. When this case was formerly in this court, there was no occasion to revive the appeal against the representative of Zachariah Burnley. Though the decree against Alexander Shepherd was by the name of administrator de bonis non, this was mere descriptio personæ; the decree was personal against
116 him. *The question then is, whether an erroneous proceeding by counsel in this court, in reviving against Taylor, can amount to a release of Shepherd from the decree? That decree was surely binding on the estate of Shepherd in the hands of his administrator. But it is said, the affirmance by this court was after the death of Shepherd, without any revival of the appeal against his representative. It is a

complete answer to this objection, that it had been agreed the suit should not abate by the death of either party. Such an agreement has been held to be binding. *Garlington v. Clutton*, 1 Call 520. But suppose there was error in the mode of proceeding in this court, was its decree a mere nullity? It is the business of the appellant to prosecute his appeal with effect; and upon the death of Alexander Shepherd, if his administrator wished to get rid of that decree, and a revival was necessary, it was his business to revive. If the decree of this court was a nullity, still the decree of the court below remains in full force. But both are valid, and the assets of Alexander Shepherd bound. Even if there had been any erroneous proceedings, it was proper to file a supplemental bill to get rid of such erroneous proceedings, and obtain the benefit of the decree. This has been done, and the proceedings on the supplemental bill are regular.

Taylor had only a right to recover the unadministered assets. *Wernick's adm'r v. M'Murdo &c.*, 5 Rand. 51. There is nothing to shew that there were any assets unadministered, but abundant proof to shew that what he did recover was administered assets. The decree in favour of the legatees was itself an administration of the assets. They were then the property of Alexander Shepherd. And if his administrator afterwards assented to a decree in favour of Taylor, it was an assent to give up so much of Shepherd's individual property. At all events, this assent could not affect the interests of the plaintiffs,
117 who had a personal *decree against Shepherd. As it regards the plaintiffs, who were no parties to Taylor's suit, the whole proceedings in it were nullities. They have a right to pursue the assets of Shepherd until their claim is satisfied. And it is right it should be so. Taylor never could have recovered these assets, if Shepherd's administrator had made that defence which was in his power. He had only to reply the fact that a personal decree had been rendered against his decedent. Had that fact been stated, the county court of Orange would never have decreed against him.

In the case *Ex parte Lyons*, 2 Leigh 761, it was settled unanimously by the general court, that no court could grant administration de bonis non except the court which originally granted administration. And there is nothing in *Fisher v. Bassett* in conflict with this doctrine. Here, jurisdiction having been properly exercised in Orange, the court of Hanover had no jurisdiction to grant administration de bonis non, and its grant is not voidable, but void. It is questionable, to say the least, whether the sureties of Taylor are liable. At all events the plaintiffs are under no necessity to look to them first.

Lyons for Pendleton's administrators. The general court and the court of appeals have come to the same conclusion as it regards this cause. Neither has maintained

that if administration be granted one day by an improper court, and the administrator dies the next, the proper court cannot then grant administration. The language of the decision in *Ex parte Lyons*, 2 Leigh 761, shews that the general court thought there must be a valid grant of administration by one court, to prevent another from granting administration *de bonis non*. And in *Fisher v. Bassett*, it was not considered by any of the judges that the exercise of jurisdiction by the improper court would prevent the exercise of it *by the proper court: the only difference of opinion between the judges was as to what should be done to restore the jurisdiction of the latter. There certainly was no difference of opinion on the proposition, that if Scott had then been dead, the grant of administration by the general court would have been valid.

Taylor for Darracott and Madison's administrator. If the court of Orange had jurisdiction to grant administration, the grant by the court of Hanover must, in the nature of things, be void. It would be extraordinary if, after a valid grant by one court, there could be a new grant by another court, because part of the estate remains unadministered. Originally the administrator was the bailiff of the ordinary, his mere agent to do what the ordinary might do in person; and there might be grant after grant, on the principle that an agency may be revoked and a new agent appointed. In the reign of Henry 8, the power of the ordinary in this respect was restrained; and in England since that time, there is no power, after one grant is made, to make another. So it is here. No instance is adduced in which it has been held, either in England or this country, that after a grant by one court or jurisdiction, administration *de bonis non* may be granted by another. No effort is known to have been made to obtain such a grant of administration *de bonis non*, except in *Ex parte Lyons*; and the application there was unanimously rejected. Such a grant must be extremely inconvenient, and there is no authority for it in the act of assembly, or any where else. Upon the death of the first administrator, the power results—leaps back to the hand that granted it; which may thereupon grant administration of the goods remaining unadministered. 1 Wms. on Ex'ors 292. The power, once rightfully exercised, results not to any and every authority which might originally have made the grant, but to that from

119 which the *original grant proceeded. It is said that the grant, being by a court of competent jurisdiction, must be valid. This takes for granted that Hanover court had jurisdiction. Let it be conceded that to some purposes every county and corporation court has jurisdiction in cases of probat and administration; yet a county or corporation court cannot have greater jurisdiction in such a case than the general court would have had. And the

general court has said that it has none. Here, it is true, the grant is in the form of an original grant. But if it would not have been valid in the form of a grant *de bonis non*, it cannot be valid in a different form. The error in the form of the grant, cannot make that valid, which, if the record had spoken truly, would have had upon its face a death warrant. It is said also, that the question in this case has been decided in *Fisher v. Bassett*. But that is not so. For there the question as to the effect of the grant of the general court was not necessary to be decided. That case is certainly no authority to uphold the jurisdiction of the county court of Hanover; no authority to shew that after a grant by one court of original jurisdiction, which was valid, a grant by another of administration *de bonis non* is valid also.

Stanard for Shepherd's representatives. Is it competent for the sureties of William D. Taylor, in the face of their own bond, to question the authority conferred upon him, any more than he himself could question it? If they are entitled to make the objection in any form, are they entitled to make it in this form,—in a collateral proceeding? It is said that the grant to Taylor is void, and that all proceedings by him under it are null. On what ground is this to be maintained? Suppose the grant, on its face, had been of administration *de bonis non*: if the decision in *Fisher v. Bassett* ascertains any thing, it is that such

a grant would have been voidable, 120 *not void. For the question as to jurisdiction to grant administration *de bonis non*, is not materially different from the question as to jurisdiction to grant original administration. In either case, if there is a subsisting valid grant by one court, there cannot regularly be a grant by another. And in each it must be shewn that there was a subsisting valid grant, to make the subsequent grant invalid. The only point on which the judges differed in *Fisher v. Bassett* was, as to the manner in which the authority may be revoked while there is a subsisting administrator. If the case was here presented of a grant to Taylor while the administrator to whom Orange court made the grant was alive, it would be the question upon which judges Tucker and Parker differed. But this is not the case. Here there was no party to summon, no party to cite. [Taylor. Upon the supposition that this was an application to Hanover court to grant administration *de bonis non*, the propriety of the grant by that court would depend upon the question whether Hanover court had itself made a previous grant.] Stanard. Still it would depend upon the question whether the previous grant was valid. [Allen, J. I understand mr. Taylor to contend that the grant of administration *de bonis non* is of itself a recognition of the validity of the previous grant.] Stanard. But in this case there was an application by Taylor for, and a grant to him of, original admin-

istration. And the question is, whether the grant is void. Suppose it had been made to appear at the time of Taylor's application, that Zachariah Burnley resided in Hanover, where he died, and that Hardin Burnley had by mistake procured a grant of administration from Orange court; might not the court of Hanover have made the grant? Could any other course have been pursued when the first grant had terminated by death? Surely it could not be necessary or proper to go to the court which had usurped jurisdiction. In

121 Lyons's case, *if the general court had been of opinion that the original grant was not valid, it would not have refused to make a new grant. If the mere circumstance that the judgment has not been in form revoked is a reason why no other court can grant administration, then the jurisdiction of every other court is ousted. For there is no mode of revoking the first administration, when the administrator is dead. [Allen, J. Suppose a grant by an improper court to one who dies, and then a grant by a proper court, after which administration de bonis non is granted by the court which first granted administration.] Stanard. Then the last grant, being made when there were rights subsisting under the grant by the proper court, would be void.

Supposing the grant to Taylor to be valid, he, qualifying as a full administrator, might recover any assets in the hands of the representative of a former administrator. There is no limitation upon his powers, except when he attempts to recover back what may have been appropriated by a former administrator in payment of debts. Taylor therefore had clear authority to receive from Shepherd, and his sureties must be bound. In this point of view, the question in Wernick's adm'r v. M'Murdo &c. does not arise. But suppose Taylor had only authority to receive unadministered assets, are not the sureties bound for assets which he has received? They were claimed by Taylor as unadministered assets, and recovered by him as such. Does it lie in the mouth of Taylor, or in the mouths of his sureties, to say that these were not unadministered assets, against the admission on the record? If, when an administrator recovers a debt, his sureties cannot go into evidence to shew that it ought not to have been recovered, neither can the sureties in this case go into evidence to shew that this money ought not to have been recovered.

Shepherd's representatives ought in no event to be compelled to pay over a 122 second time the money they *have already paid to Taylor. Suppose there had been no decree against Alexander Shepherd, but he had denied pending the suit, and the plaintiffs had discontinued their suit as to his representatives and revived it against Taylor, and in that state of things Taylor had sued Shepherd's representatives and recovered the assets of Zachariah Burnley's estate; could Shepherd's estate be held liable to pay that

money over to the plaintiffs? Surely not. The opinion intimated by judge Green in Wernick's adm'r v. M'Murdo &c., 5 Rand. 92, 3, so far as it goes, is against such liability. And Hefferman's adm'r &c. v. Grymes's adm'r &c., 2 Leigh 512, shews, that though a legal conversion of assets by the first administrator has taken place, a court of equity will still look at the real nature of the case, and hold the administrator de bonis non entitled to receive such assets, if there was no intent on the part of the first administrator to apply them to his own use. It has been argued that the decree against Alexander Shepherd, being personal, discharged the estate of Zachariah Burnley, and substituted a mere demand against Alexander Shepherd's estate. Suppose that after Shepherd's administrator had paid over to Taylor, the estate and representatives of Shepherd had become insolvent; will it be contended that the legatees would in such case have had no right to look to the estate of Zachariah Burnley in the hands of Taylor? But here the plaintiffs themselves, by their conduct in the suit, have been the cause, and the sole cause, of Shepherd's representatives parting with the money to Taylor. If the plaintiffs had revived their appeal against Shepherd's representatives, and prosecuted the claim against them, instead of discontinuing the pursuit of that estate, and leading the representatives to believe that they were discharged of accountability to the legatees, and accountable only to the administrator de bonis non, it is not to be conceived that the payment would ever have been 123 made to that administrator. *And

now, after the acts of the plaintiffs have encouraged and the representatives of Shepherd to part with the assets in their hands to Taylor, it would be utterly at variance with every principle of equity to hold them liable. Let it be admitted that the discontinuance as to Shepherd's representatives was the result of an erroneous opinion respecting the law, still the estate of Shepherd ought not to suffer for a mistake committed by the plaintiffs in the management of their own suit.

Leigh for the legatees. If the decree of May 1818 had been acquiesced in, the plaintiffs might, and no doubt would, have commenced proceedings against Hardin Burnley's administrator, to recover the balance of their legacies after crediting what was decreed against Alexander Shepherd; and they were entitled to recover, if assets enough came to Hardin Burnley's hands to pay the balance. But Alexander Shepherd immediately appealed from the decree, and as the appeal brought up the question as to the extent of liability of Zachariah Burnley's estate, and so put in suspense the claim of the plaintiffs to recover the balance, they could not, in this state of things, proceed with effect against Hardin Burnley's estate. Pending the appeal, Alexander Shepherd died; but so far as the decree affected him personally, the appeal

did not abate. This is shewn by the case of *Garlington v. Clutton*, cited by Mr. Harrison; Shepherd having agreed that no abatement should take place. In consequence of this agreement, his representatives were bound to take the same notice of the appeal as if process of *scire facias* had regularly issued against them to revive it.

If Zachariah Burnley received assets enough of John Burnley's estate to pay the legacies given by John, he became a debtor to the legatees. If Hardin Burnley received assets enough of Zachariah Burnley's

124 estate to "pay the debt of Zachariah

Burnley to the legatees, Hardin Burnley was their debtor for the legacies, and the debt was of the first dignity against his intestate's estate. If Hardin Burnley's representatives, or any of them in succession, received assets enough of Hardin Burnley's estate to pay the legacies, they each in succession became debtor to the legatees, and the debt was of the first dignity against Hardin Burnley's estate. And if Alexander Shepherd, as administrator de bonis non of Zachariah Burnley, received assets of Zachariah Burnley's estate, he became a debtor to the legatees to the extent of those assets. These propositions are unquestionably correct; and it is just as unquestionable that Alexander Shepherd, as such administrator de bonis non, did receive assets, and that Henry Pendleton, as administrator de bonis non of Hardin Burnley, received abundant assets. Nor is it any objection to the proposition, that they suppose Hardin Burnley was administrator of Zachariah Burnley, and Alexander Shepherd administrator de bonis non. If it could now be shewn that administration was irregularly granted on Zachariah Burnley's estate, first to Hardin Burnley and afterwards to Alexander Shepherd, this would be of no avail to the representatives of Shepherd, because there was a decree against him which has been affirmed, and even if that decree were erroneous, his representative cannot be permitted now to question it. Nor would it avail the representatives of Pendleton; because Hardin Burnley had received assets of Zachariah Burnley's estate, converted them, and become a debtor to the legatees; and though the grant of administration to Hardin Burnley were void, though he were regarded as an executor in his own wrong, yet he would be liable to the legatees in the same manner as a rightful executor, his executor or administrator would be chargeable in the same manner as he might have been, (1 Rev. Code of 1819, ch. 104, §

125 66, p. 390,) and the debt due from him would, *by force of the statute of Virginia, be a debt of the first dignity. *Sherman v. Christian* and others, 5 Rand. 49. But in truth there is no reason to doubt the jurisdiction of the court of Orange—no ground to say that its grants were irregular. And though they had been irregular, they would not have been void, but voidable only upon appeal or citation. Seeing then that Alexander Shepherd and

Henry Pendleton owed the legatees these debts, the question is whether our debtors without our knowledge or consent, by means of a decree in a proceeding to which we are no parties or privies, can shift the debt they owe us from themselves to another person, and either deprive us of all recourse against them, or compel us, in spite of ourselves, to resort to that other person in the first instance.

If Taylor was not administrator—if the grant to him was merely void, it is the same thing as if Shepherd's administrator and Pendleton had paid to any third person without pretence of right. It is said that Taylor was full administrator. There was, it is true, a blunder in the form of the grant; but they were not deceived by it. Taylor claimed as administrator de bonis non; and there were previous administrations, so that he could only be administrator de bonis non. But take it that the grant to Taylor was only voidable, not void, or even that he was a rightful administrator, and let us see whether this will affect the liabilities of the parties.

I. As to the payment by William Shepherd administrator of Alexander Shepherd to Taylor, of money which had been decreed to us. Is it possible that he could rightfully pay money, actually decreed to us against his decedent, to any body else, so as to exempt himself from liability to us? It is objected that the appellees have affirmed the propriety of his payment to Taylor, for they claim money which Alexander Shepherd as administrator de bonis non of Zachariah Burnley had 126 received *of John M. Sheppard the representative of the previous administrator. The money which Alexander Shepherd received was assets of Zachariah Burnley's estate in his hands, no matter how he got it. We had the right to claim it of him, or, if he failed to pay, then of John M. Sheppard. Where A. owes a debt to B. and pays it to C., B. may sue A. for the debt, or may sue C. for money had and received. If the proceeding be in equity, and both parties before the court, the court may decree against A. the original debtor, and give him a decree over against C.; or, if there be no doubt of the solvency of C., may decree directly against him. It is farther objected that William Shepherd was decreed to pay the money by the court of Orange. But what was the character of that decree? We were not parties to it; and William Shepherd knew that the money had been decreed to us. He was bound to know the fact, and that we claimed against him,—bound to know all the circumstances. Yet, it is said, he acted in good faith and without collusion. He did not act without favouritism. Taylor had in equity no pre-text of right to recover this money, but on the ground that it was necessary for debts. There was no debt but that due to us. Yet our claim was resisted, and the money paid to Taylor, that he might get a commission on the amount, or for some other reason equally insufficient.

II. As to the payment by Henry Pendleton. He also consented to a decree in favour of Taylor, with knowledge of our claim to the money, and of there being no other debt against Zachariah Burnley's estate. He paid to Taylor, in order that Taylor might account to us. He had no right to practice this favouritism; no right to give Taylor a commission. And his representatives are not entitled to exemption from liability by any thing in judge Green's opinion in *Wernick's adm'r v. M'Murdo &c.*, 5 Rand. 92, 3. All that a suit could do would be to give notice of the claim.

127 And if Pendleton knew of the claim, he is as little entitled to the benefit of the exception as if there had been a suit.

We insist then, upon the authority of *Wernick's adm'r v. M'Murdo &c.* that notwithstanding the payments to Taylor, and even though he were a rightful administrator, the representatives both of Pendleton and Shepherd remain liable to the legatees.

C. Johnson in reply. It is contended that the grant of administration to Taylor was void, because granted by the county court of Hanover, when the prior grants of administration were by the county court of Orange; and *Ex parte Lyons*, 2 Leigh 761, is relied upon. That case merely decides that the court which granted the original administration is the proper court to which the application should be made for administration de bonis non. It does not decide that a grant de bonis non, when the administration is vacant, is a nullity if made by a court different from that which granted the first administration. Suppose that the general court had in fact granted the administration asked for in the case *Ex parte Lyons*; had judged erroneously as to its own jurisdiction: could it be pretended that such grant by the general court would be void, and the sureties of the grantee not bound for his due administration? The case of *Fisher v. Bassett* and others settles the law of the subject, and it would be supererogatory to argue in support of that decision, especially as the present court is composed of only the same number of judges that sat in that case. It is referred to and commented upon in 3 Rob. Pract. 423-28, and from what is there said, as well as from the recollection of those who took part in the case, we know it was elaborately discussed and maturely considered. Regarding *Fisher v. Bassett* and others as authority, we need only enquire what is established by it. It proves that the grants by the county court of Orange to Hardin Burnley and Alexander Shepherd

128 *were valid grants, until avoided in a regular way on appeal or citation. These grants were never avoided, but they ceased by the death of the grantees. And when the county court of Hanover was applied to by Taylor for letters of administration, that court was called upon to consider and decide whether the facts were such as to found its jurisdiction to make the grant;

and in granting the letters, it did decide (as Mr. Stanard has strongly and clearly shewn) that very question. The judgment of Hanover court is precisely within the reason and principle of *Fisher v. Bassett* and others, and even if capable of being avoided, is valid until so avoided. If the grant by Hanover court had been in terms a grant of administration de bonis non, it would still not have been void; for a grant of administration de bonis non never shews on its face when or where the former grant was made, and the inference from every grant de bonis non is regularly that the former administration was granted by the same court. The only form of a grant of administration de bonis non which could with any plausibility be regarded as a nullity, would be one shewing on its face that a different court had granted the first administration. But that is not shewn on the face of the grant to Taylor by the court of Hanover, nor does the grant even profess to be a grant of administration de bonis non. Even if it were conceded that the grant of administration to Taylor was by a court which had not jurisdiction, it would by no means follow that his sureties are not bound for his due administration of the assets. Such consequences would result from holding that sureties for an administration are discharged by a defect of jurisdiction in the court which makes the grant, that it would seem better to apply the doctrine of estoppel, and hold them precluded from denying that the party for whom they are bound was administrator. If in this

case the sureties of Taylor cannot deny that he was administrator, they cannot be heard to deny that the money which he received as administrator was assets of Zachariah Burnley's estate.

Upon the question whether the payments by William Shepherd as administrator of Alexander Shepherd, and by Henry Pendleton as administrator of Hardin Burnley, were valid payments as against the legatees, Johnson sustained and enforced the views presented by Patton and Stanard.

ALLEN, J., delivered the following as the opinion of the court:

The court is of opinion, that as the court of Orange county had general jurisdiction to grant administration when a proper state of facts existed; whether the court erred or not, in determining that the facts were proved upon which the power to grant administration in the particular case depended, is not to be enquired into collaterally. Until such orders or grants were reversed or revoked, they conferred on the grantees all the powers of rightful administrators. The court is further of opinion, that when the grants expired by the death of the grantees, and the estate was unrepresented, it became the duty of some court to appoint an administrator: that if the first appointment had been made by a court having no jurisdiction, such appointment did not oust the jurisdiction of the proper court; but that when the first appointment

had been revoked or the order reversed, or when the grant expired by the death of the grantee, and there was no conflicting right in existence, it was competent for the court which in the first instance might have rightfully exercised jurisdiction, to grant administration. Whether the particular state of facts existed which would have authorized such court to grant administration originally, was a matter to be enquired into and decided by the court; and the decision, if erroneous, would be
130 voidable only, *and not void. The court is therefore of opinion that the grant of administration made by the court of Hanover to William D. Taylor on the estate of Zachariah Burnley, when there was no conflicting administration in existence, and which has not been reversed or revoked, is to be held valid, and the said William D. Taylor and the sureties in his official bond are responsible for his acts.

The court is further of opinion that where, as in this case, the administrator sues for and recovers money, debts or effects as the assets of the estate, he must account for them; and his sureties, who have covenanted for his faithful administration of them, are liable if he fails so to account. The court is therefore of opinion that the said administrator Taylor and his sureties were liable to the appellees, for the assets received of the representative of Hardin Burnley's estate and the representative of Alexander Shepherd's estate.

The court is further of opinion that as the administrator de bonis non cannot compel the representative of a former administrator to account for the converted assets, it would have been competent for the appellees, if the assets of Zachariah Burnley had been converted by his first administrator Hardin Burnley, to proceed against his representative for satisfaction. But as the appellees did not proceed against such representative, but, after the death of said Hardin Burnley, dismissed his representative from the suit, and revived the same against the administrator de bonis non of Zachariah Burnley, it was lawful and proper for the representative of Hardin to transfer and pay over to the representative of Zachariah Burnley for the time being, against whom the appellees were proceeding, the unapplied assets of Zachariah Burnley; and that such payment, made (as in the present case) in good faith and under the sanction of a decree of a court of competent jurisdiction, is a complete protection to
131 the *representatives of Hardin Burnley's estate for all sum so paid over to Alexander Shepherd and William D. Taylor, the succeeding administrators of Zachariah Burnley.

The court is further of opinion, that as the matter in controversy in the original cause was as to the extent of liability of the estate of Zachariah Burnley on account of the assets of John Burnley received by him, it would not have been proper for the representative of Alexander Shepherd, who held in his hands the ad-

mitted unapplied assets which his intestate had received from Hardin Burnley's representative, to pay over those assets to the appellees until the appeal had been disposed of; as, if the decree had been reversed, he would in that event have been responsible to the proper distributees of Zachariah Burnley for the amount. The court is further of opinion that though the appellees had obtained a decree against said Alexander Shepherd as administrator de bonis non of Zachariah Burnley, such decree was personal, only in respect to the assets admitted to be in his hands, and which it was nowhere alleged that he had converted or wasted. That when such unapplied assets came to the hands of his administrator, however the rule might be at law, in equity they should be treated as the unadministered assets of Zachariah Burnley: and that when the administrator of Alexander Shepherd, in pursuance of a decree of a court of competent jurisdiction, paid over and transferred to the representative of the said Zachariah Burnley such assets, such payment, if made in good faith, should protect the estate of Alexander Shepherd from the claim of the appellees. That in this case no collusion or bad faith is imputed or proved; but on the contrary, the course of the appellees throughout indicated to all concerned, that they looked to the representative of Zachariah Burnley for the time being, and to him alone, for satisfaction of their claim. They
132 *had instituted their suit against Zachariah Burnley: on his death, they revived it against Hardin Burnley his administrator: on his death, they dismissed the representative of Hardin Burnley from the cause, and revived it against Alexander Shepherd administrator de bonis non of Zachariah Burnley, who thereupon proceeded to collect from the representative of Hardin Burnley the assets of Zachariah Burnley: and on the death Alexander Shepherd, they revived against William D. Taylor administrator of Zachariah Burnley, who proceeded to collect the assets from his predecessors in the administration. Under such circumstances it would be against equity to compel the representatives of Alexander Shepherd again to pay the amount.

The court is therefore of opinion that the bill should have been dismissed as to the representatives of Alexander Shepherd, but without costs. That the bill should have been dismissed as to the representatives of Hardin Burnley, but without costs, unless the appellees had desired an account of the administration of Hardin Burnley on Zachariah Burnley's estate, for the purpose of shewing that a greater amount of assets of the said Zachariah Burnley had come to the hands of Hardin Burnley, than had been paid over to the said Alexander Shepherd and William D. Taylor, his successors in the administration on Zachariah Burnley's estate: and that the appellees are still entitled to such an account, if desired. That a decree should have been rendered.

against William D. Taylor and his sureties in the administration bond, or their representatives, for the amount of assets received by said Taylor of Alexander Shepherd's representative and Hardin Burnley's representative, together with any other assets of Zachariah Burnley which came to the hands of Taylor: and that leave should have been given the appellees to amend their bill, and make any other person or persons parties, who may have improperly received from said Taylor the assets of said Zachariah Burnley's estate.

It is therefore considered that the said decree be in all things reversed with costs, and the cause remanded, to revive and make the proper parties, and to be proceeded in according to the principle of this decree.

*Note by the reporter. Since the payments were made, the validity of which was discussed in this case, an act of assembly has been passed to authorize an administrator de bonis non to receive assets from the executor or administrator of a prior executor or administrator. The date of the act is the 6th of April 1839, and it will be found in the session acts of that year, p. 44, ch. 70.

Perrin and Others v. Lomax and Another.

May, 1843, Richmond.

(Absent CABELL, P., and STANARD,* J.)

Deeds of Trust—To Secure Creditors—Conversion—Contribution after Death of Grantor between Realty and Personality—Case at Bar.—In 1810 a deed of trust was made, whereby it was witnessed, that for the purpose of securing to the grantor's creditors their debts, and to make provision for the support, education and future settlement of his children, he conveyed his whole estate in trust for the payment of his debts, and for that purpose the trustees were empowered to sell from time to time such parts of the premises as to them might seem fit, or authorized to dispose of the same, or any part thereof, in such manner as might by them be deemed most beneficial and advantageous to all the parties interested; and out of the rents and profits, they were to support the grantor and his wife, and their family, during the joint lives of the grantor and his wife, and the survivor of them during the life of the survivor; and then the estate was in trust for such children of the grantor as he might leave at his death. After making this deed, the grantor died the same year (1810), leaving a widow, and three children by her. In 1811, the acting trustee sold a portion of the real property, and the proceeds were applied towards the discharge of the debts. In 1814 one of the children died, whereby her interest in remainder in the whole estate passed to her mother and the two other children. In 1815 another child died, whereby his like interest (embracing that acquired through the child that had first died)

*He had been counsel for the appellants.

†See monographic note on "Conversion and Reconversion" appended to *Vaughan v. Jones*, 23 Gratt. 444.

passed to his mother and the surviving child. And in 1816 the widow died, whereby the interests in the remainder which she had so acquired passed, as to the realty, to her surviving child, and as to the personality, to her second husband, who survived her and became her administrator. At the period of the widow's death, part of the real and part of the personal estate conveyed was undisposed of by the trustee; and thereafter he disposed of part of each to satisfy debts. *HMA*, 1. the conversion in 1811, of part of the realty into personality, being within the authority and discretion of the trustee, and made at a time when there was no conflict, but an identity of interest, amongst those entitled to the estate, cannot by reason of circumstances thereafter arising, furnish any equity for a reimbursement of the realty out of the personality, or for contribution in favour of the former against the latter. 2. That though, upon the widow's death, the succession to the real fell into a different channel from the personal property, yet as the authority and discretion of the trustee in regard to sales of the property, whether real or personal, continued as before, no equity could arise between the realty and personality for reimbursement of one to the other, neither being primarily, but the whole estate indiscriminately, subjected to payment of the debts by the provisions of the trust deed; which, and not the principles governing the administration of decedents' estates, must give the rule upon the subject. But 3. that an equity of a different nature did, however, arise out of the provisions of the trust deed, so soon as the succession to the realty and the personality so fell into different channels; and it was simply this, that the owners of the realty and personality should contribute to the burden of paying the debts remaining unsatisfied at the widow's death, in proportion to the value of their respective interests: and the exercise by the trustee of the authority and discretion vested in him, should not have the effect of disturbing the due apportionment of that burden amongst those several interests.

Ralph Wormley the first died in 1806, having by his will devised and bequeathed a large real and personal estate to his son Ralph, subject however to the payment of debts.

On the 8th of August 1810, the testator's son Ralph (who will be called hereafter Ralph the "second") made a deed of trust to John Tayloe and John T. Lomax, whereby it was witnessed, "that for the purpose of better securing to the creditors of the said Ralph Wormley the payment of their just debts, and at the same time to make adequate provision for the support, maintenance, education and future settlement of the children of the said Ralph," and for the consideration of five dollars paid to him by Taylor and Lomax, he conveyed to them the estate so devised and bequeathed to him as aforesaid, "and all property, estate, rights, credits, goods and chattels whatsoever, and wheresoever being, of him the said Ralph," upon the following trusts, that is to say, "in trust for the payment of just and lawful debts of the said Ralph; and for that purpose the said John Tayloe and John Tayloe

Lomax are fully authorized and empowered to sell, from time to time, such parts of the premises as to them may seem fit, or authorized to dispose of the same, or any part thereof, in such manner as may by them be deemed most beneficial and advantageous to all the parties interested; and out of the rents, issues and profits of the said estates hereby conveyed, to support and maintain the said Ralph and his wife Eliza, and their family, during the joint lives of the said Ralph and Eliza, and the survivor of the said Ralph and Eliza during the life of such survivor; and from and after their death, then in trust for such child or children of him the said Ralph as he may leave at his death, and their heirs forever; and in default of such issue, in trust for such person or persons as he the said Ralph may, by last will and testament in writing, appoint; or in default of such appointment, then to the right heirs and distributees of him the said Ralph Wormley. And for the better performance of the trusts herein before mentioned, the said Ralph Wormley has constituted and does hereby constitute them the said John Tayloe and John 136 Tayloe Lomax, and *the survivor of them, his true and lawful attorneys irrevocable, for him and in his name to sue for and recover, and give acquittances for, all debts, dues and demands which the said Ralph may now have owing, or which may hereafter be accruing, unto him the said Ralph; to implead and be impleaded, and to do every other lawful matter or thing touching the trust herein before created, which he the said Ralph might lawfully do by himself."

Ralph Wormley the second, after making this deed, died in the latter part of 1810, survived by his wife Eliza, and three children, Elizabeth, John and Ralph the third, all of whom were by his said wife. The child Elizabeth died in 1814, and John in 1815. Afterwards, in October 1815, the widow Eliza married Carter Braxton. She died in 1816, leaving her husband Braxton and her son Ralph surviving her, and no other descendant. In 1824 this son (Ralph the third) died an infant, intestate and unmarried, whereby his estate became divisible into two moities, one for his paternal and the other for his maternal kindred.

In 1828 a bill was filed in the superior court of chancery at Fredericksburg, by the said paternal and maternal kindred, setting forth, that Lomax alone took upon himself the burthen of the execution of the trust; that at various times he sold considerable real and personal estate, and received rents and hires, and had paid off the debts of Ralph the second; that in a suit in the said court in the name of Ward and others, creditors of said Ralph the second, against Tayloe and others, the accounts of said Lomax as trustee had from time to time been settled by a commissioner and allowed, and the complainants, having examined the same, were content therewith; that the real estate left consists of a valuable tract

of land called Rosegill, in Middlesex, and the personal estate left consistent of about

23 slaves, some stock, and a balance 137 of funds in the *hands of the trustee, arising from sales of real and personal estate, rents of land, and hires of slaves; and the complainants claim that the whole of the said real and personal estate, not required for the payment of debts, should be divided and distributed amongst them. They state, however, that Carter Braxton, as administrator of his wife, claims to share in the personal estate; and he is made a defendant, as well as Lomax the surviving trustee.

The answer of Lomax admitted, that the entire agency of the trust had devolved upon him (except as to the sale of one slave and the disbursement of the proceeds), and that he had from time to time settled accounts of his trust, in the suits by the creditors of Ralph the second against the trustees, all of which were consolidated in the name of Ward v. Tayloe; and the respondent expressed his belief that there would be a considerable surplus of estate of Ralph the second, after the payment of the creditors. He prayed, however, if the court made a decree for a division of the estate, that it would make provision for an adequate indemnification of himself and his cotrustee against the liabilities to which they were exposed.

Braxton, in his answer, said, that on the death of the infant Elizabeth, her mother became entitled to one third of the estate, that is, to one ninth of the estate of Ralph the second; and on the death of the infant John, his mother became entitled to one half of his estate, that is, to two other 138 ninths of the estate of Ralph the second; and thus, at the time of the death of Mrs. Braxton, the portion to which she was entitled of the estate of Ralph the second was one third thereof. He stated that the only real estate sold since the deaths of Elizabeth and John was a farm called The Cottage, which was sold for about 3000 dollars; while the personal estate sold since

their deaths amounted to about 12000 138 *dollars. And he insisted that the heirs of Ralph Wormley the third had no right to have the real estate relieved and reimbursed by the personal, (because of the palpable difference between the case of an executor and of a trustee,) but on the contrary, when the real and personal estates descended and passed to different parties, the trustees ought, and in equity would be compelled, to draw ratably on the two funds, the real and the personal, for the payment of debts; or, if this principle be not sanctioned, that the court should decree the respondent one third of the slaves and money remaining in the hands of the trustees.

The court of chancery, in 1828, decreed a division of the tract of land called Rosegill among the heirs of Ralph the third, making provision for the indemnity of the trustees against any debts which might afterwards be demanded against either Ralph

the first or Ralph the second; and the court also directed certain accounts, to enable it to decree in respect to the personalty. The cause was afterwards removed to the circuit court of Stafford, and subsequently to Essex.

The report of the commissioner shewed, that there was brought into the accounts reported in *Ward v. Tayloe*, and applied towards the discharge of the debts of Ralph the second, the sum of 9172 dollars 41 cents, which was the proceeds of a tract of land called Pianketank, sold by the trustees in 1811. And then the report proceeded as follows:

"After the deaths of Elizabeth and John, the following sums were received from the realty:

1815. Sales of wheat to Burke.....	256 10
1816. Net proceeds of barley and corn of 1815, shipped to Baltimore in January and sold in June..	934 46
Net proceeds of corn shipped to messrs. Donald & son.....	813 95
139 *Corn furnished mrs. Braxton.	82 50
C. M. Braxton, sales of barley..	7 20
Do. lot of corn.....	40 00
1817. Sale of Cottage to A. New.....	2982 50
Meadow to Nicholson.....	240 00
Upland to Z. Braxton.....	516 03
	<hr/>
	3738 53
Tobacco to Nicholson.....	408 78
Crops January 1817.....	2181 55
Rent of land from 1st Jan'y 1818 to 1828, inclusive, is 11 years, estimated at \$300.....	3300 00
	<hr/>
	\$11443 07

And if interest be added, it would make upwards of 20,000 dollars which the realty had contributed towards the payment of debts up to 1st May 1835; a sum greatly exceeding all the trust subject in the hands of the trustee, viz.

Bonds &c. outstanding, after deducting decree of Carter v. Wormley.....	5165 78
Slaves, in 1822 estimated at 2419 dollars 50 cents, (the commissioner has no warrant for the supposition, but,) if doubled in value, would make but.....	6839 00
	<hr/>
	\$12004 78"

It appeared that the sum of 5165 dollars 78 cents, above mentioned, consisted exclusively of a residue of the hires of the slaves which had accrued from the 1st of January 1829 to the 1st of January 1835. At the time of the decree in 1828, the proceedings in the suits between the creditors of Ralph Wormley and his trustees, together with the papers filed and the accounts taken in those suits, were, by consent of parties, referred to as a part of the record in this

140 suit, and the *court at that time confirmed those accounts. Hence the account returned in this case by the commissioner, of the transactions of the trustee, commenced with the balance due on the first of September 1828 according to a previous report, and no accounts of the trustee prior to that time were inserted in the record of this case.

In the progress of the cause an amended bill was filed, making the personal representatives of Elizabeth, John and Ralph the third, parties defendants. This amended bill, however, set forth that they all died infants and not at all indebted.

On the 26th of April 1837, the circuit court of Essex, declaring its opinion to be that the money and slaves of the trust fund in the hands of the defendant Lomax should be distributed as the personal estate of the deceased infants Elizabeth, John and Ralph Wormley, directed a division of the slaves, and decreed to the defendant Braxton, as administrator of his wife Elizabeth, one third thereof, and one third of the said sum of 5165 dollars 78 cents; and to the distributees of Ralph Wormley the third, the other two thirds.

From this decree, on the petition of the complainants, an appeal was allowed. The view taken in the petition was, that by the report of the commissioner, the aggregate amount of the personal estate in the hands of the trustee appeared to be far short of what had come to the hands of the trustee from the real estate, since the deaths of the two children of Ralph the second, and indeed since the death of their mother, his widow. And it was insisted that the decree was erroneous,

1st. Because it is a matter of plain equity, that the conversion of the estates of infants, after their deaths and the devolution of their rights on their heirs, which after events ascertain to be unnecessary, does not extinguish or impair their rights therein, so as to alter 141 *their rights of succession; but there was a plain resulting trust to Ralph the surviving child, in the proceeds of the converted property; and consequently, in respect to the balance of 5165 dollars 78 cents, of a fund of upwards of 20,000 dollars resulting from the real estate, that stands in place of so much real estate of Ralph the third, and passed on his death to his heirs and distributees.

2ndly, Because, by principles analogous to the foregoing, (as the personal was the natural fund for the payment of debts,) the trustee and administrator of Ralph the second ought to have applied the slaves to that object; and if, for inconvenience, he has, by this power as trustee, applied the real estate of the heir to that object, the slaves ought, in a question between the real and personal representatives, to stand in the place of the land and have the same destination as the land would, or at least, in favour of the heir, be charged with a sum equal to that which had been taken from the real estate.

Stanard for appellants. If it was the purpose of any party to insist that what the commissioner has reported to have arisen from real estate did not so arise, there ought to have been an exception to the report on this ground. But the report is without exception, and must be considered correct. So considering it, the consequence follows, that what now remains in the hands of the trustee should pass as real estate. For the rule is well established, that where a conversion is not made until after the death of the party making a trust, the surplus remaining after satisfying the purposes of the trust that he has created, and which would go to him if alive, is an interest in real estate, which passes as such to his heirs or devisees. *Emblin v. Freeman*, Prec. in Ch. 541; *Roper v. Radcliffe*, 10 Mod. 230; *Digby v. Legard*, 2 Dick. 500; *Ackroyd v. Smithson and others*, 1 Brown's Ch. Rep. 503. These cases shew that where a conversion of lands is authorized for particular purposes, and the land is converted to a larger amount than is necessary for those purposes, the surplus money will descend as land. The surplus here must pass as land on another ground. Equity will not permit the real estate of infants to be so converted into personality, as to interfere with the course of descent. 1 Lomax's Digest 203; 1 R. C. of 1819, ch. 108, § 21, p. 410.

II. Since the death of Mrs. Braxton, real estate has been applied to pay debts which are chargeable as well upon the realty as the personality. What were the rights of the parties at her death? Suppose, upon that even, Ralph the third had filed a bill claiming an account of the trust subject, and it had then appeared that there were debts chargeable upon the trust subject, and that this subject consisted partly of real estate and partly of personality. Surely Ralph would have been entitled to require that the personality should be applied to pay the debts, unless, by the act of a party competent to do it, the personality had been exonerated from its primary liability for the payment of debts. This primary liability of the personality results from the creditor's having a capacity to subject it primarily, while there are no means in his power to subject the real estate so long as there is personal property. But whether this or any other principle be the foundation of the rule, it is enough that the rule is established. The rule is not affected by the circumstance of there being a charge of debts upon the real estate as well as the personality: to prevent its application, it must appear that there was a purpose not only to charge the realty, but to discharge the personality. The cases, it is true, in which the doctrine has been principally discussed, are cases arising on wills. 1 Roper on Legacies 463; *Samwell v. Wake*, 1 Brown's Ch. Rep. 144; *Duke of*

143 **Ancaster v. Mayer & others*, Id. 454. And it may be said, this is not a case arising under a devise, but under a deed.

But if the intention is to govern in the one case, it should govern in the other. It is in vain to say that the trustees had power to sell by the terms of the deed: there is the same power under a devise. But the power is not allowed to be so exercised as to affect the rights of others. Parties whose rights the testator did not contemplate affecting, shall not be affected. If, at the death of Mrs. Braxton, the decision upon a bill by the heir would have been such as has been supposed, then the subsequent acts of the trustees cannot change the rights of the parties. The case of an heir paying a bond debt, who is entitled to be reimbursed out of the personal assets, and the case of the heir or devisee of a mortgagor paying off the mortgage, who is entitled to like reimbursement, are both familiar, and the principle of those cases applies to this. What is the discretion in the trustees? A discretion to sell for the payment of debts, and limited to this purpose. Can it be held that this authorizes them to change the nature of the subject at their pleasure? In what respect does this differ from a case of rights devolved by the law; such a case, for example, as *Godwin's adm'r v. Godwin's adm'x &c.*, 4 Leigh 410, where slaves were sold to raise a fund for the payment of debts, and it turned out afterwards that the funds were not wanting? The case will be exactly the same, if we suppose slaves to be sold, and funds afterwards to come to hand from other personality, which might have been applied to the payment of debts.

But if, at the death of Mrs. Braxton, the right of her personal representative be not to one third of the personal estate charged with the whole debts, the charge must at least be of a ratable proportion of the debts, according to the amount due and the value of the respective estates at the time the rights devolve.

144 **Robinson for appellee Braxton.*

Where land is conveyed by a deed of trust or mortgage to secure a debt, and the debt not being paid, there is a surplus arising from the proceeds of sale, that surplus, not being disposed of by the deed, goes of course to the representatives of the grantor; and whether to his real or his personal representatives, depends upon the nature of the subject at the time of the grantor's death. If, when he died, the land had been sold, and the surplus was in the hands of the trustees in money, that surplus would necessarily go to his personal representative. If, when he died, the land had not been sold, and he had an interest in the land subject to the debt, an interest entitling him to redeem on paying the debt, that interest passes to his heir or devisee. Then if the land be sold in the lifetime of the heir or devisee, and at the time of the death of the heir or devisee there is a surplus in the hands of the trustees in money, it necessarily goes to the personal representative of the heir or devisee. *Wright v. Rose*, 2 Sim. and Stu.

323; 1 Cond. Eng. Ch. Rep. 477; Evans &c. v. Kingsberry &c., 2 Rand. 120. The circumstance that more than enough happens to be sold gives no equity, as between the heir and personal representative, to consider this surplus of money as land, but their rights depend upon the state of the subject at the time those rights accrue. *The Commonwealth v. Martin's ex'ors &c.*, 5 Munf. 125. Upon the death of the party entitled to a surplus arising from a previous sale of lands, that surplus, being then a personal subject, goes to his personal representative; and if such party was entitled to rents and profits which had accrued from the lands before his death, those rents and profits are also a personal subject, which goes to his personal representative. *Levet v. Needham*, 2 Vern. 138.

If, in such a case as has been supposed, a case in which the conveyance was of 145 real estate alone for the *simple purpose of paying debts, the surplus would go from the party entitled to his personal representative, a fortiori it must be the case here, where the grantor has blended his real and personal estate together, and conveyed the whole, without distinction, for the payment of his debts, for the support and maintenance of himself and his wife and family, and for the benefit of his children when the husband and wife should be dead. This case is much in favour of the right of the personal representative, than the case of *Flanagan v. Flanagan*, decided by lord Camden, a statement of which is contained in *Fletcher v. Ashburner*, 1 Brown's Ch. Rep. 500, 501. There it was provided, that the debts were to be paid in the first place out of the personal estate, as far as it would extend, and in the next place by a sale of the real estate or a sufficient part thereof. Whereas here the trustees are fully authorized and empowered to sell such part of the estate, whether real or personal, as to them might seem fit. They might sell real estate first, or personal estate first, or such part of one and such part of the other as to them might seem fit. There, too, the power to sell was a limited power to raise so much money as should be sufficient to pay the debts and legacies; and after payment thereof, the real estate unsold, and the surplus proceeds of the part sold, were devised to the testator's father and brother. Whereas here, besides the power to raise by sale so much money as should be sufficient to pay the debts, the trustees are authorized and empowered to dispose of the estate, or any part thereof, in such manner as might by them be deemed most beneficial and advantageous to all the parties interested. And there, though the question was between the heir and personal representative in respect to the surplus arising from a sale decreed after the ancestor's death, under an idea that a previous sale was insufficient, which (it appeared 146 afterwards) was in fact *sufficient, the court nevertheless determined (there being no fraud) that the second sale

could not be considered as improperly made, and the money must go to the personal representative. Lord Rosslyn, in adverting to this decision, says, it shews the court thought there was no equity between the representatives, but that they must take their respective rights as they find them. *Oxenden v. Lord Compton*, 2 Ves. jun. 77, 8; *S. C.* 4 Brown's Ch. Rep. 239; *Walker v. Denne*, 2 Ves. jun. 176; *Lord Compton v. Oxenden*, 2 Ves. jun. 265; *S. C.* 4 Brown's Ch. Rep. 403. A distinction may be supposed to exist between *Flanagan v. Flanagan* and this case, upon the ground that the surplus there arose from a sale made under a decree of court. But is there any material difference between such a sale, and a sale under the power given by this deed? The trustees who acted here were a court chosen by that party under whom all interested claim, and who could give as much power and authority as could be conferred by a decree. And he has given such power. When, for the purpose of paying his just and lawful debts, they deem it proper to sell any part of the property, or when they dispose of any part of it because they deem it beneficial and advantageous to all interested, whether the part sold or disposed of be real or personal, their opinion, supposing they act without fraud, must bind all claiming under the deed, and the sale must be a valid sale. No injunction could be awarded to prevent the sale of any part of the property which the trustees saw fit to sell, if there were debts to be paid, or the sale was deemed by them beneficial and advantageous to those interested. And if in such a case no injunction could be awarded to prevent the sale, it must be impossible to hold afterwards that it was improperly made. And unless a court can say that the sale was improperly made, the surplus must go to the personal representative of the party who, at the time of the sale, is entitled to that surplus.

147 *The conversion from land into money being made in a regular and proper manner, the heir is not entitled to come into equity to reconvert the property, in order to give it a descendible quality. If he were, it would be contrary to all analogy. Where money is transferred with directions that it shall be laid out in land, but the court comes to the conclusion that the character of land is not by the grantor imperatively fixed to the property, but that an option is given to parties to retain the property in money or vest it in land, the moment the conclusion is arrived at that there was such option, that moment it is ascertained that the property will go to the real or the personal representative, according to its state at the death of the party entitled. *Wheldale v. Partridge*, 5 Ves. 388; *S. C.* 8 Ves. 227. When the fund is money, and it is claimed that the owner has made it land, it must appear that he intended it at all events to be turned into land and descend as such. If this was not his fixed purpose; if there be any uncertainty as to his purpose; if there be any

option to permit it to remain in the one form or be converted into the other, it does not become land until that option is exercised and the conversion made. On the other hand, where the fund is land, and there is an option to permit it to remain in that form or be turned into money, when that option is exercised and the conversion made, it becomes money, and passes to the personal representative.

The case of *Walter v. Maunde*, 19 Ves. 424, is very apposite to this. The will in that case (the provisions of which are stated in *Cole v. Wade*, 16 Ves. 27), gave the whole estate to trustees, for the payment of debts, funeral expenses and legacies, and then to dispose of the residue for the use and benefit of the testator's relations and kindred, as the trustees in their discretion should think proper. The testator left it to their discretion to sell

the same or such part thereof as they might think proper, and to convey the same in such manner and form as they might think proper, wholly or only partly converting the estate into money for the purpose of division, as they might think proper. The trustees died before distribution; and then the heir claimed the fund, upon the ground that there was no longer any person authorized to distribute it. It was decided in 16 Ves. 27, that the court of chancery might make the distribution; and the manner of distribution was decided upon by the chancellor in 19 Ves. 427, 8. "Whatever the trustees did," says lord Eldon, "towards and in a due execution of their power, with a view to the execution of the trust which is now disappointed, the court will also take to be property of the same nature and quality as it is found. Whatever therefore was converted into personal estate in the due execution of the trust, must be taken as personal estate." These principles are further sustained by the case of *Smith v. Claxton &c.*, 4 Madd. C. R. 484, and *Dixon v. Dawson*, 2 Sim. & Stu. 327; 1 Cond. Eng. Ch. Rep. 485.

Considering it clear that upon the death of Mrs. Braxton, her rights in whatever was then real estate passed to her real representative, and in whatever was then personal estate to her personal representative, the true question in this case is, whether the real representative had a right at that time to require that the personal estate should be applied to pay the debts, in exoneration of the real estate? Upon this question, the cases relied upon on the other side are all cases of the administration of the assets of decedents' estates. But we have no such case here. Ralph Wormley the second, at the time of his death, had no assets whatever which could pass from him to his executor or administrator. His whole estate, real as well as personal, had been transferred by a conveyance made in his lifetime. And the case is no more one of the administration of the assets of his estate, than it would have been if the conveyance,

instead of being by Ralph Wormley, had been by another person, of the property of that other upon the same trusts that are declared in this deed, and that person had continued alive to this time. We certainly can have here no question of marshalling assets, in the sense in which that term has hitherto been used. In all cases of the administration of assets of a decedent, whether testator or intestate, and whether under the will or under the law, the rights of the parties are fixed at the time the will takes effect or the death occurs. To that period the court looks in fixing their rights, no matter how long afterwards it may be that it has to decide upon them. How will such a principle apply here? Could any *cestui que trust* say, at the date of the deed, that the personal estate must be exclusively applied, and the real estate not at all, to the payment of debts? And if this could not be done, then it must be contended that the rights conferred by the deed are not to be ascertained from the deed, but depend upon subsequent events. Can this be so? Upon the deaths of Elizabeth and John, could either Mrs. Braxton or the guardian of Ralph have obtained the decree of a court controlling the discretion conferred upon the trustees by the deed? Surely not. The court must have said, it was competent to the grantor to put the trustees in his place, and make their action binding upon all claiming under him; and their authority to sell such part of the estate as to them might seem fit, was not, by the terms of the deed, limited to the lives of Elizabeth and John.

It seems impossible to hold that at the death of Mrs. Braxton, her third of the personal estate was charged with the whole debts then remaining. On the other hand, there may be difficulty in saying that after that time, when different parties were interested in the realty from him who succeeded to the personality, the trustees still had the arbitrary right to sell, for the debts remaining due, such part of the estate either real or personal as to them might seem fit. A more equitable principle seems to be that suggested in the alternative presented by Mr. Stanard, when concluding his argument; to wit, that the court should say, that there being at the death of Mrs. Braxton a certain amount of debts due, chargeable alike on the whole estate, and the real estate going to her son and the personal to her husband, an account should be taken of the value of each kind of estate then remaining, and the debts made to fall in ratable proportions upon each. [Stanard. I do not go for charging the debts ratably.] Robinson. You contend, I know, that the personal estate remaining when Mrs. Braxton died should bear all the debts; but if you should fail in this, then it was suggested by you that the two kinds of estate ought to be charged with ratable proportions of the debts. There is great force in this view of the subject; and if the power of sale is to be considered as existing after

mrs. Braxton's death only for the payment of debts, it is difficult to come to any other conclusion. For as the rights to the realty and two thirds of the personalty were then concentrated in Ralph Wormley, and the right to the other third of the personalty was then in the administrator of mrs. Braxton, there ought to be a right in them to pay off the debts, and there must be some correct principle on which this could be done; and no rule seems so fair as that of ratable proportions according to the value of the estate then falling to each. *Long v. Short*, 1 P. Wms. 403; 2 Vern. 756; *Headley v. Redhead*, Coop. 50. It may be said that these were cases of the administration of assets; but there is nothing in the principle of contribution which should confine it to cases of that sort, or prevent it from being applied to a case like this.

If the decree be reversed, an enquiry will be necessary to ascertain the value of each kind of estate existing at the time the rights were severed, and the amount
151 *of debts due at that time. For it is apparent on the face of the commissioner's report, that his statement of the sums made from the realty after the death of the infants is not to be relied on. The proceeds of wheat, barley, corn, tobacco and other crops are put down as sums received from the realty, though they must have arisen as much from the slaves as from the land. The land would not have produced the crops unless the slaves had worked it.

Braxton said, he was desirous of ending this litigation, and would not ask a reversal of the decree; but if it should be reversed, and the principle of ratable contribution just mentioned should be adopted, he was satisfied that principle would give him much more than the decree of the court below.

Patton in reply. The argument of mr. Stanard and the authorities cited by him have sufficiently established, as a general proposition, that a man's personal property is primarily bound for the payment of debts, from which nothing will relieve it but express exemption, or plain and manifest intention so to exempt it. This principle has not been controverted, in cases of the administration of assets. Is not this case one of that character? Concede that upon the death of Ralph the second, who had conveyed away his estate, there were no assets to be administered; was it so upon the deaths of his children Elizabeth and John? Clearly not. Upon their deaths, their shares descended and passed, not under the deed, but under the statute of descents and the statute of distributions. And if there had been an administration on the estate of either, and a suit by the administrator to recover his share of the personalty, he could have recovered nothing until all the debts were paid. As it regards the conflicting rights of the real and
152 *personal representatives of Elizabeth and John, the case being one of descent and distribution, their per-

sonal estate must exonerate their real estate. So upon the death of mrs. Braxton, her personal representative was entitled to nothing as against her real representative, until all the debts charged upon her estate had been paid out of the personalty. Supposing the case can be looked at in this point of view, as one of descent and distribution, the proposition does not appear to be controverted.

[Robinson. If not controverted, it was because the matter was not before presented in this point of view. But it will not aid the other side at all to consider this a case of the administration of assets, either of the estates of Elizabeth and John Wormley, or of mrs. Braxton. Let us suppose that either of them had had personal estate other than that derived under the deed from Ralph the second; nothing can be more plain than that such personal estate would not have been bound to exonerate the estate derived under that deed (though it were altogether realty) from the debts of Ralph the second. The exoneration of real estate out of the personal estate of a decedent is confined to cases where the debts are the proper debts of that decedent,—debts of his own contracting. This is a well established principle, acted upon in the case of *The Duke of Ancaster v. Mayer* and others, 1 Brown's Ch. Rep. 454, 464, (which mr. Stanard cited for another purpose) and in numerous other cases. *Lawson v. Hudson*, 1 Brown's Ch. Rep. 58; 3 Brown's Parl. Cas. p. 424 of Tomlin's edi.; *Evelyn v. Evelyn*, 2 P. Wms. 664, and cases there collected by mr. Cox in his note. In *Scott v. Beecher* and wife, 5 Madd. Ch. Rep. 96, (am. edi. 65,) a copyhold estate was mortgaged, and the mortgagor not only devised to his widow the copyhold estate, but bequeathed to her his personal estate, which was sufficient to pay all his debts, including the mortgage. She qualified
as executrix, and afterwards died

153 without having *paid off the mortgage, but leaving outstanding personal assets of her husband's estate sufficient to pay it off. In a contest after her death (which produced a severance of rights), it was held that her heir had no equity to have this mortgage paid off out of the mortgagor's personal estate. It thus appears that if the deed of trust of Ralph the second had been upon real estate alone, the subsequent deaths of Elizabeth and John, or of mrs. Braxton, could give no right to her heirs to have the debts secured by the deed paid off out of the personal estate, even though that personal estate was derived from the party who contracted the debts. And the circumstance of personal estate being conveyed by the deed, alone with real estate, can only authorize each kind of estate to be subjected to debts according to the terms of the deed; which have already been considered.]

Patton. In the cases just cited by mr. Robinson, the real estate was primarily and indeed exclusively bound. In our case, it is not exclusively bound: and the

debts are due by the same person from whom both the real and personal fund are derived. My argument is, that the contest being between the heirs and personal representatives of Elizabeth and John Wormley, and the estate real and personal being derived from Ralph the second, the personal representatives of Elizabeth and John had no right to any part of the personal property as assets of their estates, until all the debts of Ralph the second, charged by him upon that personal property, were discharged. It is true, he had charged his real estate also. But the real estate was neither exclusively nor primarily charged with the debts by him. And it is that feature in this case which distinguishes it, clearly and plainly, from all the cases cited by Mr. Robinson, and brings it more nearly within the influence of *The Earle of Belvedere v. Rochfort*, 5 Brown's Par. Cas. p. 299 of Tomlin's edi.

154 *No matter what may be the interpretation of the deed of Ralph the second, as to the discretion and power of the trustees to sell either real or personal property to pay debts, that power and discretion was given in reference only to the rights of his children and grantees, as to whom, in their lifetime, it was a matter of no consequence whether the real or personal estate was sold, as they were to have all that was left, whether real or personal. When, however, new rights and inconsistent interests grew up by their deaths, the deed could not operate to leave it to the trustees, in the exercise of a discretion for the benefit of the children, to defeat those rights and interests. As to the heirs and representatives of the grantees, the law threw on them the estates real and personal, subject to the charge for the payment of debts. As between them, the case is similar to a devise for the payment of debts and legacies, where, so far as the creditors are concerned, both real and personal estates are equally responsible, but as to the representatives themselves, the natural and primary obligation of the personal estate recurs. This argument is applicable, supposing Mr. Robinson's interpretation of the deed to be the true one.

But we do not admit that interpretation. We insist that the deed had no other effect than to give a power to sell the real estate, if necessary, for the payment of debts; that this power was only conferred to insure to the creditors full satisfaction, and was not intended to disturb the primary and natural obligation of the personal estate to pay the debts; and that if the trustees, for the more speedy and convenient payment of the debts, chose to sell the real estate for that purpose after the deaths of Elizabeth and John, their doing so could not affect or impair the rights of the infant heir (Ralph the third) to be reimbursed out of the personal estate. In equity, the trustees, after the deaths of Elizabeth and John, were quasi guardians of the

155 infant (Ralph the *third), and could not sell his real estate to pay the debts

of his ancestor (Ralph the second), when there was ample personal estate to pay them, and especially when the effect was to throw the whole burden on the real estate, and to give one third of the amount, out of his estate, to the personal representatives.

Stanard. Much stress seemed to be laid on the case of *Scott v. Beecher and wife*. This case will be found to be a hasty decision of the vicechancellor, rendered upon slight argument, in support of which no authorities are cited; and the position broadly assumed in it is not tenable. For the widow, as residuary legatee of John Tyson, took his estate subject to the payment of his debts, and among others the bond secured by the mortgage; and there can be no doubt that had the mortgagee chosen to proceed at law upon the bond, instead of resorting to the mortgage, he might have had satisfaction out of the personal estate of the mortgagor in the hands of his executrix. The case admitted of a decision on another ground; viz. that the widow having the absolute dominion over the whole subject, and being *sui juris* in all respects, her conduct evinced an election on her part to continue the mortgage as a charge upon the real estate: and in the face of such election by the party under whom both claimed, her heir had no equity as against her personal representative. But that ground would not apply to a case like this, arising between the real and personal representatives of parties not *sui juris*, not clothed with any dominion over the subject, and not competent in law or in fact to manifest any intention or make any election whatever. Unless the decision in *Scott v. Beecher and wife* can be placed on this ground, it is inconsistent with the case of *The Earl of Belvedere v. Rochfort*. And if there be an inconsistency between the two, at least as much consideration is due to a decree

156 *in chancery affirmed in the house of lords, as to a hasty decision of a vice-chancellor.

It is somewhat remarkable that though Mr. Robinson seemed to think that this case has nothing to do with the doctrines in cases arising under wills or relating to the administration of assets, the only two cases which he has adduced to support his new theory of contribution, in favour of which he seems willing to abandon the decree of the court below, are both cases arising under wills and relating to the administration of assets. No case, it is believed, can be found amongst the decisions of this court, in which it has been held that where a man by his will gives a slave or a horse to A. and a tract of land to B., the legatee of the chattel can claim contribution from the devisee of the land. But whatever may be the rule as to such a case, nothing is better settled than that a general or pecuniary legatee, or a residuary legatee can never call on the devisee of the land for contribution. As between them, the personal estate must always be first applied to the payment of debts, even though the

legacy should thereby altogether fail. *Clifton v. Burt*, 1 P. Wms. 678; *Harewood v. Child*, cited in *Cas. temp. Talb.* 204, and approved by lord Hardwicke in *Inchiquin v. French*, Amb. 33; *Tait v. Lord Northwick*, 4 Ves. 816. And *mrs. Braxton's* becoming entitled to one third of the unascertained residuum of the personal estate of Ralph the second that might remain after the payment of his debts, does not place her in the relation of a specific but of a general or residuary legatee.

BALDWIN, J. The court is of the following opinion: The effect of the deed executed in 1810 by Ralph Wormley the second and his wife to trustees, conveying to them all his property, real and personal, for the purposes therein mentioned, was to create an equitable estate therein in himself and wife during their joint lives
157 *and the life of the survivor, with remainder to such children as he should leave at the time of his death; which estate was subject to the payment of his debts, with a full authority to the trustees to sell for the purpose the property conveyed, or any part thereof, whether real or personal, according to their discretion, and apply the proceeds to the discharge of the debts. By the death of the grantor Wormley in 1810, the remainder became vested in his three children, Elizabeth, John and Ralph the third, but did not take effect in possession until the death of the widow. By the death of Elizabeth in 1814, her interest in remainder in the whole property, real and personal, passed to her mother the widow, and to John and Ralph the third her brothers; and by the death of John in 1815, his like interest, embracing that which he had acquired by the death of Elizabeth, passed to his mother the widow, and Ralph the third his brother. And by the death of the widow in 1816, the interests in the remainder which she had acquired by the deaths of her children John and Elizabeth, passed, as to the realty, to her only surviving child Ralph the third, and as to the personalty, to Carter M. Braxton, her surviving second husband and administrator. In 1811, the acting trustee sold a portion of the real property to the amount of 9172 dollars 41 cents, and the proceeds have been applied towards the discharge of the debts. This was a conversion, within the authority and discretion of the trustee, of so much of the realty into personalty; and being made at a time when there was no conflict, but an identity of interest amongst those entitled to the estate, it cannot, by reason of circumstances thereafter arising, furnish any equity for a reimbursement of the realty out of the personalty, or for contribution in favour of the former against the latter. The surplus income of the estate, real and personal, beyond the maintenance of the family, which accrued prior to the death of the widow, has also been
158 *applied to the payment of debts; and the record furnishes no informa-

tion of the respective amounts derived in that way from the realty and personalty. Nor would such information be at all material, the widow being entitled to the profits of the whole estate, subject to the payment of debts, during her life, for the maintenances of herself and family. It follows from these considerations, that upon the questions involved in this cause, it is unnecessary to look back beyond the death of the widow in 1816, to ascertain the relative payments theretofore made out of the realty and personalty, towards the discharge of the debts. And any equity between the parties must arise out of the means respectively furnished for that purpose by the realty and personalty, since that period; when the succession to the real fell into a different channel from that of the personal property; Ralph the third then becoming the owner of the whole of the former and two thirds of the latter, and the defendant Braxton, in right of his deceased wife, of the remaining third of the latter. After that period, the authority and discretion of the trustee in regard to sales of the property, whether real or personal, continued as before, and no equity could arise between the realty and personalty for reimbursement of one to the other, neither being primarily, but the whole estate indiscriminately, subjected to payment of the debts by the provisions of the trust deed; which, and not the principles governing the administration of decedents' estates, must give the rule upon the subject. An equity of a different nature did, however, arise out of the provisions of the trust deed, so soon as the succession to the realty and the personalty practically fell into different channels: and it was simply this, that the owners of the realty and personalty should contribute to the burthen of paying the debts remaining unsatisfied at the widow's death, in proportion to the value of their respective interests; and that the ex-
159 ercise by the trustee *of the authority and discretion vested in him should not have the effect of disturbing the due apportionment of that burthen amongst those several interests. It appears that after full payment of the debts charged upon the estate, there remained of trust moneys, besides the slaves, in the hands of the trustee at the date of the chancellor's decree of 1837, for distribution, the principal sum of 5165 dollars 78 cents, consisting exclusively of a residue of the hires of the slaves which had accrued from the 1st of January 1829 to the 1st of January 1835. It further appears that in the year 1817, the trustee sold other parts of the real property, to the amount of 3738 dollars 53 cents, which has been applied to the payment of debts, still leaving the tract of land called Rosegill, of which partition was directed by the chancellor's decree of 1828, amongst the heirs of Ralph Wormley the third, who died in the year 1824. If the plaintiffs, as heirs and distributees of Ralph the third, have any equity against the defendant Braxton's

distributive third of the personal property, it must be founded on the fact that the said sum of 3738 dollars 53 cents, applied from the realty towards the payment of the debts, together with the rents and profits of the realty which may have been so applied since Mrs. Braxton's death, exceeds the due proportion which ought to have been contributed from the real property and Ralph the third's distributive two thirds of the personal property, compared with what ought to have been contributed by the defendant Braxton's one third of the latter, having due regard to the value of each interest. That the fact is so is hardly probable, and it ought to have been made appear by the plaintiffs. The record before us does not contain the accounts of the trustee prior to the 1st of September 1828; and of course does not furnish the means of ascertaining the rents and profits of the lands and the hires of the slaves, and the proceeds of sales (if any) of slaves and other personal property, which

160 *were applied to the payment of debts from the time of Mrs. Braxton's death until the 1st of September 1828. For the accounts of the trustee between those periods, reference, it would seem, was had in the court below to a settlement by a master commissioner, and the other papers in certain suits brought by creditors of the estate, and which by the chancellor's decree of 1828 were, with the consent of the parties, directed to be made parts of the record of the present suit. The papers and proceedings in those suits have not been copied into the record before us, though they probably contain the evidence upon which the chancellor held, by his decree of 1837, that the money and slaves remaining of the trust fund in the hands of the trustee should be distributed as the personal estate of the deceased infants Elizabeth, John and Ralph Wormley, and which distribution was thereby accordingly decreed. If copies of those papers and proceedings could have availed the appellants any thing in their purpose of shewing the said decree to be erroneous, they ought to have suggested a diminution of the record, and brought them up by certiorari. But inasmuch as said papers and proceedings were probably confined to the trust transactions, without furnishing comparative estimates at the proper period, of the value of the lands on the one hand, and of the slaves and other personal property on the other, it would perhaps have been more regular for the chancellor to have directed an account, in the present suit, of the whole trust subject and transactions. Wherefore, though this court perceives no error in the decree for which the same ought to be reversed, and though the appellee Braxton states that he is content therewith, and desires no further account; yet if it is desired by the appellants, and they are willing to incur the risk of a readjustment of the accounts upon the principles above declared, this court will amend the said decree by directing the same.

161 *[Stanard. I cannot take the responsibility of calling for any new account. Let the decree be affirmed.]

PER CURIAM. The appellants, by their counsel, now declining such an amendment of the decree as was suggested in the opinion of this court, the decree is affirmed with costs, and the cause remanded for the further proceedings contemplated by the decree of the circuit court.

Floyd v. Harrison and Others.

July, 1843, Lewisburg.

(Absent CABELL, P., and BROOKS, J.)*

Mortgages—Redemption—Case at Bar.—A deed is made, whereby, after reciting that F. the grantor hath sold to H. the grantee, for the sum of 200 dollars, certain real and personal estate, it is witnessed that the grantor, in consideration of that sum, conveys the same to the grantee; and then the deed concludes as follows: "It is agreed and fairly understood by and between the said F. and H. that in case the said H. or his heirs or assigns shall not be able to make the aforesaid 200 dollars out of the estate herein before conveyed, that then the said F. shall refund the same to the said H. or his heirs or assigns, with lawful interest thereon from this date till paid, or such part of the said 200 dollars as the said H. shall not be able to realize as aforesaid." Under the authority of this deed, the grantee sells and conveys the estate, and his grantee again sells and conveys the same. After which, to wit, about ten years after the date of the first mentioned deed, the grantor in that deed files a bill in equity to redeem the estate conveyed, on paying whatever may be due of the 200 dollars, with interest. HELD, the bill cannot be sustained. ALLEN, J., dissented considering the case within the principle of *Chowning v. Cox* *and others, 1 Rand. 306, recognized more recently in *Breckinridge v. Auld* and others, 1 Rob. 148. The two other judges who sat in the case (STANARD and BALDWIN) considered it not within the principle of those cases.

Same—Whether Mortgagee May Sell under Power Given by Mortgage.—The case of *Chowning v. Cox* and others, 1 Rand. 306, is a departure from the doctrine, now well settled in England and recognized in New York, that a mortgagee may sell the property after forfeiture, under a power given for that purpose in the mortgage deed: per BALDWIN, J.—The doctrine so settled in England and recognized in New York seems to have been wholly overlooked by counsel and court in the argument and decision of *Chowning v. Cox*. Though this consideration may not warrant the reversal of that decision, it is most cogent to limit its authority to the particular case then in judgment. Per STANARD, J.

*They were absent the whole of this term, having been prevented from attending by indisposition.

†**Mortgages.**—See the principal case cited in *Spencer v. Lee*, 19 W. Va. 192, 195; also, *foot-note* to *Breckinridge v. Auld*, 1 Rob. 148.

See generally, monographic note on "Mortgages" appended to *Forkner v. Stuart*, 6 Gratt. 197.

Same.—The grounds on which STANARD, J., concurred in the decree in Breckenridge v. Auld and others, 1 Rob. 148, stated by him in his opinion in this case.

On the 27th of November 1816, a deed was made between Gabriel J. Floyd, then of the town of Louisville in the county of Jefferson and state of Kentucky, of the one part, and Charles L. Harrison of the same town of the other part, whereby,—after reciting that Benjamin Johnston senior died intestate, leaving eight children, to wit, Susanna Johnston who intermarried with Davis Floyd, Ann C. Johnston who intermarried with John F. Gray, Robert Johnston, and five others, of whom each child became entitled to one eighth part of his estate; and after further reciting that the said Robert Johnston and Ann C. Gray had died intestate and without issue, whereby the said Susanna Floyd became entitled to one seventh part of the said Robert Johnston's, and one seventh part of the said Ann C. Gray's part of the estate of the said Benjamin Johnston senior; and after further reciting that the said Susanna Floyd had died, having first had issue, to wit, the said Gabriel J. Floyd and Charles D. Floyd, whereby the said Gabriel J. became entitled to one moiety of his mother's interest in the estates of the said Benjamin Johnston senior deceased

163 *and the said Robert Johnston and Ann C. Gray deceased; and after a further reciting that "the said Gabriel J. Floyd hath this day sold to the said Charles L. Harrison, for and in consideration of the sum of 200 dollars, all his interest of, in and to all the estate, both real and personal, of the said Benjamin Johnston senior deceased and Robert Johnston and Ann C. Gray deceased, to which he is now or may hereafter be entitled as one of the heirs of his said mother Susanna Floyd deceased, lying and being, or owing, within the states of Virginia and Kentucky," it was witnessed that the said Gabriel J. Floyd, for and in consideration of the premises, and of the aforesaid sum of 200 dollars to him in hand paid, conveyed unto the said Charles L. Harrison "all his the said Gabriel J. Floyd's interest as heir as afore mentioned, of, in and unto all lots, parts of lots and lands within the states of Virginia and Kentucky, claimed and owned by the heirs of the said Benjamin Johnston senior deceased, and also all the right, title and interest which he may become entitled to hereafter by descent, and also all his right, title, interest and claim in and to bonds, notes, bills, judgments and executions which he is or may be entitled to by descent, which are now due and owing to the estate of the said Benjamin senior deceased and Robert and Nancy deceased, or which may hereafter become due and owing as aforesaid." Then followed the habendum clause, and a warranty by the grantor against himself and all persons claiming under him. After which came the following clause:

"And it is agreed and fairly understood by and between the said Gabriel J. Floyd and Charles L. Harrison, that in case the said Harrison or his heirs or assigns shall not be able to make the aforesaid 200 dollars out of the estate herein before conveyed, that then the said Floyd shall refund the same to the said Harrison or his heirs or assigns, with lawful interest thereon from this date till paid, or 164 *such part of the said 200 dollars as the said Harrison shall not be able to realize as aforesaid."

On the 16th of July 1823, a deed was made from Charles L. Harrison (by James Harrison his attorney) to John and James M'Lure, whereby, after reciting various conveyances to the said Charles from persons interested in the estate of the said Benjamin Johnston deceased, embracing the conveyance from Floyd as well as others, Harrison, for the consideration of 550 dollars, conveyed unto John and James M'Lure "all the lands or land claims, or part or parts of tracts of land, now owned, claimed or possessed by the said Charles L. Harrison by reason of said conveyances made as aforesaid, in either of said states of Virginia and Kentucky, also all debts or demands which the said Charles has against any person or persons, derived by said purchases of the aforesaid shares or parts of the said estate of said Benjamin Johnston; to their only proper use, benefit and behoof."

The rights of John and James M'Lure under this deed were conveyed by them, on the 30th of October 1826, to John Gibson for the consideration of 800 dollars.

After all these conveyances, a deed was made on the first of November 1826, between Charles L. Harrison and Gabriel J. Floyd, whereby the former conveyed unto the latter, for the nominal consideration of one dollar, all the right, title, claim and interest of said Harrison, held and then owned by him by virtue of the deed made to him by said Floyd, of, in and to lands in the states of Kentucky and Virginia.

And on the first of September 1829, Floyd commenced a suit in chancery in the county court of Ohio, against Charles L. Harrison, John M'Lure, James M'Lure, John Gibson, William F. Peterson and Charles Allison.

The greater part of the bill was taken up with explaining the state of the 165 title derived from Benjamin *Johnston the elder; and exhibits were also filed with it, explanatory of the title. It will suffice, as to this matter, to say (in the language of one of the judges composing the majority of this court) that the title in its origin, according to the plaintiff's statement of it in his bill, appeared extremely objectionable, and the interests claimed under it were, at the date of his deed to Harrison, for the most part, if not altogether, in action instead of possession.

The bill states that on the 27th of September 1816, the complainant was indebted to Harrison in the sum of 200 dollars; men-

tions that the estates conveyed by the deed of that date were of great value; and charges that the deed was intended as a mortgage, and given in the form it was, to enable Harrison to make sales and conveyances to raise the sum aforesaid; that Harrison so understood the deed; and that after selling portions of the property to the amount of the debt and charges, or nearly so, he, on the 1st of November 1826, made to the complainant a reconveyance of all the right and title acquired by him. The bill mentions the deed from Harrison to M'Lures, and states that at the time of that conveyance, Harrison was fully paid, and that the complainant, at the time of settling with Harrison, acquitting him, and receiving the reconveyance, had no knowledge or notice of the said deed to M'Lures. The bill also mentions the conveyance from M'Lures to Gibson, and charges that Gibson holds the property in his own name for the use and benefit of William F. Peterson, who pretends to be acting as attorney in fact, and in that capacity has sold to, or otherwise interested in the business, Charles Allison, whom he has put in possession of part of the property. The prayer of the bill is for a release to the complainant of the legal title; or, if a balance of the debt shall be found yet due, that he may be permitted to redeem.

166 *John M'Lure put in a plea and answer, pleading that he was a purchaser without notice, and answering that the plaintiff had notice of the deed of 1823 to John and James M'Lure, before he took his reconveyance from Harrison in 1826; that the plaintiff had disclaimed title to the land in controversy in 1827, and had nevertheless sold his interest in it to David Pugh, for whose benefit this suit was prosecuted.

Gibson answered to the same effect.

Peterson answered, disclaiming interest. The subpoena was returned executed upon James M'Lure and Charles Allison, but they did not answer. Harrison was proceeded against as an absent defendant.

Depositions were taken on behalf of the defendants, to prove that the complainant was perfectly aware of the conveyance from Harrison to the M'Lures when he obtained a reconveyance from Harrison to himself, and that he took that reconveyance under an idea that, to the extent of the lands in Brooke county, he could overreach the M'Lures and those claiming under them, by getting the reconveyance recorded in that county before the conveyance to the M'Lures was recorded there.

On behalf of the complainant, the deposition of John Edie was taken. Being asked what he supposed to be the value of a share, or the one sixth part, of such of the lands of Benjamin Johnston senior in Brooke county as were not sold by him in his lifetime, he answered, "that he is of opinion that the share in Brooke is of the value of 4000 dollars; that is, the one sixth of the unsold lands of Benjamin Johnston senior in the county of Brooke." In an-

swer to another question, he explained his opinion to be, that the share inherited by Susanna Floyd from her father, brother and sister, "if none of it had been sold by her husband, would have been worth 4000 dollars in the year 1827." He stated that he was acquainted with the parts of her share sold by her husband Davis Floyd, 167 and was of opinion that "in 1827 the said parts were worth 2000 dollars, leaving the share of each of her sons in 1827 worth 1000 dollars." He spoke of the lands in Brooke county only.

But the deed before mentioned of the 16th of July 1823, from Harrison to John and James M'Lure, conveyed, for the consideration of 550 dollars, not only what had been conveyed by Floyd to Harrison, but the share of Gabriel J. Johnston a son of Benjamin Johnston senior, the share of John Harrison who intermarried with Mary a daughter of the said Benjamin, and the interest of Benjamin Johnston junior, another son, in the share of his sister Ann C. Gray.

The cause was removed by certiorari to the circuit court of Brooke, and on the 13th of October 1832 came on to be heard before that court, when it was decreed that the plaintiff's bill be dismissed as to the defendants John M'Lure, James M'Lure, William F. Peterson, John Gibson and Charles Allison; that they recover of the plaintiff their costs; and that if the counsel for the plaintiff desire the same, it be referred to a commissioner to state an account between the plaintiff and the defendant Harrison. But this account the plaintiff, by his counsel, waived.

From this decree an appeal was allowed.

G. N. Johnson for appellant. The deed of November 1816 is a mortgage, intended to be coupled with a power of sale. The transaction was not a sale to Harrison; else why was the vendee to sell the land again from time to time, until the sum of 200 dollars with interest was raised? It was not a sale, because there was no equality in the bargain. Harrison was, upon that supposition, to get 200 dollars with interest, at all events, and as much more as he might make out of the sales of land of indefinite and constantly increasing value, part of which was worth 1000 or 2000 dollars.

168 It *was not a sale, because the vendee had precisely such rights in the property as an ordinary mortgagee would have, with the nugatory addition of the invalid power to sell, attempted to be conferred; a power, too, not inserted in absolute deeds, and indicating rather fiduciary than absolute ownership. Nothing was wanting to make this a mortgage in form, but the express reservation of an equity of redemption. But it is held universally, that whatever be the form, every conveyance of land as a security for the repayment of money to the grantee is a mortgage. See 1 Powell on Mortg. 115, 116, note (H), and p. 4, note (3); Hughes and others v. Edwards and wife, 9 Wheat. 489; Conway's ex'ors v. Alexander, 7 Cranch

218; also 4 Kent's Comm. 142; 1 Lomax's Dig. 315, 321. It is so held, in spite of express agreements that the estate shall not be redeemable. See 1 Powell on Mortg. 116, note (H), above cited, and the cases there mentioned. In the case of Clay and others v. Willis, 1 Barn. & Cress. 364, 8 Eng. Com. Law Rep. 103, as in this case, there was no right of redemption reserved, and there was a power of sale; and the court considered the deed a mortgage. The existence of a covenant binding the grantor personally, is looked upon as a very strong, if not a conclusive evidence that the deed is a mortgage. See Coote on Mortg. 22, 3, and case there cited of Howard v. Harris, 2 Ch. Cas. 147; Conway's ex'ors v. Alexander, 7 Cranch 218; 1 Lomax's Dig. 321, and cases cited in note (6). Again, it is held that "mortgages are mutual;" that is, where one of the parties receives the benefits of a mortgage from the transaction, the court will hold the deed to be a mortgage, in favour of the other party; so that if it gives the grantee the power of getting his money and interest back at all events, by means of a covenant to repay or otherwise, the grantor will be allowed to redeem the land upon repayment of the money with interest. Coote on Mortg. 33; 1 Powell on 169 Mortg. 335, *and note (R); Howard v. Harris, 2 Ch. Cas. 147. The circumstance that the grantee has not an immediate remedy upon the personal covenant, although the grantor may have the immediate right to redeem, is not material. See Coote on Mortg. 33, 34. The mutuality need not run quatuor pedibus. The great principle upon which courts of equity originally interposed, and moulded ancient mortgages to their present state, was this, that it was inequitable that a creditor should obtain a collateral or additional advantage, through the necessities of his debtor, beyond principal and interest. See Coote on Mortg. 21. In Bonham v. Newcomb, 1 Vern. 214, 232, the risk of loss to the grantee was relied upon to shew that the transaction was a sale, not a mortgage. Courts will not allow a mortgagee to accompany his bargain by any agreement by which a collateral and undue advantage may be gained. Coote on Mortg. 26, citing Jennings & others v. Ward & others, 2 Vern. 520. Wherever, in doubtful cases, the courts have construed the transaction to be a sale, it will be found that the bargain was fair and equal. See the class of cases mentioned by Coote, p. 28. The gross inadequacy of the consideration is another strong proof that the transaction was a mortgage. Wharf v. Howell and wife, 5 Binn. 499; Conway's ex'ors v. Alexander, 7 Cranch 218; 1 Powell on Mortg. 125, note (P).

Gibson, the holder, claims to be a purchaser without notice of Floyd's equity: but that defence is manifestly inapplicable to the case. For the deed from Floyd to Harrison, importing a mortgage, discloses the equity upon its face, and each

subsequent deed in the chain of title refers to that which preceded it. The case of Graff and others v. Castleman &c., 5 Rand. 195, determined that notice of a deed was to be presumed against a purchaser, under circumstances less strong than exist here. If Gibson really believed his title to be indefeasible, it was his own fault or 170 misfortune. The *principle is, "once a mortgage, always a mortgage." Powell on Mortg. 116, note (H). The risk whether a mortgage is redeemable or not, rests with the purchaser. Hansard v. Hardy, 18 Ves. 455.

George H. Lee for appellees. The deed from the appellant to Harrison was not, nor was it intended to be, a mortgage, but was in fact and was intended to be an absolute conveyance of an undivided interest in an estate of uncertain title, extent and value; the grantee requiring (in consequence of the doubt whether or no the interest granted was of any value), and the grantor giving, a guarantee that the grantee should, when he came to dispose of it, be able to realize the amount of the purchase money, or that he (the grantor) would make good the deficiency. The question whether a conveyance is to be considered a mortgage or otherwise, depends upon all the circumstances of the contract, and is not confined to the mere written evidence of it. Robertson v. Campbell &c., 2 Call 421. For the traits of a mortgage, as distinguished from a conditional sale, see Thompson v. Davenport &c., 1 Wash. 125, Chapman's adm'x v. Turner, 1 Call 280, Leavell v. Robinson, 2 Leigh 161, and Conway's ex'or v. Alexander, 7 Cranch 218. In the last case, land was conveyed to trustees, in trust to convey the same to A. in case B. should fail to repay, on a certain day, certain money advanced by A., with interest. B. failed to pay the money on the day limited, and the trustees conveyed the land to A.; and it was held that B. had no equity of redemption.

But if the deed is to be construed as in the nature of a mortgage, yet it was made and intended, and the particular form used was adopted, not with a view to authorize the grantor to demand a reconveyance upon paying the consideration he had received, but for the very purpose of enabling the grantee to make sale of the subject, and with the understanding that 171 he should "do so. And a mortgage with such power to sell is good, and the sale under it effectual. In Taylor's adm'rs &c. v. Chowning, 3 Leigh 654, such a sale was sustained. The practice in New York is to permit such sales. Jackson v. Henry, 10 Johns. R. 184. And the modern english doctrine is the same way.

The exercise of the power conferred by the deed (and expressly intended to be exercised), by the sale to the M'Lures, ought not now, after the lapse of time since the execution of the deed, and especially considering the conduct and declarations of the appellant, and the other circumstances of the case, to be disturbed or questioned. In

Roberts's adm'r v. Cooke, 1 Rand. 121, judge Cabell relied much upon the acquiescence of Roberts. Here the acts and conduct of the appellant are such as should prevent a court of equity from giving him its assistance.

G. N. Johnson in reply. The new english practice was creeping into use in that country, under the protection of some of the eminent conveyancers, especially mr. Coventry, when it was powerfully shaken, if not overthrown, by the strong objection to it manifested by lord Eldon in *Roberts v. Bozon*, in 1825. He appears to have heard of the new practice then for the first time. See Coventry's note, 1 Powell on Mortg. p. 9. There could not be a stronger demonstration of the evils of the new practice, than is afforded by the laboured apology of mr. Coventry for them. In this court, however, it ought to be sufficient to refer to its own adjudications in the cases of *Chowning v. Cox* and others, 1 Rand. 306, and *Breckenridge v. Auld* and others, 1 Rob. 148.

If the deed is to be construed as a sale of the land at the price of 200 dollars, with a guarantee that the land should produce in the market at least that sum with its interest, leaving to the purchaser the full benefit of whatever surplus might be
172 procured, then the transaction *would be obviously usurious. It is well settled doctrine, that wherever the contract assures to him who advances money a return of his whole principal and interest, at all events, and gives to him a chance only of farther profit, this chance is regarded as a premium over and above the lawful interest, and will make the contract usurious. *Ord on Usury* 70; *Gibson v. Fristoe* and others, 1 Call 76, 81; *Smith v. Nicholas &c.*, 8 Leigh 349.

BALDWIN, J. The justice of this case is clearly against the plaintiff. He makes a conveyance, for a valuable consideration, of his interest in certain lands and choses in action, without any limitation upon his grantee's power of alienation; lies by for a number of years, without asserting any claim to the property, and till after successive sales and conveyances thereof to bona fide purchasers; then, with full notice of the fact, obtains a reconveyance from his grantee, fraudulently made by him to defeat his own purchasers; and now seeks to recover back the subject, upon the allegation that the deed was intended merely as a mortgage. If the plaintiff is entitled to relief under such circumstances, it ought to be very clearly established.

The deed in question, if a mortgage, certainly departs very widely from the usual form of such instruments. It contains no unconditional covenant for repayment of the consideration, nor any acknowledgment of a subsisting indebtedness; no covenant on the part of the grantee for a reconveyance, nor any condition upon which the estate is to be avoided; no reservation, in any shape or form, of a power of redemp-

tion on the part of the grantor, nor of a right, for any period, to the possession and enjoyment of the property, which passed with the title to the grantee; while the authority of the latter to sell or otherwise dispose of the subject, ad libitum, is recognized by a necessary implication. In

short the instrument, after a recital
173 of the *grantor's title and the sale of his interest to the grantee for the sum of 200 dollars, is in the common form of a deed of bargain and sale, except that it contains a guarantee of the value of the property conveyed, not absolute but contingent; the terms of the guarantee evidently contemplating a sale or sales of the subject by the grantee, without his being able to realize the price paid by him, with its interest; in which event only it is stipulated that the grantor shall make good the deficiency. But there is no obligation to sell imposed upon the grantee; and according to the terms of the contract, he was at liberty to retain the property itself, or the proceeds of sales, as his own, without accountability. This guarantee, however, rendered the contract unequal, inasmuch as it guarded the grantee, during the solvency of the grantor, against the hazard of loss, while it left him the chance of gain by an increase in the value of the property. A guarantee of value is unusual in sales of real estate, though not so in sales of personal choses in action; in regard to which the law, in the absence of an agreement to the contrary, implies such a guarantee; and therefore if the purchaser of a bond is unable, by the use of due diligence, to make the money out of the obligor, he is entitled to reimbursement from the assignor, of the consideration paid, with its interest. This inequality in the contract did not render it the less a sale, if so intended by the parties, as its language imports. Under what circumstances, if any, an action of covenant would have lain upon the guarantee, or whether under any it would have been enforced by a court of equity, are matters foreign to the enquiry. It was not a stipulation for the benefit of the grantor, but for an additional advantage to the grantee; and whether valid or invalid, could not affect his title as purchaser.

The cause, however, is not to be determined by the mere form of the contract, but by the intention of the
174 *parties, to be gathered not only from the terms of the instrument, but also from extrinsic circumstances. The propriety of resorting in such cases to evidence aliunde, results from the nature of the question; for otherwise a mortgage might be converted into a sale, or a sale into a mortgage, by fraud, accident, or mistake. But the present case is not embarrassed by the enquiry whether the transaction was intended as a mortgage or as a conditional sale; an enquiry frequently of much perplexity and nicety; the difficulty arising out of the circumstance that both the one and the other are estates upon condition, and the condition of the like char-

acter in both, so far as its performance goes to defeat an estate granted, by repayment of the consideration; and the essential distinction being, that in the event of nonperformance, the estate in the former case is forfeited at law but not in equity, and in the latter both at law and in equity. Here the question is not between a mortgage and a conditional sale, but between a mortgage and an absolute sale: for if the transaction was in fact a sale, there is no room for the idea, nor is it pretended, that it was upon any condition whatever. And on that question, it seems to me impossible to hold this instrument a mortgage upon its face, without maintaining that the harshness, or inequality, or (if you please) unlawfulness of a provision in a contract of sale, is to have the effect, not of rendering abortive the provision itself, or of avoiding the entire contract, but of changing it into another contract of a wholly different nature. How can we undertake to pronounce this deed a mortgage by its very terms, in the absence of any condition or provision to defeat the absolute title conveyed to the grantee?

But though the deed is not a mortgage upon its face, the clause of guarantee may very properly be relied on, in connexion with other evidence, for the purpose of ascertaining what was the real character of the *transaction as contemplated by the parties; for upon that question of fact, we are to look to all the circumstances of the case; and it is an important consideration, which in a doubtful case might have a decisive influence, that the grantee is assured against the risk of loss, to the full amount of his principal money and interest. Upon such a question, authoritative rules can do little more than ascertain the abstract distinction between a sale and a mortgage: beyond that, they are guides rather to the investigation than the adjudication; the fact of intent being a common sense deduction from all the evidence, by a sound discrimination of the weight of circumstances, and a just combination of the whole. Still the imperfection of human testimony requires us to bear in mind, that the intrinsic import and legal effect of the instrument itself are not to be lightly disregarded; that there is a *prima facie* presumption of its expressing truly the agreement of the parties; and that though it may be difficult, if not inexpedient, to prescribe the limits of extrinsic testimony, it ought to be of such a nature as to furnish some reason for the necessity of its introduction. This is usually found in the unskillfulness or carelessness of the scrivener; the ignorance of the parties; the misplaced and abused confidence of one of them; the relation existing between, or the relative condition of, the parties, subjecting one of them to the power or undue influence of the other; or, in a word, in whatever may be fairly referred to fraud, accident, or mistake. And when, upon the whole case, it appears that the conveyance was executed to secure a loan or a pre-

existing debt, objections arising out of the informality or imperfections of the instrument must be made to yield to the substantial merits of the cause; and so must even express stipulations tending to defeat, or restrain, or clog the equity of redemption, and thus give a collateral or additional advantage to the creditor, beyond his principal money and interest.

176 *When we examine the plaintiff's bill, we find it stating broadly, that the deed was intended as a mortgage to secure a debt due from him to Harrison the grantee, with a power to the latter to make sales and conveyances of the property, to an extent sufficient to discharge the sum due. It makes no pretence that the instrument does not express truly the agreement of the parties. On the contrary, it treats the paper as a mortgage upon its face, so understood and acted upon by the parties; as evidence of which it alleges that the defendant Harrison, after making sales to the amount of the debt and charges, or nearly so, reconveyed the subject to the plaintiff. There is no complaint against Harrison in the bill, except that, before the reconveyance to the plaintiff, he sold and conveyed the property to the defendants John and James M'Lure; of which sale and conveyance, the plaintiff falsely charges that he had no notice at the time of the reconveyance. And when we come to look into the proofs in the cause, we find nothing to warrant the belief that the contract between the parties was in any wise different from that evidenced by the deed. There is no proof that the consideration of the conveyance was a loan of money, or a pre-existing debt; nor of an agreement to reconvey or surrender the property, or account for its value or the proceeds of sales, in any event whatever. The actual reconveyance, so far from interpreting the original contract favourably for the plaintiff, shews, under the circumstances, a combination between the parties to defraud the vendees of Harrison. It appears from the evidence to have been procured by the plaintiff under the delusive notion that it would enable him to claim such of the lands as lie in Brooke county, in the character of a purchaser from his own grantee, without legal (though with actual) notice of the previous sale to the M'Lures, the deed to them not having been recorded in that county. This, and his other conduct

177 already noticed, are irreconcilable *with the idea of a consciousness on his part that he stood in the relation of mortgagor. The pretension that the consideration of the deed to Harrison has been reimbursed to him, otherwise than by his sale to the M'Lures, seems to be wholly unfounded. Nor is any light thrown upon the question by the testimony on the part of the plaintiff, to prove the inadequacy of that consideration upon a contract of sale. It consists of the opinion of a single witness as to value, without reference to the period of the sale, or the state of the title; and is of little weight compared

with the prices at which that, and other interests in the common subject, were sold, first to the M'Lures, and afterwards by them to the defendant Gibson; which will be found, upon calculation, not to exceed per share the consideration received by the plaintiff. In fact, the value of the subject sold would seem to have been altogether uncertain and precarious; the title in its origin, according to the plaintiff's own statement of it in his bill, appearing extremely objectionable, and the interests claimed under it, for the most part, if not altogether, in action instead of possession. In such a state of things, the value must have been merely speculative; and a purchaser, though he may have been willing to risk the title by taking a deed with special warranty, might prudently require a guarantee that if he did not make, he should not lose any thing by his speculation, beyond the labour and expense of pursuing it unprofitably. And in point of fact it has turned out, that instead of gaining, he has lost by the contract.

But whatever may be the force of the circumstances aliunde, they cannot affect the subsequent purchasers without notice; and none is pretended by the bill, nor established by the proofs, beyond that furnished by the face of the instrument. Of this defence they, the only substantial defendants, (the plaintiff having declined an account against the defendant
178 Harrison) have availed *themselves in due form of pleading; so that at last the cause must turn upon the intrinsic import and effect of the deed in question.

If the clause of guarantee could be so construed as to give the plaintiff an equity of redemption, it would at the same time so modify that equity, as to defeat the plaintiff's unjust demand against the bona fide purchasers, under the power of conversion acknowledged by himself to have been conferred by the instrument. Regarding the paper as a mortgage, there being no time limited for the payment of the debt, the grantor might redeem at any time; but then, when he comes to redeem, he must exercise his right in a way adapted to the actual condition of the subject: if before a sale by the grantee, he is entitled to a reconveyance of the property; if after, to the proceeds in the hands of the grantee, subject to the payment of the debt; and the vendees are in no wise bound to see to the application of the purchase money. In truth, they are substantially purchasers from the mortgagor himself, through his duly constituted agent; and it would be a grievous iniquity, if the principal, after a sale under his lawful authority, could turn round and reclaim the property from the innocent purchasers.

It is contended, however, on the part of the plaintiff, that the power of sale vested in the grantee is void, under the authority of *Chowning v. Cox &c.*, 1 Rand. 306. That case is a departure from the english doctrine, now well settled, (1 Lomax's Dig. 322; *Coote on Mortg.* 128,) that a mortgagee

may sell the property after forfeiture, under a power given for that purpose in the mortgage deed; a doctrine recognized in New York, and the practice there regulated by statute. 4 Kent's Comm. 141. In *Chowning v. Cox &c.* it was decided, for reasons lucidly and cogently stated, that the mortgagee could not thus, by his own act, foreclose the equity of redemption. But

179 that decision has no *application to the case before us. Here there was no forfeiture, and no foreclosure: no forfeiture, because the right of redemption was not limited in point of time; and no foreclosure, because the sale was not made to enforce a forfeiture. It was made by the mortgagee, not in that character,—not as a creditor coercing the payment of his debt, but as a trustee appointed to possess, control, manage, and dispose of the estate, with unlimited discretion, not merely for his own benefit, but for that of the grantor likewise. There are no considerations of justice or policy against the exercise of such a power, in which the grantor must be considered as giving his tacit concurrence; as much so as if he were present at the sale, and acquiescing therein; which, according to *Taylor's adm'rs &c. v. Chowning*, 3 Leigh 654, (the supplement to *Chowning v. Cox &c.*) renders a sale by the mortgagee valid, though made by way of foreclosure. It would hardly be doubted, I presume, that a debtor may by power of attorney authorize a creditor to sell his land, receive the purchase money, retain the amount of the debt, and account for the residue; and that a conveyance of the title and surrender of possession, for the better exercise of the power, would be unobjectionable. A trust is not incompatible with a mortgage security. A mortgagee in possession is a trustee, with authority to receive, and accountable for, the rents and profits. He may purchase the subject from the mortgagor, and, a fortiori, sell it by his permission to another. If the possession of the mortgagee is conferred by the contract, and no time is limited for the payment of the debt, the security bears a considerable resemblance to the *vivum vadium* of the common law, and also to the welsh mortgage; in both of which there is no forfeiture and no foreclosure; and in the latter of which, if not in the former also, there may be a redemption at any time. *Coote on Mortg.* 9, 180 207, 517. In such a security, *there is no reason why the mortgagee may not be empowered, in addition to or in lieu of the profits, to apply the capital itself, from time to time, to the extinguishment of the debt; and for that purpose to convert it from land into money.

Thus, whether the transaction is to be regarded as a sale or as a mortgage, the plaintiff is entitled to no relief against the derivative purchasers; and if entitled to any against his grantee alone, he has waived it by declining an account. In my opinion, therefore, the circuit court did right in dismissing the plaintiff's bill.

ALLEN, J. The principal question in this case will depend upon the construction of the deed of 1816. The extrinsic circumstances in evidence furnish but little aid in determining whether it is to be construed as a mortgage or an absolute sale. The deed is in the ordinary form of an absolute conveyance, conveying to the grantee the various interests described; and then comes the clause which gives rise to the difficulty. "It is agreed and understood by and between the said G. J. Floyd and C. L. Harrison, that in case the said Harrison or his heirs or assigns shall not be able to make the aforesaid sum of 200 dollars out of the estate hereinbefore conveyed, that then the said Floyd shall refund the same to the said Harrison or his heirs or assigns, with lawful interest from this date till paid, or such part of the said 200 dollars as the said Harrison shall not be able to realize as aforesaid." In the absence of all proof to the contrary, it seems to me that the terms here used import a loan of money, and nothing more. The consideration mentioned in the deed is to be refunded, with interest from the date of the agreement. It is clear that the parties did not contemplate any beneficial occupation of the premises by the grantee; for in that event the profits, it is to be presumed, would have equalled the interest.

181 The parties contemplated "an immediate sale, and the application of the proceeds to the payment of the sum advanced; and there was a personal covenant to refund the money with interest, or such part of it as might not be realized by the sale. Under this covenant, it seems to me there could be no doubt, that if Harrison had applied to a court of equity to foreclose the deed as a mortgage, and upon a sale of the property the amount had not been realized, he would have been entitled to a personal decree for the residue, the deed itself reciting and embodying an express agreement to refund. The absence of a covenant to pay the money will not make it the less a mortgage, if it appears that the conveyance was originally intended as a security for the payment of money. 1 Powell on Mortg. 119 a. note (K), and the cases there cited. But where, as in this case, there is such a covenant contained in the conveyance, it is difficult to conceive how the instrument can be construed to be any thing more than a security. In the case of Howard v. Harris, 2 Chan. Cas. 147, the judge, in decreeing redemption, added, that he did so the rather because the defendant had a covenant for the repayment of his money, and therefore he had it in his power to have made it a mortgage at any time. The same construction, it seems to me, must be given to this instrument. The parties not contemplating a beneficial occupation of the premises, but a sale to raise the money, and the grantor having covenanted to repay with interest from the date, he could not have denied his liability for the debt. This distinguishes the case from Conway's

ex'ors v. Alexander, 7 Cranch 218. In that case there was no covenant to repay, nor any evidence of a loan; and the chief justice observed, that an action at law could not have been maintained for the recovery of the money, and if, to a bill praying a sale, and a decree for so much as might remain due, the grantor had answered that this was a sale and not a mortgage, clear proof must have been produced to justify a decree against him. If the grantee, then, could have treated this as a mortgage, the rule that a mortgage cannot be a mortgage on one side only, but must be mutual, applies, and governs the case. And this rule operates, though the rights of the parties may be in other respects different: as in the case cited in Talbot v. Braddyl, 1 Vern. 395,—if A. lend upon a mortgage, with a proviso to redeem on payment of a certain sum at the end of two years, there one side cannot foreclose till the end of the two years, but the mortgagor may come before and redeem. And so e converso, though the grantee here could not proceed on the personal covenant until after a sale, the grantor could at any time redeem before a sale, upon paying the amount secured. The contract, viewed as an absolute sale, would be most unequal and oppressive. Under that construction, the grantee could either retain the property and reap the profits without account, or, whenever he thought proper, proceed to sell. He was sure of his advance with interest, under any circumstances, and entitled to all he might make in addition. And the grantor, in the mean time, could take no step to relieve himself. If the property were depreciating, he could neither redeem it nor enforce a sale. For whenever it is conceded that he had a right to relieve himself from this contingent liability by requiring a sale, the deed loses its character of an absolute sale, and can only be viewed as a security. If the conveyance in its inception was a mortgage, the absence of a provision for redemption cannot affect it. Where it is doubtful whether an absolute or conditional sale, or a mortgage, was intended, the want of such a provision is a circumstance entitled to proper consideration. But where the instrument was intended as a security, the absence of a provision to redeem, or express stipulations to prevent it, will not change its character. 1 Powell on Mortg. 119 a.

183 *If the deed in its inception was a mortgage, the power to sell, according to Chowning v. Cox &c., 1 Rand. 306, is invalid, and the right of redemption is not barred as against the defendants, purchasers with notice; for the deeds under which they held disclosed the right of the original grantor. The doctrine in Chowning v. Cox &c. may be inconvenient, and an unnecessary interference with the rights of adult parties. But the case has been recognized since as law, and very recently in Breckenridge v. Auld & others, 1 Rob. 148. I am not disposed, when we have but a bare

court, to disturb it. The distinction taken between this case and that, seems to me to be unsubstantial. Whether the sale be made to enforce the forfeiture after the day of payment is passed, or to raise the money in pursuance of a power conferred in the instrument, it equally militates against the principle which lies at the foundation of the rule,—the power of the creditor over his debtor, and the incompatibility of a due exercise of the powers and duties of a trustee, with the relation of creditor.

I think, therefore, that the decree is erroneous and should be reversed.

STANARD, J. I concur unreservedly in the conclusion of my brother Baldwin, that the decree of the circuit court, denying, under the circumstances of the case, the aid of equity to the plaintiff below against the purchaser of the land, ought to be affirmed.

Some interesting questions have been earnestly and elaborately discussed, the resolution of which is not essential to the conclusion in which I have averred my concurrence. I have, however, considered those questions, and proceed briefly to state the opinions deliberately formed, or at least to which I strongly incline.

We have no information or proof of the transactions between the parties, that induced the execution of the deed from Floyd to Harrison, nor of the consideration of the deed, other than that which is furnished by the instrument itself. The deed has not a single distinct lineament of a mortgage. The final covenant, that the subject conveyed was of a given value, and if that value should not be realized, the grantor would make good the deficiency, is the only matter from which it is attempted to be implied that the conveyance was a mere security for money, and consequently that the title of the grantee was defeasible, and substantially that of a mortgagee. This implication rests for its validity on the assumption that the consideration of the deed was a debt due Harrison from Floyd, or money advanced to the latter by the former, to the amount of 200 dollars. Now, though 200 dollars is stated to be the consideration of the conveyance, it does not follow that that was the consideration, much less that it was in numero the amount of a previous debt from Floyd to Harrison, or of money then advanced. The transaction might, in perfect consistency with the deed, have been an exchange of property, the consideration from Harrison being other property; or the consideration might have been a collateral duty to him from Floyds.

The subject conveyed to Harrison was in all probability most precarious, or at least so deemed by the parties, and they might fairly stipulate, to avert total loss from Harrison, that to a certain extent its productiveness should be guaranteed by Floyd. If such was the nature of the transaction, every semblance of a mortgage is oblit-

erated. The deed is an absolute one, the result of an actual sale, in which, in place of a general warranty of the vendor, is substituted a guarantee of value to a limited amount, on a consideration which may have exceeded the amount of the guarantee, though short of the possible amount that might be realized from the subject conveyed. In this view of the case,

it was a contract of hazard as to value beyond 200 dollars. The deed contains nothing that forbids us from taking this view of it. The conduct of the parties evinces that they so regarded the transaction. For a period of more than ten years, during which Harrison was dealing with the property as his own, no claim or act of Floyd brought in question the title of Harrison. The first movement of Floyd after the lapse of more than ten years, is one not proceeding on the ground of rights reserved by or implied from his deed to Harrison, but one impliedly renouncing such rights, and by a fraudulent confederacy with Harrison, seeking to place Harrison's reconveyance to him in advance of the conveyances made by Harrison to others. The acts of the parties reflect back on the original deed, and justify a court of equity (at least when relief is sought by confederates in fraud) in measuring and limiting their claims as they have measured and limited them by their own acts, and forbearing to give activity and effect to an equity which those acts shew was not contemplated by the parties.

But the most interesting question that has been discussed is on the postulate that the deed from Floyd conveyed but a defeasible interest to Harrison, with a power to him to sell: and the question is whether, such being assumed as the plain effect of the deed, Harrison could sell any part of the real subject conveyed, and by his sale and conveyance fairly made, passed to his vendee an indefeasible estate. On the part of the appellant it is insisted, that such sale and conveyance would have still left in Floyd an equity of redemption, and that as to him the estate of Harrison's grantee would continue to be defeasible. For this proposition the case of *Chowning v. Cox &c.*, 1 Rand. 306, is relied on. I do not mean in this place to bring in question the authority of that case, having strict regard to its particular circumstances, and the limitations on its doctrine deducible from the sequel to that case, reported in 3 Leigh 654. It may however be remarked in passing, that that case was argued and decided without any reference to or notice of the decisions of the courts of Westminster and New York, on the general question respecting the efficacy of a power in a mortgage deed, authorizing the mortgagee, in particular contingencies, to sell the land, and pass an indefeasible estate to the vendee. That such sale with such effect may be made under such power, is the established doctrine of the english courts, and of the court of equity in New York; and that doctrine, as so sanctioned,

seems to have been wholly overlooked by counsel and court in the argument and decision of the case of *Chowning v. Cox &c.* These considerations, though they may not warrant the reversal of the decision in the case of *Chowning v. Cox &c.* are most cogent to limit its authority to the particular case then in judgment, and forbid the application of general remarks used in that case, or argumentative expansions of general principles inferred from it, to other cases as within the reason of that case.

The case of *Chowning v. Cox &c.* coupled with that of *Taylor's adm'r's &c. v. Chowning*, presented the following traits. A conveyance was made by a debtor to a creditor to secure the payment of a debt, and with power to the creditor as trustee, in default of the payment of the debt at a specified time, to make sale of the land, discharge the debt, and pay the surplus to the debtor. Before the sale was made, the parties got involved in litigation, and the debtor, resisting the right of the creditor to sell, had obtained an injunction to prevent the sale. The parties remaining in this antagonistic position, the injunction was dissolved, and the sale was made in invitum as respected the debtor. So far the case appeared when the original cause was brought to judgment: and the court then decided that

the trustee was but mortgagee, and
187 that, his sale notwithstanding, *the debtor's equity of redemption was extant. The decision of the court was applied to a case in which, ostensibly, the sale was made by a party who was but mortgagee, against the assent and in spite of the active resistance of the debtor, while there were matters in litigation between them which might influence the extent of the debt chargeable on the land. The power to sell was claimed by virtue of a provision in the deed, by which that power was to arise in the event of the default of the mortgagor. Now, looking to the original principle on which courts of equity have interposed and reduced that which had become absolute in law to a defeasible estate, it is ascertained that it was to relieve against a forfeiture. That forfeiture, in the ordinary mortgage, accrued to the mortgagee by rendering his estate at law absolute. Courts of equity interposed to avert this forfeiture, which made the estate at law absolute in the mortgagee; and it soon became a canon of that court that no stipulation between the parties, where the conveyance was a mere security for money, should extinguish this equity. Proceeding on these principles, it was certainly plausible to treat the stipulation for power to dispose of the land to another, free from the equity of redemption, to arise on a subsequent default of the mortgagor, as partaking of the nature of a forfeiture; and as the parties could not stipulate that an absolute estate should vest and abide in the mortgagee on any future default of the mortgagor, such stipulation could not be effectual to enable the mortgagee, as a consequence of any

such default by the mortgagor, to pass an indefeasible estate to a third person. On this principle the court of equity might, in apparent consistency with the principle of its original interference, have interfered to relieve against the mitigated forfeiture of a power in the mortgagee to sell, and extinguish the equity of redemption, on the subsequent default of the mort-
188 gagee. On this principle *I think the case of *Chowning v. Cox &c.* must rest. Beyond it, I do not deem it authority; and even to that extent, it is confronted by the adjudications of the English and New York courts.

The effort of the counsel for the appellant has been to extract from the case of *Chowning v. Cox &c.* (in which he is countenanced by some of the general expressions of the court) this general principle, that a power to sell and convey real estate, free from an equity of redemption in the party who by conveyance creates the power, cannot be exercised effectually, if the party to whom the power is given is entitled as creditor or incumbrancer to the proceeds of the sale, in whole or in part. To that extent the case of *Chowning v. Cox &c.* is not authority; and as I humbly conceive, if the general reasons of the court cover such a principle, they do not consist with well established doctrines. My opinion is, that according to established doctrines, a creditor may act as trustee for his debtor, and the debtor may impart to a trustee, though that trustee be his creditor, a power to convey an indefeasible estate on a fair and bona fide sale to a third person, notwithstanding the whole or part of the proceeds may come to the creditor; at least when such power is exercised without any distinct effort by the debtor to recel the power, on grounds that ostensibly jeopard an honest and fair exercise of it. And this conforms to multiform and unquestioned transactions of society, embracing interests numerous and important. Property is conveyed in trust for the payment of debts and the support of the family of the grantor, with power to keep it together, to expend money in improvements, and to sell at discretion to pay debts, and the charges of keeping and improving the property and supporting the family. The trustee makes large advances before sale, and can get reimbursement by sale only. The power of sale is
189 exercised, and years afterwards it is *ascertained that the sale was so made (and that too at a fair and full price) by the trustee, to reimburse what is honestly due him. Yet if the principle attempted to be extracted from *Chowning v. Cox &c.* be sound, law and equity must regard the sale as unavailing to give an indefeasible title; the power of the trustee would be defeated and annulled by the fact that he was interested in the sale, and the purchaser under him would be but a mortgagee. A testator by his will devises to his executor his real estate, in trust to sell at his discretion for the payment of debts,

and the executor happens to be a creditor, (a case probably of frequent occurrence). Has it ever been surmised that the interest of the executor as creditor disables him from executing the trust under the will, so as to convey on a fair sale an indefeasible estate in the property sold? A large part of the business of society is transacted by agency, the agent to whom the power of sale is confided being creditor for advances, or other dealings of the party who confides his property with him for sale. Has it ever been supposed that under such sales the purchaser takes but a defeasible estate, if the agent be the creditor of the owner, and the sale be made to provide the means of paying his debt? When a conveyance is made in trust, with general power in the trustee to sell and convey an absolute estate, assent is given in the most formal manner to the sale that may be made by the trustee, he and his vendee acting bona fide. In the case of *Taylor's adm'rs &c. v. Chowning*, 3 Leigh 654, the sale was sustained, though made under a power given to a mortgagee, to arise on a subsequent default of the mortgagor; on the ground of the acquiescence of the mortgagor in the exercise of the power of sale, implied from the fact of knowledge of the sale, and his forbearance to interpose any objection at the sale to the exercise of the power. Was this evidence of acquiescence stronger than that afforded by the

190 solemn *creation of a general trust to be exercised by making a sale, and the continued declaration of the purpose to have the power so exercised, which the unquestioned continuance of the trust imported? If the proof by parol, that the creator of the power knows that it is about to be executed and forbears to interpose an objection to its exercise, be adequate to secure to the purchaser under the power an indefeasible estate, must not his solemn declaration under hand and seal, untracted, of his assent to the creation and exercise of the power, give equal security to the purchaser?

I take this occasion to state what in substance I orally stated from the bench, in expressing my concurrence in the decree that was entered in the case of *Breckenridge v. Auld & others*, but which I inadvertently failed to reduce to writing, and to have published as part of the report of that case.

My concurrence in the decree in that case was in no degree influenced by the case of *Chowning v. Cox &c.*, 1 Rand. 306. In that case Auld, who sold to Strider, had an absolute deed from Breckenridge, who had no interest in the land but that arising from a secret trust between him and Auld. The deed to Auld was absolute, for the purpose of enabling him to make sale of the land. Such being the situation of the title, Auld, as the fee simple owner, made sale of the land to Strider by a contract entirely fair on the part of Strider, and Strider took possession. In this state of things, Breckenridge made known and

asserted his title under the secret trust. Had Strider insisted on his purchase, my unhesitating opinion was that it ought not to have been invalidated in deference to the claim of Breckenridge under his secret trust, and that so far as Strider was concerned, Breckenridge was as much bound as if he himself had made the sale. The case of *Chowning v. Cox &c.* in its utmost latitude, was unavailing to defeat a fair purchase from one held out to the 191 world as the *fee simple owner, and so held out for the very purpose of making the sale. But in that case Strider, so far from insisting on his purchase, was a plaintiff before the court below, asking a rescission of the contract. Breckenridge also asked for a rescission; and as to Auld, as between him and Breckenridge, he was but an incumbrancer, having no substantial interest in the question whether the land remained Breckenridge's, charged with his incumbrance, or Strider's, subject to the same charge. So far then as respected the question whether the sale to Strider should be sustained, both the parties having substantial interest in that question concurred in asking that the sale should be rescinded: and on that ground only, I concurred in the decree rescinding the contract.

Decree affirmed.

192 *Hendricks & Others v. Compton's Ex'or.

July, 1843, Lewisburg.

(Absent CABELL, P., and BROOKE, J.)

Laches—Injunction to Judgment—Neglect to Make Defence at Law.*—An obligation given on the retainer of counsel to defend the obligor on a charge of forgery, is assigned by the counsel, and judgment is obtained thereupon by the assignees, on which judgment execution issues, under which a forthcoming bond is taken, and judgment is rendered thereupon. After these proceedings, without any defence having been made at law, and without any excuse for not making it, an injunction is obtained on the ground that the obligor was induced to employ the obligee, by the menace that if he did not, the obligee would act as counsel against him in aid of the prosecution. **Held**, the injunction should be dissolved and the bill dismissed: for if in law such a contract was valid, a court of equity has no right to absolve the party from it; and if in law the contract was invalid, the defence should have been made in that forum.

On the 26th of February 1824, John Compton junior exhibited his bill to the county court of Tazewell, setting forth, that on the 1st of December 1821, he executed his obligation under seal to John Linton, for 100 dollars; that at the time of executing the same, he was under an arrest upon the charge of forging a bill of sale; that Linton advised the prosecution against

*See monographic note on "Laches" appended to *Peers v. Barnett*, 12 Gratt. 410.

the complainant, and the complainant has reason to believe that the prosecution would not have been instituted against him, if it had not been for Linton; that after the complainant was arrested, Linton informed him there would be no attorney for the commonwealth at the called court, and said he would be damned if he did not appear at the called court and prosecute the complainant, unless the complainant employed him; and that the complainant became alarmed, and executed his obligation to Linton. The complainant represents that

Linton told him a falsehood, for he 193 (Linton) knew *that the attorney for the commonwealth would be at the called court; states that at the time he executed the obligation to Linton, he was unacquainted with him, but his friends advised him that it was not safe to rest his defence in the hands of Linton, and he was therefore compelled to employ other counsel, who are justly entitled to their fees, because they did not act the same dishonourable part; and farther states that Linton did in fact go before the justice of the peace, before whom the complainant was examined upon the charge aforesaid, and asked questions against him; that the complainant asked the justice to continue his examination until the next day, in order that he might procure a material witness, and Linton informed the justice he had no such right. These actings and doings of Linton, the complainant insist, are fraudulent and unjust, and contrary to equity and good conscience. The prayer of the bill is that Hendricks & Byars the assignees of Linton, and the said Linton, may be made defendants, and be enjoined from all proceedings on the judgment on the forthcoming bond, obtained against the complainant and his sureties.

The answer of Linton states, that he was employed in a suit between Compton and one Powers, for some slaves; that at the trial the bill of sale mentioned in the complainant's bill was used, and it was alleged to be a forgery; that the court decided against the plaintiff; and that the same evening (as well as the respondent recollects), he saw the plaintiff on trial for the supposed forgery. The respondent states, that he might then have asked questions to explain the matter, and might have given his opinion to the justice upon any question that might then have arisen; that the justice sent the complainant on to an examining court, and the complainant was put under a guard at the house where respondent then boarded; that on the application of the complainant, an agreement was entered into between 194 *him and the respondent, that respondent would appear at the called court for fifty dollars; that the next day Compton, becoming alarmed by the remarks of several persons, came to respondent and asked him for his opinion; that respondent gave it as his opinion that he would unquestionably be acquitted at the called court; that Compton asked respondent what

he would take if he was cleared, with the understanding that otherwise nothing was to be paid; that respondent agreed, if he would double the amount, to make that contract with him; and that it was agreed upon between them, and a new obligation executed with that condition. The respondent states that he then returned to the court which he had been attending, but quitted it while yet in session, and attended the called court, and in good faith discharged his duty as counsel; that young Mr. Compton, or a gentleman who was about to marry complainant's daughter, came on to the county, and employed Charles C. Johnston esq. and endeavoured to employ Benjamin Estill, at the sum of 200 dollars; that after the called court was over, respondent went with complainant to the house of Thomas Perry, where they then settled; that respondent then either took a new instrument, or the condition was torn off by consent, he does not recollect which; and that Compton the same night executed to respondent another note, perhaps of 10 dollars, to prosecute a suit against the prosecutor; a proof that he had not at that time the opinion of respondent which he now professes.

Hendricks & Byars in their answer, (after excepting to the bill upon the ground that there is no equity in it,) say, that being assignees merely of Linton, they know nothing of the contract between the complainant and Linton, or of the attending circumstances, of their own knowledge; that all their knowledge of these matters is derived from Linton, to whose answer they refer. They add, that before bringing suit at law, their agent wrote to

195 *the complainant once, perhaps twice, asking if he had any defence to make against the payment of the obligation; and never receiving any answer, they supposed the complainant had no defence.

Thomas Perry, a witness to the obligation, deposed that it was executed in consideration that Linton should defend the complainant against a prosecution for forgery, and the condition was torn off in the presence of Compton, Linton observing that the condition was now of no account. Linton, he says, frequently observed, before it was executed, and in the presence of the plaintiff, that if the plaintiff did not employ him, he (Linton) would prosecute him and send him to the penitentiary; or words to that amount. "Linton, as this deponent believes, was drinking, and going on in his usual way." Being asked, "Did the plaintiff appear to be alarmed at the threats of Linton?" he answered, "He appeared to be agitated, either from such threats or from his peculiar situation."

James M'Neil deposed, that he recollected "hearing Linton say to Compton, that if he (Compton) did not employ him, he (Linton) would send him to the penitentiary, or words to that amount; and that he (Linton) would prosecute said Compton, if he did not employ him."

David M'Comas deposed, that Linton was

busy in starting the prosecution against Compton for forgery, by telling Powers that he ought to prosecute him. Deponent has an indistinct recollection that Linton had something to say against Compton on his examination before the justice. He further recollects that Compton asked the justice for a continuance of his case, in order to procure some evidence; and a doubt arising with the justice whether he ought to grant a continuance, the justice called upon deponent for his opinion, (he being the attorney for the commonwealth,) and Linton asked him to say that a continuance could not be granted, in 196 *order to alarm Compton, that he Linton might obtain a fee; or words to that amount. He well recollects that Linton appeared for Compton at the called court.

William Wynn deposed, that he recollected hearing Linton tell Compton he was determined to appear against him at the called court, whether he should be employed or not, and would send him to the penitentiary, unless Compton employed him; that his threats on that occasion were well calculated to alarm any man who knew not Linton, and was so peculiarly circumstanced as Compton was.

Pending the suit the complainant died, and it was revived in the name of his executor.

On the 2d of August 1838, the cause having been pending in the county court more than a year, was, under the act of February 12, 1838, (Sess. Acts of 1838, ch. 64, p. 61,) removed, on the motion of the defendants, to the circuit superior court of the county.

On the 25th of April 1839, the cause came on before that court. And that court decreed that the injunction be made perpetual, and that the defendants pay to the plaintiff his costs.

From this decree an appeal was allowed.

Patton for appellants. The injunction ought to have been dissolved and the bill dismissed. 1. The only plausible ground in favour of the decree is, that the obligation was extorted by Linton's threats of appearing to prosecute unless he was employed to defend, and that the obligation was therefore given under duress. Now, admitting, for the sake of argument, that the menace, if seriously made, amounted to duress, it is clear that it invalidated the obligation at law, and could have been proved under a plea of non est factum, either general or special. This being so, there is no ground for relief in equity, without a sufficient excuse alleged and 197 proved for not making the defence

*at law. Faulkner's adm'r v. Harwood, 6 Rand. 125; Cabell's ex'ors v. Roberts's adm'r's, Id. 580; Haden v. Garden, 7 Leigh 157. In this case no excuse is offered, nor any reason assigned, for not making the defence at law. But 2, the threat, supposing it proved in its most indefensible terms and spirit, does not

amount to duress. Compton was not in the custody of Linton. The threat was, that he would do that which the law required should be done by some counsel, and from which no injury could result to Compton. If innocent, he would probably be acquitted, no matter who prosecuted him; if guilty, it was no threat from which he was entitled to be protected, that he would be visited with punishment. 3. It is not pretended that the consideration of the bond was that Linton should refrain from prosecuting; and if it were, a court of equity would not relieve a party from an obligation given on such consideration. The consideration of the bond was in terms (it is distinctly admitted in the bill) that Linton, a lawyer, should give his aid in defending Compton from a criminal prosecution. This was a valid, legal consideration. However censurable, in a moral point of view, may have been the attorney's conduct in holding out to Compton the inducement to employ him which he is represented to have held out, and although his course was not such as comports with the delicacy and scrupulous honour which the members of the profession should and generally do observe, it is nevertheless submitted that such conduct cannot vitiate the obligation given for the retainer, in the hands of bona fide assignees, and after the professional assistance had been faithfully rendered and successfully exerted. It is alike against law and reason, that upon any such grounds a party should be absolved from the obligation to pay, for services actually rendered, the compensation stipulated to be given for them.

198 *The decree is at all events erroneous (even upon the principles of the court below) in not giving the appellants a decree over against Linton.

There was no counsel for the appellee.

STANARD, J. The injunction in this case was sought and obtained by the testator of the appellee, to a judgment on an obligation given on the retainer of counsel to defend the party on a charge of forgery. The ground on which it was sought was not that such an obligation, on such a consideration, was by law invalid, for that would be untenable; nor that the service had not been rendered, for it confessedly was; but that the obligor was induced to employ the obligee by the menace, that if he did not, the obligee would act as counsel against him in aid of the prosecution. That the conduct imputed to the obligee is a gross violation of professional delicacy, propriety, and even morality, no one with just perceptions of professional selfrespect and duty would controvert. Whether, however, it would amount to such coercion, duress or extortion, as to invalidate the contract for compensation for the services thus in a manner imposed on the party, is a question purely legal, and proper for the adjudication of a court of law, on being presented to that forum as a defence to a suit for the compensation. Without con-

sidering that question in this case, it suffices to say, that if the law would not sustain such defence, in other words if in law such a contract was valid, a court of equity has no right to absolve the party from it; and if in law the contract was invalid, the defence should have been made in that forum. In this case no excuse is suggested, or even intimated, much less proved, for not making the defence at law. On the contrary, after the obligation passed into the hands of assignees, 199 who, for *aught that appears, are honest claimants for value, judgment at law is suffered to pass in their favour without an attempt at such defence; and it is only after the party, being pressed by execution, has delayed it by a forthcoming bond, and is again pressed by execution on the bond, that this defence is brought forward in a court of equity against these assignees. It is not fit that the aid of that court should be given to a party asking it on such grounds and under such circumstances; especially as it appears that after the service was rendered, and when the party was free from the influence of a pending prosecution, and of the apprehended aid that the obligee might give to it, he ratified the contract for the compensation by making it unconditional.

My opinion therefore is, that the injunction ought not to have been granted; and that the decree perpetuating it is erroneous, and ought to be reversed with costs, the injunction dissolved, and the bill dismissed, with costs to the appellants in the county and superior courts.

The other judges concurring, decree entered accordingly.

200 *Syrus and Others v. Allison.

July, 1848, Lewisburg.

(Absent CABELL, P., and BROOKE, J.)

Ejectment*—Demise of Insolvent Debtor.—Where a person taken in execution is discharged as an insolvent debtor, the estate in lands belonging to him at the time of such discharge is, by the act in 1 R. C. of 1819, ch. 134, § 34, p. 538, so completely vested in the sheriff of the county wherein such lands lie, that an ejectment for such lands cannot afterwards be maintained on the demise of the insolvent debtor, while the execution remains unsatisfied.

This was a supersedeas to a judgment of the circuit court of Cabell, in an action of ejectment for lands in that county. The declaration was filed in April 1838, and contained two counts; the first upon the demise of William Allison, the second upon the demise of Stephen Wilson. Thomas Syrus, George P. Brumfield and Willis M'Keand were admitted defendants, and pleaded the general issue. At the trial a special verdict was returned, which found that William Allison, one of the lessors,

*See monographic note on "Ejectment" appended to Tapscott v. Cobbs, 11 Gratt. 172.

was discharged from custody on the 27th of June 1826, under the act for the relief of insolvent debtors, by the warrant of two justices of the peace, and then and there rendered a schedule, containing no estate of any kind; "that he has acquired no title, or seisin, or right of possession to the land in controversy, by possession or any other-wise howsoever, since he took the insolvent debtor's oath as aforesaid, but that his only title or right was acquired before that time;" that upon taking the oath aforesaid, the said William Allison made no conveyance of the land in controversy to the sheriff; and that the execution described in the warrant and schedule still remains due and wholly unpaid. (The execution appeared by the *warrant and schedule to have been at the suit of William Anderson for the benefit of John Laidley.) If, upon these facts, the court should be of opinion that the suit for the land could be sustained upon the demise of William Allison, then the jury found for the plaintiff, on that demise, the land laid down in the plat of the surveyor (returned in the cause) within certain described lines, and one cent damages. But if the court should be of opinion that the action could not be sustained upon the demise of the said Allison for the said land before described, ("and to which the said Allison has not acquired any right or title whatever as aforesaid, since taking the insolvent debtor's oath as aforesaid") then they found for the defendants. As to the demise laid in the declaration in the name of Stephen Wilson, and all the residue of the land in the declaration mentioned, they found for the defendants.

On the 2d of October 1839, the court pronounced its opinion that the law on the special verdict was for the plaintiff, and entered judgment that the plaintiff recover against the defendants his term to come in the lands mentioned in the declaration as demised by Allison, and described as aforesaid, together with the damages assessed and the costs of suit; "subject however to sale by the sheriff of Cabell county who was in office on the 27th June 1826, for the satisfaction of the judgment creditor at whose suit the said William Allison took the oath of insolvency, as found in the verdict."

B. H. Smith for plaintiffs in error. It is plain that the judgment must be reversed; for the verdict, while it ascertains that Allison acquired no title to the land since he took the insolvent debtor's oath, does not find that he had any title before that period. But a reversal on this ground would merely lead to a new trial; whereas there is another ground on which the court should give judgment that the plaintiff in ejectment *take nothing.

From the time that Allison was discharged as an insolvent debtor, he had no estate in the lands in controversy; all the estate which he had therein before that discharge, became, from the time of the

discharge, vested in the sheriff of the county wherein the lands lie. 1 R. C. of 1819, ch. 134, § 34, p. 538; Shirley v. Long, 6 Rand. 735; 1 Rob. Pract. 554, 5. The recent decision in Dunn v. Price, 11 Leigh 203, is not in conflict with Shirley v. Long; at least not as it regards the present case. Ejectment can only be sustained upon a legal title. Adams on Ejectment 32, 33, and notes. In Hopkins &c. v. Ward &c., 6 Munf. 38, it was held that the cestui que trust might maintain ejectment upon a demise in his own name. But there, though the land was conveyed to a trustee, the trustee had by his deed declared the land to be in trust for the benefit of another; and by the statute, the possession of the trustee in such a case is transferred to the person entitled to the use, as perfectly as if he had been enfeoffed with livery of seisin. 1 R. C. of 1819, ch. 99, § 29, p. 370. And though in that case the land was subject to a charge created on it in favour of the trustee, yet the purposes of the trust had been satisfied as to the trustee, and a release of this charge might well have been presumed. Whereas, in the present case, it is expressly found that the amount of the execution still remains wholly unpaid, and there is no ground on which a conveyance can be presumed from the sheriff to the insolvent debtor. The facts of this case as effectually preclude such presumption, as they did in Hodsden v. Staple, 2 T. R. 684, where the unsatisfied term outstanding in trustees barred the recovery of the heir at law, though he claimed subject to the charge. Allison had, at most, but an equity of redemption; and there is no case in which the holder of such a mere equity can maintain ejectment. See Adams on Ejectment 32, 3, and 81-8. *After a mortgage is forfeited, ejectment cannot be maintained by the mortgagor. There can be no reason in the present case for departing from the general rule which requires a legal title to maintain the action: there is no principle, nor any consideration of policy, which calls for such departure.

No counsel argued the case for defendant in error.

STANARD, J. The special verdict in this case expressly finds that the lessor of the plaintiff has acquired no title whatever to the land in controversy since he took the oath of insolvency, and does not distinctly find that he had title before. Though I think it highly probable that there was satisfactory proof of such previous title, (for unless there was, the enquiry into the effect of the oath of insolvency, and of the discharge of the insolvent, was useless, and a special verdict unsuited to the case) and that the jury intended to find that fact as a part of the case, yet the strict rules which govern the construction of such verdicts seem to forbid that a fact, indispensable to make any case for the lessor of the plaintiff, should be supplied by implication. Without that fact, the lessor of the plain-

tiff could not recover, though his oath and discharge as an insolvent left in him a right that would support an ejectment for land owned by him at the time of taking the oath. If then such an action could be supported notwithstanding the oath of insolvency, the special verdict would probably be deemed imperfect, and the proper disposition of the case would be a reversal of the judgment of the court, and the award of a venire de novo. Should it, however, be the opinion of this court, that the effect of the oath and discharge of the lessor of the plaintiff as an insolvent, is to transfer his title in lands to the sheriff of the county in which they may be situate, so as to

204 disable him, at least *while the debt remains unsatisfied, to maintain an action of ejectment on his previous title, in such case the fact of such previous title becomes immaterial, a venire de novo to supply it becomes useless, and the special verdict in this case contains matter sufficient on which final judgment can be rendered.

Does then the legal title of the insolvent, in lands owned by him at the time he takes the oath and is discharged, pass from him and vest in the sheriff of the county in which the lands are situate; and can the insolvent maintain ejectment for such lands on his demise, while the debt under the execution, for which he took the oath and was discharged, remains unsatisfied? The express words of the statute furnish an affirmative answer to the first member of the interrogatory; and from it, a negative answer to the second member seems to be a necessary consequence. The statute declares that all the estate and interest that the insolvent has, and can lawfully depart withal, shall vest in the sheriff of the county in which the lands may be. It is not a qualified or equitable title, or a right in the nature of a lien, that the law declares shall be vested in the sheriff, but all the estate and interest therein of the insolvent. Such being the explicit declaration of the statute, there is no room for a constructive doubt of the intention of the legislature, incompatible with the language of that declaration, or impairing its force. The only question that could arise would be the competency of the statute, by such a provision, to work the transfer of the title from the insolvent to the sheriff. On this there can be no doubt. The same legislative power which gives to a deed sealed and delivered the effect of transferring the title of the party sealing and delivering, to his grantee, or which gives to the conveyance of a commissioner of the court of chancery the effect of transferring the title of parties to the suit in which the decree appointing the commissioner is rendered, is *competent to transfer the title of the insolvent, as a consequence of his oath and discharge as such.

205

This naked question has not (as far as I know) been distinctly adjudicated by the court of appeals. But in the case of Shirley v. Long, 6 Rand. 735, the language of the

judges is consonant with the opinion now expressed. And from the opinions of judge Carr and president Tucker, and the general concurrence of the other judges, in the case of *Ruffners v. Lewis's ex'ors &c.*, 7 Leigh 720, it seems that such was the opinion of the whole court. The cases of *Stoever v. Stoever*, 9 Serg. & Rawle 434, and *Ross &c. v. M'Junkin &c.*, 14 Id. 364, (for a reference to which I am indebted to my brother Allen) shew that a similar decision has been made by the courts of Pennsylvania, as to the effect on an insolvent's title and right of action, of his assignment and discharge under the insolvent laws of that state.

The opinion of the court is, that the judgment of the court below be reversed, and judgment on the special verdict entered for the plaintiffs in error.

206 *Smith v. Hunt and Others.

July, 1848, Lewisburg.

(Absent CABELL, P., and BROOKE, J.)

Foreign Attachment*—Plea by Assignee That Debtor is a Resident.—In a suit in equity in the circuit court of Russell, against an absent debtor having lands within the commonwealth, after a valuation of the lands had been made and returned, two persons filed petitions, setting forth that they had purchased the lands from the debtor and received conveyances of the same, and praying to be made defendants. The court ordered the plaintiff to amend his bill and make them parties, which was accordingly done. Whereupon they filed a plea alleging, that at the time the subpoena was sued out, the debtor was a resident of the county of Russell and state of Virginia, subject to the process of the common law courts of said county, and possessed of personalty sufficient to discharge the debts due by him to the plaintiff. To this plea the plaintiff demurred. HELD, the demurrer should be sustained: for the petition is only a part of the case for the purpose of having the petitioners made defendants; and so far as the record discloses, they may have been mere strangers, having no right to intermeddle. Whether the debtor was nonresident or not, was a question foreign to them, until by their answers they had shewn they had an interest in the controversy.

In this case several questions of law were argued by G. N. Johnson for the appellant, and B. R. Johnston for the appellees, upon which the court deemed it unnecessary to express an opinion. The decision of the court turned upon a question of practice; and so far as is material to understand that question, the case is sufficiently stated in the following opinion.

ALLEN, J. On the 24th of September 1835, the appellant instituted a suit in chancery against Hunt in the circuit court of Russell county, by suing out his subpoena. The subpoena, it appears from the

record, is lost. On the 4th of January 1836, the plaintiff filed his bill, 207 *which was in the nature of a foreign attachment, seeking to charge the lands of the defendant as an absent debtor.

The defendant Hunt has never appeared, and at a subsequent period an order of publication was taken against him; whether upon any, or, if any, a proper affidavit, it is not necessary to enquire in the present condition of the cause. An order of valuation was also taken out and executed. Afterwards, on the 20th September 1836, White and Jackson filed their petitions, alleging that they were purchasers of the lands of Hunt sought to be charged, and had received conveyances of the same, and asking to be made defendants to defend their rights. An amended bill was thereupon filed, by direction of the court, making them defendants. On the 19th of April 1837, the defendants White and Jackson filed their plea in abatement, in which, without averring or in any manner shewing that they had any interest in the subject, they allege that the original defendant Hunt was, at the date of the subpoena, a resident of the county of Russell and state of Virginia, subject to the process of the common law courts of said county, and possessed of personalty sufficient to discharge the debts due by him to the complainant. To this plea the complainant replied generally, and the cause was continued, with leave to the complainant to amend his bill. At the October rules 1837 the amended bill was filed, alleging that the claims of White and Jackson were fraudulent. At the April term 1838, the complainant, upon leave, withdrew his replication to the plea, and demurred. His demurrer was overruled, and he again replied. A jury was sworn to try the issue; and after some proceedings (certainly very irregular, but not necessary to be detailed) the jury was discharged, the defendants had leave to withdraw their plea, and the cause was sent to the rules. At the August rules 1838, the defendants

208 White and Jackson again pleaded in abatement, that *Hunt was a resident at the date of the subpoena, and that the subpoena was executed on him. At the April term, the complainant objected to the filing of the plea. His objections were overruled. He thereupon replied; and a jury was sworn, which found that Hunt was a resident of the county of Russell until the 9th of October 1835. The cause was then placed on the docket; and coming on for hearing upon the bills and verdict, the court, being of opinion that it had no jurisdiction, dismissed the bill with costs.

The whole proceeding, it seems to me, after the order making the petitioners White and Jackson defendants, was irregular. Whether Hunt was a nonresident or not was a question foreign to them, until by their answers they had shewn that they had an interest in the controversy. So far as this record discloses, they may have been mere strangers, having no right to intermeddle. Their petition is only a part of

*Attachments—Claimants of Attached Property—Proper Issue.—The principal case is cited in *Starke v. Scott*, 78 Va. 184.

the case for the purpose of their being made defendants. If they had shewn by their answers and the proofs, that they were bona fide purchasers of the land before the filing of the bill but after the date of the subpoena, it might then have been necessary to determine, upon enquiry into the nature of the subpoena and endorsement, or in the absence of any proof touching it, at what time the lien of the plaintiff attached; whether at the date of the subpoena, or the filing of the bill.* But as the case has proceeded, the plaintiff, though he may have had the clear right, taking either period, to subject the land to his debt, has been turned out of court at the instance of defendants who may never have had any claim to the land. I think, therefore, that the court should have sustained the demurrer to the first
209 *plea, and should have disallowed the second; and that for this reason the decree should be reversed, the pleas rejected, and all the proceedings under them set aside, and the cause remanded with leave to the defendants to answer, and for such other proceedings as may be deemed necessary to mature the cause for hearing and final decree upon the original and amended bills.

The other judges concurring, a decree was entered accordingly.

Patrick v. Ruffners.†

July, 1843, Lewisburg.

[40 Am. Dec. 740.]

(Absent CABELL, P., and BROOKE, J.)

Ferry—Action for Disturbance of Franchise—Proof to Maintain Action.—In an action by the grantee of a ferry against a wrongdoer who disturbs the enjoyment of his franchise, the grant of the fran-

*Note by the reporter. In the petitions, the conveyances to the purchasers were stated to have been made, one of them on the 6th, and the other on the 7th of October 1835: being in the interval between the date of the subpoena and the time of filing the bill.

†For monographic note on Ferries, see end of case.

‡Ferry—Action for Disturbance of Franchise—Proof to Maintain Action.—The principal case is cited in *Mason v. Harper's Ferry Bridge Co.*, 17 W. Va. 410.

Same—Incorporeal Hereditament—How Granted.—The principal case is cited in *Mason v. Harper's Ferry Bridge Co.*, 17 W. Va. 410, as authority for the proposition that a ferry is an incorporeal hereditament acquired from the public, granted either by a special act of the legislature, or by some other competent authority, under the provisions of a general law.

Same—Constitutional Provision—Taking of Property.—The principal case is cited in *Mason v. Harper's Ferry Bridge Co.*, 17 W. Va. 417, for the proposition that a ferry franchise is private property within the meaning of that section of the constitution, which declares that private property shall not be taken or damaged for public use without just compensation. See monographic note on "Ferries" appended to the principal case.

chise from the public, the use of the ferry with its appurtenant landings and outlets, and the fact of such disturbance, are all that need be established. Nor is it material whether the disturbance is by invading the plaintiff's right to the exclusive transportation and tolls, or by obstructing or impairing his navigation, or by destroying or injuring the landings and outlets. Per BALDWIN, J.

Same—Same—Declaration—Injury to Reversion.—A declaration in case by the owner of a ferry for the disturbance of his franchise, contains two counts, each of which is demurred to. The first count sets forth, in substance, that the plaintiff was possessed of a legally established ferry; that there were good and convenient roads, ways and landings for the use of the same; and that there was, and of right ought to have been, a free and uninterrupted passage for the water flowing in and down the river, so as not to affect or injure the landings, ways or roads at the ferry; and it charges that the defendants wrongfully placed obstructions in the river near the ferry and landings, by which the current of the stream
210 was checked and diverted, *and thrown from and upon the landings (in modes particularly described); thereby occasioning the plaintiff great labor and expense, destroying or injuring the roads and landings, rendering the embarkation and debarkation difficult, and preventing the transportation of persons and property. The second count is the same, except that, instead of alleging a possession of the ferry by the plaintiff, it avers his right to the reversion thereof, expectant upon the term of his tenant, in whom the possession, use and enjoyment are charged to be; and that the grievance complained of is to the prejudice of the plaintiff's reversionary estate. HELD, both counts are good on general demurrer: dissentiente ALLEN, J., who was of opinion as to the second count, that it not being for the accruing damages consequent upon the obstruction, but by the reversioner for an injury to the inheritance, it could not be sustained without an averment in it of possession of the landings, or of some right to their use.

In an action in the circuit court of Kanawha, the following declaration was filed at August rules 1838.

George H. Patrick complains of Daniel Ruffner and Lewis Ruffner in custody &c. of a plea of trespass on the case. For that whereas, before and at the time of committing the grievances hereinafter next mentioned, the said plaintiff was possessed of a legally established ferry from the east side of Elk river at the mouth thereof to the west side thereof, during which, and until the institution of this suit, said ferry was provided with flats, skiffs and other craft necessary for the transportation of all persons, wagons, carriages, horses, cattle, sheep, hogs, or other thing whatsoever across the same: and whereas also, before and at the time of committing the grievances hereinafter next mentioned, there was a good and convenient road or way and landing on each side of said river, at the ferry aforesaid, for approaching to or departing from the same, as well as for embarking and debarking all persons, wagons,

by the grant of the franchise. These, and the incidental means of enjoying them, were possessed by him only, and no one else has a right to complain of the particular grievance alleged, namely the disturbance of his franchise, by which he alone

217 has sustained damage, *in the diminution of his profits. In truth, according to the case made by the declaration, the public at large could in no wise be prejudiced, but by the inability to cross the ferry safely and conveniently; and that resulted merely from the disturbance of the plaintiff's franchise; an immediate injury to him, for which he is entitled to redress.

There could be nothing in the objection that the plaintiff does not directly allege that he was possessed of the landings and outlets. By shewing the use of them to be appurtenant to the ferry, he has asserted all the possession of which the subject was susceptible. If they were private property, that can avail the defendants nothing, unless they can prove that it belonged to them; which it will be competent for them to do on the trial of the cause. The plaintiff need not assert or prove that he was the owner of the soil: the use for the purposes of the ferry is enough against a wrongdoer; and is even enough against the owner, if the right to that use has been acquired from him, or from those under whom he claims title; which is a mere matter of evidence to repel the *prima facie* right apparent from the enjoyment. It is true that in *Saville*, p. 11, pl. 29, it is asserted that in every ferry the land on both sides of the water ought to belong to the owner of the ferry, for otherwise he could not land on the other side. But this idea is repudiated in *Peter v. Kendal & Co.*, 6 Barn. & Cress. 703, in which it was held that he need not have property in the soil on either side. And this doctrine is no invasion of the right of private property; for, while the grant of the franchise takes away the defence of exclusive ownership in another, it does not prevent the defendant from asserting it in himself. If the plaintiff were even the proprietor of the soil, it would not only be unnecessary, but perhaps improper, to aver it in the declaration; inasmuch as the gravamen of the action

218 is not an injury to the soil, *but to the incorporeal right of using it as an incident of the franchise.

So, too, if the landings and outlets were parts of an established highway, the use of them for the purposes of the ferry is all the possession which the plaintiff could assert or prove; and thus, in that aspect of the case, the only question really is whether, when a ferry is lawfully established on a public road, the grantee is entitled to the use of it for landings and outlets, as appurtenant to the ferry. And upon that question I can have no doubt, even as against the owner of the soil over which the road, as a public easement, passes; though the question is not presented by the declaration, and can only arise upon the proofs. The ownership of

the soil, it is true, is subject only to the public easement; but the delegation by the public of the use of that easement to the grantee of the franchise, for the purposes of exclusive transportation and tolls, is a part of the grant, and not at all incompatible with the reserved rights of the owner of the soil; who can no more obstruct the travel and carriage across, than to and from the water; and if he does so by any means, it is at one and the same time a grievance to the grantee and the public, for which each is entitled to the appropriate remedy. When the ferry is a connecting link of a public highway, to say that the grantee has no right to land or receive freight in the highway on the banks of the stream, without the consent of the owner of the soil, would be a most subtle and unreasonable proposition, and wholly at war with our statute, 2 Rev. Code, ch. 238, p. 261, 262, authorizing the county courts to establish ferries on public roads through water courses; the 1st section of which applies to cases where the applicant is the owner of the lands on both sides, and the 3d section extends the authority to those in which he is the owner on one side only:

which last section is obviously founded upon the right of the *commonwealth to delegate the use of the easement to the grantee of the ferry, for the purposes thereof; and both sections necessarily refer the question of qualification by riparian ownership to the decision of the county court, whose grant can only be annulled by a regular proceeding for that purpose, though it cannot affect injuriously the rights of property in others. That the grantee would have no such right against the owner of the soil, where a landing place of the ferry happens to intersect a highway, is countenanced by the cases of *Chambers v. Furey*, 1 Yeates' R. 167, and *Cooper v. Smith*, 9 Serg. & Rawle 26; but even that idea is repelled by *Bayley, J.*, in *Peter v. Kendal & Co.* above cited, and by chancellor Kent in his *Commentaries*, vol. 3, p. 421, note d.

As already suggested, the defendants cannot, upon these demurrers, assert a title in themselves, or deny that of the plaintiff. The declaration charges, in effect, a lawful possession of the franchise, and a wrongful disturbance thereof by the defendants; all which is admitted by the demurrers. Moreover, the validity of the franchise cannot be questioned by the defendants in any stage of this collateral action, otherwise than by shewing a title in themselves paramount to that granted by the public. This can only be done by plea or proofs. If the landings be not in a public highway, and the defendants shew a right to the soil, the plaintiff may meet that defence by replying or proving a right to the use of them for the purposes of the ferry, derived from the defendants, or from their ancestors or predecessors. If the landings be in a public highway, it is out of the power of the defendants to shew a paramount title; for they can have no right

to a franchise themselves. That can only be obtained from the public, in consideration of public duties in reference thereto to be performed by the grantee, for the breach or neglect of which he is liable

220 to prosecution and *punishment.

However strong, therefore, the possible claim of the defendants to the grant of a ferry, it cannot be set up against the grant to the plaintiff or those under whom he claims: and even if the latter was obtained by a fraudulent or false suggestion, it cannot be impeached collaterally; the only remedy, if any, being by *scire facias* in the name of the commonwealth to repeal the grant. *Silver Lake Bank v. North*, 4 Johns. Ch. R. 373; 2 Kent's Comm. 312; *Slee v. Bloom*, 5 Johns. Ch. R. 381, 7 Bac. Ar. 137; *Scire Facias C. 3*. No injustice is done by this doctrine to the owner of the soil over which a public road passes; for what injury does he sustain by the use of the public easement for the passage through, any more than to and from, the watercourse? It is not like the case of riparian ownership upon a navigable stream, where the public easement consists merely in its navigation; which, as the law is now settled (3 Kent's Comm. 425, 426,) gives no right to the community to land upon its banks, and interfere with the wharfage, or other exclusive enjoyment of the owner.

For these reasons, I cannot perceive the propriety of denying the plaintiff a trial before a jury upon the merits of his cause. The structure of his declaration is not such as would in any wise exonerate him from establishing by proofs a good cause of action, or debar the defendants from any lawful defence. And even if the action could be regarded as brought for a common nuisance, the declaration shews a special damage to the plaintiff, of a direct and serious nature; and whether affecting his corporeal or incorporeal hereditament,—his actual possession, or mere use and enjoyment,—his right as a member of the community, or as the owner of a franchise,—is, in that view, wholly immaterial. Nor is a general demurrer sustainable, if the plaintiff has made out a good case, however informally and immethodically.

221 It seems to me, however, that *there is no good objection to the declaration, whether of form or of substance; but that, on the contrary, it has been drawn with technical skill and precision.

My opinion is, that the judgment of the circuit court is erroneous in sustaining instead of overruling the demurrers, and ought to be reversed.

ALLEN, J. The first count of the declaration avers that the plaintiff was possessed of a legally established ferry; that there was a road or landing on each side of the river for approaching the ferry; and that the defendants had injured and obstructed these landings, whereby the plaintiff had been subjected to inconvenience and expense. The second count sets out a possession by the lessee of the plain-

tiff; describes the injury to the landings as in the first count; and concludes with averring that such injury is to the prejudice of the plaintiff's rights as reversioner. It is not averred directly in either count, that the plaintiff was possessed of or entitled to the use of the landings, except so far as such possession or use may be held to be incident to the franchise itself.

A ferry, we are informed, is in respect of the landings, and not of the water (*Saville*, p. 11, pl. 29); and as a consequence, that the land on both sides ought to belong to the owner of the ferry. The supreme court of Pennsylvania, in *Chambers v. Furey*, 1 Yeates 167, and in *Cooper v. Smith*, 9 Serg. & Rawle 26, recognized the doctrine laid down in *Saville* as good law, and held that the dedication of land for a public highway gave no right to others to use it without the consent of the owner, for the purpose of landing or receiving freight; that the dedication to the public was for the purpose of passage only, and, subject to that easement, the fee remained in the owner. This, it seems to me, is the true doctrine, notwithstanding the dictum in *Peter v. Kendal &c.*, 6 Barn. & 222 Cress. 703. That was an *action for

a disturbance to a ferry by setting up another boat. To the objection that it was not averred that the plaintiff was the owner of the landings, it was replied, that ownership was not required: that the ferry owner must have the right to land, and it was sufficient if the landing was in a public road; or there might have been a grant or reservation of that right. The right to the landings was not there the subject of controversy; the injury complained of did not affect them, and it was not necessary to consider or determine under what circumstances the owner of the ferry might use the road.

A ferry is a valuable franchise created by law. The franchise consists in the right to demand a stipulated compensation for a particular service. Ferries are usually found on public roads; and the public having the right of passage, there can be no question that any individual, in the exercise of this right, may transport himself and property across the stream, and use the road as a landing, and that the owner cannot obstruct him. But it does not follow that he can convert this personal right into a source of emolument, and at his own pleasure use the road as a landing for a ferry. The franchise to exact the tolls is annexed to the land, is private property, and the owner cannot be deprived of it against his consent, without just compensation.

The right of individuals to wharves, landings &c. in cities, referred to in the cases cited from Yeates and Serg. & Rawle, illustrates the doctrine. The dedication of land as a street or road does not affect the right of the owner to this species of property. There is no incompatibility between the private right and the public easement.

Our own statute seems to treat the ferry as being in respect of the landings. The owner of the land on both sides, or on one side, of the stream through which a public road passes, is authorized to apply for the establishment of a ferry. The law, 223 it is true, "contains no provision for condemning the land on the opposite side, where the person applying is the owner on but one side; but this probably was an inadvertent omission. The law clearly did not proceed upon the supposition, that when a public road was established, the rights of the owner of the soil, as to this subject, were extinguished, and that it would be competent to confer the franchise on a stranger, having no interest, absolute or qualified, in the soil. If I am correct in these views, it follows that where a direct injury is done to the landings, and the declaration proceeds for the recovery of damages for such wrong, there should be an averment of possession, or of some right to the use of the landings; some averment to put the plaintiff to the proof of his right upon the trial. If the allegation that the plaintiff is possessed of the ferry comprehends the landings as appurtenant, proof of the establishment of the ferry would suffice, and the defendant might be subjected to a double recovery for the same act; to the owner of the fee for the trespass, and to the ferry owner, who may have had a mere license to use the landing, or no other right than that of any individual in the public road.

For these reasons, I think the second count was bad. The injury alleged is to the inheritance, and consists of damage to the landings, not of the loss consequent upon the obstruction; for the reversioner had no claim on that ground. The injury is set out, and is described to be an injury to the landings. Whether the injury as averred would permanently affect the inheritance or not, is a question of fact for the jury: but the declaration should have averred some right to or interest in the subject itself.

The first count however, it seems to me, was good, and the demurrer should have been overruled. That count, after setting out the injury to the landings, avers, that in consequence of this act, the plaintiff 224 was put to "expense; persons being deterred from the use of the ferry, &c. This I think a sufficient averment of special damage arising from the public nuisance in injuring and obstructing the public road. And in a proceeding for this consequential damage to the ferry, the case of *Peter v. Kendal &c.* is an authority shewing that it was not necessary to aver possession of the landings. For this purpose, and where the injury goes to the enjoyment of the franchise, the grant would be sufficient as against the wrongdoer, and no question could arise as to the right to the landings. I am of opinion, therefore, that the court erred in sustaining the demurrer to this count, and that for this cause the judgment should be reversed.

STANARD, J. The court below having sustained a general demurrer to the declaration, the only question for this court is, whether the declaration and each count of it be so radically defective, either for want of right of action in the plaintiff, or for substantial defects in setting forth that right, as to justify the judgment sustaining the demurrer.

The first count distinctly affirms the plaintiff's possession of a lawfully established ferry, and charges certain wilful acts of the defendants, which, it is averred, consequentially impair the profits of the ferry, and subject the plaintiff to other special damage, of expense and labour in repairing the injuries (caused by the acts imputed to the defendants) to the landings used with and appurtenant to the ferry.

The averments are full and sufficient to shew a right of action, if an action can be supported by the owner of a ferry for injuries, mediate or immediate, to the landings, which diminish the profits of the ferry, and subject the owner to labour and expense in the use of his franchise.

The franchise is a right, by prescription or grant, to charge and receive toll 225 for transporting by water, from "landing to landing, persons or property. The passage is generally across a water-course, to and from public ways on either side thereof and leading thereto, and the ferry forms the connecting link between the landings, and is substantially a continuance of the public highway. As the use of landings is indispensable to the exercise of the franchise, the right to use them is incident to the lawful ownership of the ferry; and the averment of such ownership involves the averment of a right to use the landings as appurtenant thereto. If the road to the water line on each side be a highway, the grant of the franchise, by necessary implication, passes the right to use the highways, as a necessary incident to the exercise of the franchise: if the roads be not highways, the owner of the ferry may be the owner of the soil where the landings are, or may have a right of way for the uses of his ferry from the owner of the soil: if neither of these rights exist, his title to the franchise is defective; and then the action would fail, not because the right to use the landings had not been sufficiently averred, but because the plaintiff had failed in the proof of it, by failing to prove the possession of a lawfully established ferry.

The right to use the landings is then in effect averred; and the only question is whether the acts of the defendants, and their consequences, as charged in the declaration, entitled the ferry owner to an action.

The acts and consequences are alleged to operate on a subject in which the plaintiff has a right of use, impairing the value of another right to which it is incident, and to the profitable enjoyment of which it is indispensable, and subjecting him to specific damage of labour and expense. I

cannot doubt that this is an injury for the redress of which the plaintiff is entitled to his action. The right of passage on a highway is common to all citizens; and generally, for injuries to the highway, no private action can be sustained. But

226 *if any citizen, in the use of this common right, suffers special damage in his person or property from the obstruction or injury of another to the highway, he is entitled to redress by action against that other. Even though the damage consist merely of the inconvenience and expense consequent on the delay of his journey, he is entitled to his action. *Rose v. Miles*, 4 Mau. & Selw. 101; *Greasly v. Codling &c.*, 2 Bingham 263, 9 Eng. C. L. R. 407.

The second count is for an injury to the reversionary interest of the plaintiff in the ferry. In an action for the injury to such an interest, the declaration must expressly charge that the act complained of is to the injury of the reversion, unless the act charged be of such nature that it must be to the injury of the reversion. *Jackson v. Peaked*, 1 Mau. & Selw. 234. As a proper counterpart of this rule, the declaration is not good though it charges the act as an injury to the reversion, if the act charged cannot in its nature be considered as detrimental to the reversion; as for example, entering and taking the growing crops or fruits, to which the tenant would be entitled. The second count in this case charges that the act of the defendants, and its consequences, are injurious to the reversion. The only enquiry therefore, in deciding on the sufficiency of the count, is whether the act and its consequences, as charged, be of such a kind that they cannot be considered injurious to the reversion. The consequence imputed to the act is a destruction of the landing. This surely may be injurious to the right of using the landings, and that right we have seen is incident to the franchise of a lawfully established ferry, and is commensurate in duration with the franchise, and forms part of the reversionary interest therein, as well as of the actual tenancy thereof. The destruction of the landing certainly may be an injury to the reversion, by subjecting the owner to inconvenience

227 and *expense in the use of the franchise, diminishing present rents, and reducing the present value of the reversion. It is no answer to the action of the reversioner, that the injury may be temporary, and that before the reversioner falls in, and his title to the use and occupation of the ferry vests in possession, the landings may be restored or the injury to them removed. 1 Mau. & Selw. 234. That the owner of the soil where the landings are may have an action for the injury charged in the declaration to the landings, and that that ownership is not alleged to be in the plaintiff and may be in another, so that if this action be sustained the party may be made responsible in two actions brought by different persons, is not, I apprehend,

a sufficient reason for denying the action to this plaintiff unless he be the owner of the soil. It is of frequent occurrence that a party is subjected to several actions for the same act. The same act may in its consequences operate on different rights, existing in different persons, in the subject affected by the act. Thus if a party cut a ditch across a public highway, and any citizen, in the use of the public highway, suffer special damage as a consequence of this nuisance, the party cutting the ditch is liable to an action of trespass at the suit of the owner of the soil; to an action on the case for the special damage, at the suit of the citizen who may have sustained it; and to an indictment for the nuisance. Other illustrations might be given.

My opinion therefore is, that however difficult it may be for the plaintiff to connect, by sufficient proof, the alleged consequences with the act charged on the defendants, and to make good the averment of damage to the reversion, and however small that damage may be, the second count shews a cause of action with certainty sufficient to render it good on general demurrer; and consequently that the demurrer in this case ought to have been overruled as to the second as well as the first count.

228 *The judgment of the court of appeals was entered in the following terms:

The judgment of the circuit court is reversed with costs: and this court proceeding to render such judgment as the court below ought to have given, it is considered that the demurrers of the defendants in error, to the declaration and each count thereof, be overruled. And the case is remanded for further proceeding, on a writ of enquiry to be awarded by the superior court, unless the said defendants should plead issuably to the action; and, should such plea or pleas be offered by the defendants, for the trial of the issue or issues that may be made upon such plea or pleas.

FERRIES.

I. Definition.

II. Establishment of Ferries.

1. Jurisdiction to Establish.
2. Proceedings to Establish.
 - a. The Application.
 - b. Parties.
 - c. Finding of Jury.
3. Conditions Precedent to Establishment.
4. As Condition Precedent to Erecting Dam.
5. Effect of Establishment.

III. Protection Afforded Ferries.

1. Against Rival Ferries and Bridges.
2. Against Private Ferries.
3. Against Excessive Taxes.

IV. Transfer of Franchise.

V. Partnership in Franchise.

VI. Discontinuance of Ferries.

VII. Pleading and Practice.

1. Actions for Disturbing Ferries.
2. Appellate Practice.

DEFINITION.

A ferry is an incorporeal hereditament acquired from the public, either by special act of the legislature, or by some other competent authority, under the provisions of a general law. It includes the exclusive privilege of transportation, for tolls, across a watercourse, and also the use, for that purpose, of the respective landings and their outlets. *Patrick v. Ruffners*, 2 Rob. 209, 40 Am. Dec. 740.

II. ESTABLISHMENT OF FERRIES.

1. JURISDICTION TO ESTABLISH.—Jurisdiction to establish ferries is conferred upon the county courts by ch. 64, Code 1873. When in a particular case such jurisdiction is acquired, the failure of the court in the progress of the case to comply with the statute in detail, may be error reviewable on appeal, but is no ground for collateral attack on the judgment. *Wimblish v. Breeden*, 77 Va. 324.

This statute, however, does not authorize the county court to establish a ferry across a stream which forms one of the boundaries of the state. *Zane v. Zane*, 2 Va. Cas. 68.

2. PROCEEDINGS TO ESTABLISH.

a. THE APPLICATION.—In an application to the county court to establish a ferry, the applicant should set forth in his petition that he owns the land either on one or both sides of the stream, and that a public road has been established through the land to the place where the ferry is sought to be established. *Zane v. Zane*, 2 Va. Cas. 68. See also, *Wimblish v. Breeden*, 77 Va. 324.

b. PARTIES.—The court should permit any one to become a party to the proceeding, so as to give him a right to obtain a writ of error to the judgment, who has a peculiar interest in the controversy different from that of all other members of the community. For example, a proprietor of an old ferry in close proximity to the proposed ferry should be allowed to become a party contestant. But where a person's interest is only such interest as is common to all others in the community, he should not be allowed to become a party. *Williamson v. Hays*, 25 W. Va. 609.

c. FINDING OF JURY.

Finding of Jury Is Only Evidence of Necessity of Ferry.—Under the statute providing for the impanelling of a jury to say whether public convenience will result from the establishment of a proposed ferry, the finding of the jury is merely evidence; and the weight of it, under all the circumstance of the case, is a matter for the discretion of the court to which the finding of the jury is returned. *Muire v. Smith*, 2 Rob. 458.

Validity of Finding—Competency of Jurors.—The fact that a juror, upon a jury impanelled to say whether public convenience will result from the establishment of a ferry, was of the opinion, before he was sworn, that public convenience would result; that he had expressed this opinion, and that he had circulated a petition for the ferry, is not ground for quashing the finding of the jury, if the juror is otherwise qualified to render an impartial verdict. *Muire v. Smith*, 2 Rob. 458. And a person who signs a memorial to the legislature for the establishment of a ferry is not thereby rendered incompetent to act on the jury. *Somerville v. Wimblish*, 7 Gratt. 206.

3. CONDITIONS PRECEDENT TO ESTABLISHMENT.—Section 12, ch. 64, Code 1873, requires the person desiring to establish a ferry "to own or to have contracted for the use of land at the point at

which he wishes to establish the same." This statute, however, is complied with where the lessee of the land, the owner of the equity of redemption therein, and the trustee holding the legal title unite in the application for the establishment of the ferry. *Wimblish v. Breeden*, 77 Va. 324. See also, *Zane v. Zane*, 2 Va. Cas. 68.

4. AS CONDITION PRECEDENT TO ERECTING DAM.

Judgment Allowing Erection of Dam upon Providing a Ferry Presumed to Be Correct on Appeal.—In a case in which the judgment of the court giving leave to erect a dam provided that the applicant should keep a ferry boat at the crossing of a public road over the stream across which the dam was to be erected, it was held that, as such judgment was authorized by statute (2 Rev. Code 227, § 5), and as the county and circuit courts had held upon the evidence that a ferry boat at that place would sufficiently remedy any impediment to the crossing of the stream, the court of appeals would presume that they acted rightly, in the absence of evidence to the contrary. *Mairs v. Gallahue*, 9 Gratt. 94.

Duties in Regard to Ferry Boat.—Where the right to erect a dam is made conditional upon the applicant's maintaining a ferry across a stream for the benefit of the public, the duty of keeping up the ferry boat is not merely personal to the grantee of the privilege of erecting the dam, but is a condition incident to the grant, and attaches to it in whosoever hands it passes. The kind of boat to be kept is such a one as the exigencies of the travel and trade on the road shall require. And it is the duty of the party required to keep up the ferry boat to ferry the public over the stream without charge. *Mairs v. Gallahue*, 9 Gratt. 94.

5. EFFECT OF ESTABLISHMENT.

Title Conferred by Franchise.—The establishment of a ferry confers upon the owner no title to any portion of the soil on the other side of the stream, and no easement therein except the incidental delegation of such as has been theretofore or may thereafter be acquired by the public as a highway. *Somerville v. Wimblish*, 7 Gratt. 206.

But the establishment of a ferry in a public road entitles the grantee to the use of the road for landings and outlets, as the use of the landings and their outlets is a part of the ferry franchise. *Patrick v. Ruffners*, 2 Rob. 209, 40 Am. Dec. 740; *Mason v. Harper's Ferry Bridge Co.*, 20 W. Va. 223.

As Ground for Dissolution of Injunction.—The establishment of a ferry at a point at which a person has been enjoined from operating an illegal ferry is sufficient ground for dissolution of the injunction, where the same person is licensed to conduct the second ferry. *Hostler v. Marlowe*, 44 W. Va. 707, 30 S. E. Rep. 146.

III. PROTECTION AFFORDED FERRIES.

1. AGAINST RIVAL FERRIES AND BRIDGES.

Grant of Franchise Does Not Imply a Monopoly.—A monopoly will not be implied from the mere grant of a charter to a company to construct a work of public improvement, and to take the profits. To give such monopoly, there must be an express provision in the charter, whereby the legislature restrains itself from granting charters for rival and competing works. Hence, though a ferry has been established across a river, it is competent for the legislature to establish another ferry from the opposite side of the river, to pass along the same line used by the first; and the granting of this second charter is no invasion of the franchise of

the owner of the first ferry. *Somerville v. Wimblish*, 7 Gratt. 205; *Tuckahoe Canal Co. v. Tuckahoe, etc.*, R. Co., 11 Leigh 42; *Trent v. Cartersville Bridge Co.*, 11 Leigh 521; *Roper v. McWhorter*, 77 Va. 214; *Wheeling Bridge Co. v. Wheeling, etc.*, Bridge Co., 34 W. Va. 155, 11 S. E. Rep. 1009; *James River & K. Co. v. Thompson*, 3 Gratt. 270.

West Virginia Statutory Provisions.—Formerly Code W. Va., § 6, ch. 44, provided that the board of supervisors, and after 1872 the county court, should not establish a ferry over a watercourse within half a mile of another ferry legally established except over the Ohio river. The obvious reason for granting this exclusive privilege to the proprietor of the ferry was that it was considered promotive of the public good, it being considered that there was not sufficient travel and transportation over any stream in that state to justify the establishment of two ferries so close to each other. By Acts 1883, ch. 159, § 6, this law was repealed, but in repealing it the legislature simply declared, that it ought not to be regarded as prejudicial to the public good in every case to establish two ferries over a stream within that distance of each other. It was considered, and very properly, that instead of prohibiting the establishment of a second ferry close to another over the same stream it should be left to the discretion of the county court, subject however to the review of the circuit court, to determine, whether the general public interest would be promoted in the particular case by the establishment of two ferries so close to each other over the same stream. *Williamson v. Hays*, 25 W. Va. 609. Under this act, the county has the authority to establish a ferry within half a mile of another ferry over any of the streams within the state, and without in any manner infringing upon the franchise of such existing ferry, or rendering the proprietor of the new ferry liable for damages on account thereof. *Hostler v. Marlowe*, 44 W. Va. 707, 30 S. E. Rep. 146.

Where Ferry is Not Safe and Convenient.—In an action against a bridge company for erecting a bridge which injures the ferry property, it is proper to instruct the jury that if the landings of the ferry are not safe and convenient, and that by the expenditure of money they could be made safe and convenient, that they must find for the plaintiff such damages, as they may ascertain his franchise would sustain by reason of the erection and use of the bridge less the amount of the costs of making the landing safe and convenient. *Mason v. Harper's Ferry Bridge Co.*, 20 W. Va. 223.

Against Collateral Attack on Franchise.—The validity of a ferry franchise cannot be collaterally questioned except by parties who can show a right paramount to that granted by the public. *Patrick v. Ruffners*, 2 Rob. 209, 40 Am. Dec. 740. But the franchise itself may be taken if the public convenience requires it and just compensation is made therefor. See *James River & Kanawha Co. v. Thompson*, 3 Gratt. 270, and monographic note on "Eminent Domain" appended thereto.

Province of Jury in Actions against Rival Concerns.—In ascertaining the amount of damages sustained by the owner of a ferry by the erection and operation of a bridge, the jury are to regard the franchise as permanent, and will not take into consideration the fact that the legislature may repeal the law creating the exclusive privilege of transportation across the river within half a mile of the ferry. *Mason v. Harper's Ferry Bridge Co.*, 20 W. Va. 223.

The jury may take into consideration the reve-

nues derived from the exercise of the ferry franchise, while the proprietor was landing his boat on the land of another, rather than on his own landings, even though he was a trespasser while making such landings. *Mason v. Harper's Ferry Bridge Co.*, 20 W. Va. 223.

2. AGAINST PRIVATE FERRIES.—The owner of a public ferry cannot maintain any action against persons who use their own boats for passage or transportation of themselves, their families and property, and who do not hold themselves out to transport the general public. *Trent v. Cartersville Bridge Co.*, 11 Leigh 521.

3. AGAINST EXCESSIVE TAXES.—A town incorporated under ch. 47, Code W. Va. cannot assess and collect wharfage from the proprietor of the ferry for the use of a ferry landing within its corporate limits; nor can it tax the ferries except as property and at the rate it may tax other property within its corporate limits. *Christie v. Malden*, 23 W. Va. 667.

IV. TRANSFER OF FRANCHISE.

Does Not Render It Irrepealable.—Where the ferry franchise has been conferred upon the corporation by the legislature, the sale of this franchise to another corporation does not render the franchise irrepealable, or deprive the legislature of its power to grant a rival franchise should it be deemed to the public interest so to do. *Wheeling Bridge Co. v. Wheeling, etc.*, Bridge Co., 34 W. Va. 155, 11 S. E. Rep. 1009, *affirmed* in 138 U. S. 287.

Unauthorized Lease of Ferries.—In *Roper v. McWhorter*, 77 Va. 214, a lease, by the board of supervisors of Norfolk county and the city council of the city of Portsmouth, of the ferries in Norfolk county, was held void for the reason that the lease was unauthorized under the laws of this state.

V. PARTNERSHIP IN FRANCHISE.

While there may be a partnership in a ferry, yet as a ferry is not ordinarily the subject of partnership and trade, the terms of the contract by which it is made so, should be more clear than in cases in which the subject is one of ordinary trade and partnership. Thus in a case in which the owner of a public ferry leased it for two years, in consideration of \$1,000 cash, and upon an agreement between the parties that if the net profits of the ferry did not yield the lessee \$2,000 within the two years, he should hold over the term until the profits yielded the \$2,000, and if the profits gave more than the \$2,000 in the two years, the surplus should be equally divided between them, it was held that this contract did not constitute a partnership so as to render the lessor liable for losses occasioned by negligence in operating the ferry during the term of the tenancy. *Bowyer v. Anderson*, 2 Leigh 551.

VI. DISCONTINUANCE OF FERRIES.

Discontinuance a Penalty Imposed by Law.—The discontinuance of a ferry is a penalty which the law attaches to the failure of the ferry keeper to exercise his privilege of keeping up his ferry; it is not an offence, much less an indictable offence. *Carter v. Com.*, 2 Va. Cas. 354; *Trent v. Cartersville Bridge Co.*, 11 Leigh 521.

Jurisdiction to Discontinue.—Under § 1380, Va. Code 1887, conferring on the court of the county "from" which any ferry is established the right to discontinue such ferry for failure to comply with the law, the county court of either of two counties between which a ferry is operated has jurisdiction to discontinue the ferry on a proper showing, sub-

ject to the concurrence of the other court. *Sargeant v. Irving*, 2 Va. Dec. 888.

Discontinuance for Nonuser.—Under §§ 28-4, ch. 287, Rev. Code 1819, where a public ferry has been disused for more than three years, though the franchise of the ferry owner has not been declared forfeited by *quo warranto* or other like proceedings, he is not entitled to the aid of a court of equity, to prevent others from invading the franchise, which he has thus abandoned. And, in such case, it seems that he cannot maintain an action at law to vindicate his franchise. *Trent v. Cartersville Bridge Co.*, 11 Leigh 521.

VII. PLEADING AND PRACTICE.

1. ACTIONS FOR DISTURBING FERRIES.

Against Parties Obstructing River.—An action for disturbing a ferry may be maintained by the owner against persons who, by obstructions in the river, cause injuries mediate or immediate to the landings, thereby diminishing the profits of the ferry, and subjecting the owner to increased labor and expense in the use of his franchise. *Patrick v. Ruffners*, 2 Rob. 209, 40 Am. Dec. 740.

Declaration or Complaint.—In an action for the disturbance of a ferry, by injuring the landings and their outlets, the complaint need not set forth the means by which the ferry was legally established, or the derivation of the plaintiff's title thereto. Nor is it necessary to allege expressly that the plaintiff was possessed of the landings and outlets, or that he was owner of the soil; for if the complaint shows that they were used as appurtenances to the ferry this is sufficient. *Patrick v. Ruffners*, 2 Rob. 209, 40 Am. Dec. 740.

2. APPELLATE PRACTICE.—Where an application is made for the establishment of a ferry across a stream, over which a ferry has already been established, the owner may resist the establishment of the new ferry; and if, upon hearing the evidence, the court to which the application is presented refuses to establish a new ferry and the applicant thereupon obtains a writ of error to the circuit court, after moving to set aside the judgment as contrary to the law and evidence, and excepting to the action of the court in overruling said motion, the circuit court cannot properly act upon and determine the writ of error, unless the bill of exceptions certifies all of the evidence offered, or all of the facts proved before the county court, or unless all of the facts appear either expressly or by necessary implication in the bill of exceptions. *Williamson v. Hays*, 35 W. Va. 52, 12 S. E. Rep. 1092. See also, *Williamson v. Hays*, 35 W. Va. 609. See also, *Mairs v. Gallahue*, 9 Gratt. 94.

229 *Smith and Others v. The Governor.

July, 1848, Lewisburg.

(Absent CABELL, P., and BROOKE, J.)

Pleading—Action on Constable's Bond*—Effect of Constable's Receipt as Evidence—Case at Bar.—In an

*Official Bond of Constable—Action on.—See monographic note on "Official Bonds" appended to *Sangster v. Com.*, 17 Gratt. 124.

†Constables—Effect of Receipt as Evidence.—See the principal case cited in foot-note to *McNeale v. Governor*, 8 Gratt. 209.

action against a constable and the sureties in his official bond, for failing to pay over debts entrusted to the constable and received by him from the debtors, the receipt of the constable for the debts, signed in his official character, is, according to the true construction of the act passed March 8, 1826, concerning constables and their sureties, prima facie evidence, as well against the sureties as against the constable, of the receipt of the money; provided six months have elapsed between the date of the receipt and the commencement of the action. Per ALLEN and BALDWIN, J. But the fact that the receipt of the constable was signed in his official character, must appear in some way on the face of the paper itself; if it do not, the party claiming under the receipt cannot obtain the benefit of the act by oral testimony of the character in which the receipt was signed. Per totam curiam.

This was an action of debt in the circuit court of Kanawha, in the name of the governor of the commonwealth, at the relation of the party claiming to be injured, against Henry E. Smith, and the sureties in the bond given by him the 12th of February 1838, for discharging the duties of constable in a particular district of Kanawha, for two years from that date. At the trial of the issue on the plea of conditions performed, the plaintiff, to sustain the issue on his part, gave in evidence the said bond, and two receipts; one of which commenced, "Received August 13, 1838, of R. Aug. Thompson, the following notes for collection," and, after the names of the debtors, with the dates and amounts of the notes, was signed "H. E. Smith;" and the other of which, after the names of other debtors, with the dates and amounts, was as follows: "Rec'd November 12, 1838, the above notes in 230 *addition for collection. H. E. Smith."

The plaintiff proved the signatures to the said receipts to be in the proper handwriting of the defendant Smith, and to have been subscribed by him in the presence of the witnesses; and also proved by oral evidence, that the claims or evidences of debts set out in the receipts were placed in the hands of the defendant Smith as constable, to be warranted on and collected by him as such constable, and were by him so received. On the part of the defendants it was contended, that as the official character of the defendant Smith was not appended to his signature and did not form a part thereof, the receipts aforesaid were not within the statute of the 8th of March 1826,* declaring constables' receipts signed in their official character to be prima facie evidence of the collection of the claims after six months, and that it was not competent to prove by oral evidence that the receipts were executed by him in his character of constable. Whereupon, on the motion of the plaintiff, the court instructed the jury that the receipts were admissible evidence, although the word "constable" was not added to the name of the defendant Smith; that, to entitle the plaintiff to the benefit of the receipts as prima

*Sess. Acts of 1825-6, ch. 19, p. 21; Suppl. to R. C. ch. 141, p. 201.—Note in Original Edition.

facie evidence under the said act, the jury must be satisfied that they were signed by Smith in his official capacity; but that it was competent to deduce the character in which the defendant Smith signed the receipts, from the purport of the receipts and the intrinsic evidence of the transaction, taken together with the whole testimony. To this opinion and instruction of the court, as well as to the admission of the receipts aforesaid in evidence, the defendants excepted. A verdict was found for the plaintiff, and judgment rendered thereupon. And to that judgment a supersedeas was awarded.

231 *The cause was submitted without argument, by B. H. Smith for the plaintiffs in error, and by Summers for the defendant in error.

ALLEN, J. The first clause of the act concerning constables and their securities, passed March the 8th 1826, provides, that "if any constable shall receive from any debtor the amount of any debt or claim, which may have been entrusted to or placed under the control of such constable to warrant for, and which might have been recovered by warrant, every such constable and his securities shall be liable to the creditor or plaintiff for the amount so collected, in the same manner as he or they would be for money collected by him under execution." This clause ascertains the liability of the officer and his sureties. They are made responsible for money collected on claims placed in the hands of the constable to collect in that character, whether the money was received under execution or not. The law is silent as to the evidence whereby the facts are to be proved, upon which the liability of the officer and his sureties depends. They may be proved as well by oral as written evidence. If a claim of the kind designated is placed in the officer's hands to collect as officer, though no receipt be taken, and he actually receives the money, the officer and his sureties are responsible.

But constables are frequently entrusted with the collection of many small claims; and the creditor would be subjected to much inconvenience, if required in every case to produce the evidence of the payment of each claim to the officer. To obviate this difficulty, the next clause of the act provided, that "in any proceeding against a constable for failing to pay money thus received, his receipt for the debt or claim, signed in his official character, shall be admitted by the court as prima facie evidence of the receipt of the money; provided six months shall have elapsed between its date and the commencement of the proceeding."

232 *The suit in this case is against the constable and his sureties. This last clause of the act speaks of a proceeding against the constable alone; and a question might arise whether the receipt described should have the effect of prima facie evidence against the sureties. The first clause makes both principal and sureties liable for money received by the

principal. In whatever mode that fact is established, the sureties are responsible. The second clause was merely intended to furnish a convenient mode of proving the fact. As the constable and his sureties may be joined in the suit, it could not have been the intention of the legislature, that proof which, uncontradicted, would be conclusive against the constable to establish the receipt of the money, should not be evidence against the sureties, whose liability is a mere consequence of the establishment of that fact as against their principal. The proceeding, too, is for money thus collected; referring to the previous clause which made the sureties liable; and thereby shewing that a proceeding to recover from them, as well as the constable, money for which they had been so rendered responsible, was the proceeding contemplated.

But both clauses of the act keep in view the official character of the constable; with the object, no doubt, of protecting the sureties from liability for claims collected by the constable, not officially, but as the mere agent of his employer. The claims must be placed in his hands as constable, to be collected in that character by warrant, and must be such as could be recovered by warrant. And the receipt, if one is taken, to acquire the dignity of prima facie evidence of the receipt of the money, must be signed by him in his official character. Though not so signed, it would be admissible evidence to shew the delivery of the claims, but would not of itself be prima facie evidence of the character in which the claims were received, or of the collection of the money by the constable after six months. The creditor would be compelled to adduce other evidence of these facts. To guard the sureties against fraud or collusion, the receipt should shew on its face that it was executed at the time by the constable in his official character; and therefore, to entitle it to be received as prima facie evidence of the receipt of the money, the law requires it to be signed by the officer in his official character.

In the case under consideration, there is nothing on the face of the receipts to shew that they were signed by the constable in that character. The plaintiff proved by witnesses, that the claims were placed in the hands of the constable to warrant for, and were received by him in the character of constable. Upon this evidence, the court properly instructed the jury that the receipts were admissible, and that, to entitle the plaintiff to the benefit of them as prima facie evidence under the act aforesaid, the jury must be satisfied that they were signed by the constable in his official character. The court however added, that it was competent to deduce the character in which he signed the receipts, from the purport of the receipts and the intrinsic evidence of the transaction, taken together with the whole testimony. The receipts, on their face, purport merely to be receipts from one man to another for certain debts to be collected. They do not purport to be executed by the party as constable.

The fact that he was constable being proved by other evidence, we may conjecture that he received these claims in that character. But in the absence of such proof of his official character, the receipts themselves furnish no intrinsic evidence of the character in which they were signed. The instruction therefore, though somewhat obscure, can mean only that the character in which he signed need not appear on the face of the receipts, but may be established by proof aliunde.

234 This would be substituting *the recollection of witnesses for the official signing required by the statute. In this, I think, the court erred. The character in which the receipts were signed should appear in some way on the face of the paper itself, and the defect could not be supplied by oral testimony, so as to make the receipts *prima facie* evidence under the law.

I think the judgment should be reversed, the verdict set aside, and the cause remanded for a new trial of the issue, upon which such instruction is not to be repeated.

BALDWIN, J., concurred.

STANARD, J., said, he deemed it unnecessary to express an opinion upon the question whether the receipts of the constable for the debts, signed in his official character, is, under the act of March 8, 1826, *prima facie* evidence as well against the sureties as against the constable, of the receipt of the money. He concurred in the judgment of this court.

Judgment of circuit court reversed with costs, verdict set aside, and cause remanded for a new trial, on which the instruction given at the former trial is not to be repeated.

235 *Pauley v. Chapman.

August, 1848, Lewisburg.

(Absent CABELL, P. and BROOKE, J.)

Forcible Entry—Force Necessary. *—Case in which, on a complaint by a party under the statute in 1 R. C. of 1819, ch. 115, p. 455, that another had forcibly turned him out of possession of a tenement, the jury returned a special verdict finding the facts, and upon those facts the court considered that the entry was not "with strong hand or with multitude of people," and rendered judgment that the complaint be dismissed.

On the 4th of May 1839, Edward Chapman exhibited a complaint before a justice of the peace of the county of Logan, against Henry Pauley, for forcibly turning him out of possession of a tenement in that county. The complaint was made, and a warrant issued by the justice, in the form prescribed by the act in 1 R. C. of 1819, ch. 115, § 4, 5, 6, p. 455, 6. Two justices of the county attended at the courthouse on the day specified in the warrant, and constituted a court for the trial of the complaint. The case was, however, adjourned until

the 21st of August 1839, when a jury was impanelled, and after being duly charged, returned a special verdict, which found, That on the 20th of November 1837, the plaintiff received a deed of that date, executed by John Joseph Beanoist, by John Laidley as his attorney in fact, to the said plaintiff, embracing the land in controversy; which deed was acknowledged by the said attorney in the office of Logan county court on the 21st of November 1837, and admitted to record. That the said plaintiff had three improvements on the lands embraced in the said deed, at the time the defendant entered as hereinafter mentioned. That in January 1838, the

236 defendant, with two hired hands, *entered upon part of the land embraced in the said deed, about a mile and three quarters from one of the said improvements of the plaintiff, and about three quarters of a mile from the nearest improvement. That the land on which the defendant entered was in native forest, and totally unimproved; and at the time of the entry of said defendant, no person was upon any portion of the land embraced in said deed, except the tenant of the plaintiff, with his family; which tenant occupied the improvement most remote from the place of entry of the defendant, and had occupied it for two years or more previous thereto. That the defendant and his hands cut down timber growing upon the land in controversy, at the place where he the defendant entered as aforesaid; built thereon a small cabin and covered the same with clapboards, put a floor in the house, and a door, fastened up said door, and then left the premises, which have continued uninhabited by the defendant or any other person. That while the defendant was building the house aforesaid, neither the plaintiff nor any other person was present, except the hands aforesaid; and that no other violence or force was committed by the defendant, than the cutting the timber, building the house, and fastening up the door aforesaid. That about a month before the entry aforesaid by the defendant, the said defendant went to the residence of the plaintiff, some three or four miles from the land in controversy, and proposed to purchase a portion of the land comprised in said deed, which lay below the land in controversy. That the plaintiff refused to sell the land which the defendant wished to purchase, but proposed selling him land lying above that he wished to purchase: when the defendant and plaintiff started to see the same.

If upon these facts the law should be for the plaintiff, then the jury found a verdict in the form prescribed for a verdict for the plaintiff on a complaint of forcible 237 entry; and if the law should be for the defendant, then the jury found a verdict in the form prescribed for a verdict for the defendant on such complaint.

The county court, being of opinion that the law was for the defendant, rendered judgment against the plaintiff, and that the defendant recover of him his costs.

*See monographic note on "Unlawful Detainer" appended to *Dobson v. Culpepper*, 28 Gratt. 352.

The circuit court awarded a supersedeas, on the petition of the plaintiff Chapman; and on the 11th of May 1840, reversed the judgment of the county court with costs, and entered judgment that the plaintiff recover against the defendant his possession of the said tenement, and also his costs in the county court.

To the judgment of the circuit court, a supersedeas was awarded on the petition of the defendant Pauley.

B. H. Smith for the plaintiff in error. This complaint is founded upon that part of the statute which forbids an entry "with strong hand or with multitude of people," and gives a remedy to the party turned out of possession "by such forcible entry;" 1 R. C. of 1819, ch. 115, § 2, p. 455. To sustain a complaint for forcible entry, the force must be actual, not constructive; otherwise the remedy given for an unlawful entry would be unnecessary. In every case of unlawful entry, force is implied. But there is an obvious distinction made by the statute between cases of actual and cases of constructive violence. In the latter, the defendant may shew a right of entry at the trial; but in cases of forcible entry, he is precluded from so doing. If a complaint for forcible entry can be sustained in a case in which there has been no actual force, the defendant ought to be permitted to shew a right of entry as a justification: otherwise, in all cases of peaceable entry, the plaintiffs will proceed as for a forcible entry, and thus preclude the defendants from shewing a right of entry; contrary to the intention of the statute. *Rex v. Bathurst, Sayer 225, Rex v. Storr, 3 Burr. 1698,* 238 and **The King v. Wilson & others, 8 T. R. 357,* are authorities pertinent to the present case. See also 1 Hawkins 500, 501, 2.

The attorney general for defendant in error. Here the plaintiff was in actual possession of the land, he having three improvements on it, one of which at least was in possession of his tenant. The defendant entered in violation of the plaintiff's rights and without colour of title. This entry and ouster of the actual possession of the land, with the intention to hold the same against the will of the plaintiff, was a forcible entry, although without actual force at the time of the entry. *Coke Litt. 257 a, 257 b, 3 Tho. Co. Lit. 80, 81, 545.* The entry was also forcible, because with multitude of people. The expression in the act is "with strong hand or with multitude of people;" either constitutes a forcible entry. Three persons are sufficient to constitute a riot at common law, and the same number is sufficient to constitute a multitude under this act. The force need not be applied to persons; it is sufficient if applied to property. 3 Bac. Abr. p. 716 of Lond. ed. of 1832, *Forcible Entry, B.* A forcible entry into a house in the absence of all persons, is a forcible entry under the statute, 2 Rolle 2. And a disseisin accompanied with robbery of goods is a forcible

entry. 2 Inst. 235. See also 1 Hawkins (edi. by Curwood) p. 510 et seq. Hawkins takes a distinction between acts of violence and circumstances of terror. Acts of violence to property, though unaccompanied with terror to the person, make the entry forcible. *Rex v. Jopson &c., Sayer 27, 1 Wils. 325.* In the present case, the acts of cutting timber and building a house were acts of violence and force. The cases of *Rex v. Bathurst, Sayer 225, Rex v. Storr, 3 Burr. 1698,* and *The King v. Wilson & others, 8 T. R. 357,* being prosecutions on behalf of the crown, it was necessary 239 that *there should be an offence against the public, as well as against the private right of the person injured. But our statute gives only a civil remedy. A breach of the public peace is not an ingredient in a case under it; and a less degree of force therefore seems to be sufficient. Where the dispossession is such, that there may be implied from the act a determination to effect it by force if necessary, or to resist by force a restoration of the possession, it should be held, under our statute, that there is a forcible entry.

Smith in reply. The authorities before cited establish these propositions: 1. That an entry without actual violence is not an entry with strong hand or multitude of people, where threats or weapons or numbers are not resorted to, to overawe the tenant in possession, and drive him from the premises. 2. That independently of the statute, where an entry was made with force, and the tenant forcibly turned out of an actual possession, an indictment lay at common law. 3. That where trespass was committed on the premises of another, but without actual force against the person of the possessor, and damage was done to the freehold by digging it up or cutting trees, or other injuries of like kind, an indictment would not lie at common law. It matters not whether, in the cases cited, the prosecutions were at common law or under the statute: whether the one or the other, they shew what is an entry with strong hand or multitude of people, and that such entry is not sustained by constructive force, but by actual violence, or by threats, weapons, putting in fear, or overawing by numbers. It is not enough that there be injury to personal property, or destruction of the soil, or the trees growing on it. The threats, violence and overawing must be to the party removed from the possession. Our legislature well knew that an indictment did not lie at common law 240 for unlawfully entering *on the land of another, and cutting and even carrying away timber, when they passed the act of the 14th of February 1823 for the punishment of such and other trespasses, and made them misdemeanours. *Sess. Acts of 1822-3, ch. 34, p. 36; Supp. to Rev. Code, p. 280.*

Here, Chapman had at most but a constructive possession of all beyond his enclosures. To say that he has been violently turned out of such a possession, at a time

when he and his tenants, and all claiming connexion with him by title or kindred, were miles distant and wholly ignorant of the entry, is a strange idea.

PER CURIAM. The judgment of the circuit court is reversed with costs, and that of the county court affirmed.

241 *Pitzer v. Williams.

August, 1843, Lewisburg.

(Absent CABELL, P. and BROOKE, J.)

Mills—Ad Quod Damnum—Application for—Ownership of Applicant—Notice—To Whom Given—Proprietor.—A person owning real estate died intestate, leaving a widow and children; and dower not being assigned to the widow, she continued in the mansion house and the plantation thereto belonging. Under the act in 2 R. C. of 1819, ch. 285, § 1, p. 225, notice was given to the widow as the proprietor of the land, by a person desiring to build a machine useful to the public, and to abut his dam against the said land, that application would be made for a writ of ad quod damnum: and the writ was accordingly awarded, and an inquisition returned. After which, one of the heirs, who resided on the plantation with his mother, being made a defendant on his motion, moved the court to dismiss the case, upon the ground that notice of the application ought to have been given to him as one of the proprietors; but his motion was overruled. He then offered to introduce evidence to prove that the applicant did not own the land on which he proposed to erect his machine: but it being proved that the applicant was in possession of the land, claiming title to it, and had built a house thereon, the court refused to permit the

***Condemnation Proceedings—Notice—Construction of Statute.**—The "tenant of the freehold" to whom notice must be given in beginning proceedings under the statute for the condemnation of lands for public purposes, means the "tenant in possession appearing as the visible owner." For this proposition the principal case is cited and approved in Board of Supervisors v. Gorrell, 20 Gratt. 511; Hope v. N. & W. R. Co., 79 Va. 288; Keystone Bridge Co. v. Summers, 13 W. Va. 488. The principal case is also cited in this connection in Carpenter v. Garrett, 75 Va. 134. The principal case is cited in Bridge Co. v. Comstock, 36 W. Va. 275, 15 S. E. Rep. 73. See Coleman v. Moody, 4 H. & M. 1. See monographic note on "Eminent Domain" appended to James River & Kan. Co. v. Thompson & Teays, 8 Gratt. 270, and monographic note on "Mills and Milldams" appended to Calhoun v. Palmer, 8 Gratt. 88.

Same—Same—Proprietor.—It was held in *Pitzer v. Williams*, 2 Rob. 241, that a widow to whom dower had not been assigned, and who continued in the possession of the mansion house and plantation thereto belonging, must be considered as proprietor of the land in the meaning of the statute respecting writs of ad quod damnum; and a motion by the heir, who resided on the land with his mother, to dismiss the proceedings because notice was not served on him as one of the proprietors of the land, was overruled.

Same—Statutory Requirement That Fee Shall Be Taken.—The principal case is cited in Roanoke City v. Berkowitz, 80 Va. 622.

evidence so offered to be introduced. **Held**, there is no error in these proceedings. For it was sufficient that the person making the application was in the actual possession and occupation of the land on which the machine was to be built; and that the person to whom the notice was given was the tenant in possession and appeared as the visible owner.

At a court held for Alleghany county on the 21st of October 1839, Elisha B. Williams produced a notice in these words: "Mrs. Jane Pitzer. Being the owner of a lot of land on one side of Jackson's river, the bed whereof belongs to the commonwealth, and being desirous to erect a carding machine upon the said lot, and to erect a dam across the said stream for working the same, and to abut such dam against 242 your lands upon *the opposite side of said stream, you will please take notice, that on the 21st day of October 1839, I shall make application to the county court of Alleghany, then to be holden at the courthouse thereof, for a writ of ad quod damnum, to ascertain what damages you will sustain by reason of the premises, and such other matters as are directed by the act of assembly in such case made and provided; and shall thereupon move such proceedings as the law directs, in order to obtain the leave of said court to erect such machine and to build said dam. Yours &c. Elisha B. Williams. September 29, 1839."

It was proved that a copy of this notice was delivered to the said Jane Pitzer on the 8th of October 1839: whereupon the case was docketed and continued.

On the 21st of January 1840, the defendant moved to quash the notice for error apparent on the face thereof; which motion was overruled; and leave was then given the plaintiff to file his petition, which he accordingly filed in these words:

"To the worshipful the county court of Alleghany. The petition of Elisha B. Williams respectfully represents, that your petitioner is the owner of a lot of land lying on Jackson's river at the town of Covington in said county, on which he has erected a carding machine, which has heretofore been in operation to some extent, and has proved greatly beneficial to the public. Your petitioner finds it necessary, in order to the successful operation of said machine, to erect a dam across the river, and to abut the same against the lands of Mrs. Jane Pitzer, opposite to his aforesaid lot. He believes that a dam one foot high would be sufficient to answer his purpose, and that such a dam could do no material damage, either to the lands of Mrs. Pitzer, or to any of the proprietors of the lands above or below, and that it could not prove a public annoyance in any way. Your petitioner has obtained the consent of the

243 *president and directors of the James river and Kanawha company according to law, and prays that your worships will award him a writ of ad quod damnum, and that such other proceedings may be had in the premises as the law requires, to

authorize him to erect a dam of the foregoing description.

Elisha B. Williams."

A writ of ad quod damnum was accordingly awarded and issued, and an inquest returned, which set forth that the freeholders viewed the lands proposed for an abutment, and located and circumscribed by metes and bounds one acre thereof, and appraised the same at one dollar; and that they examined the lands above and below, both of the said Jane Pitzer and others, and believed the erection of said dam to the height of one foot, where it was proposed to be erected, would do the proprietors of such lands no damage, by overflowing or in any other manner. They also responded to the other enquiries directed by the statute, in the following terms: "The mansion house of no proprietor, nor the offices, curtilage, gardens nor orchards will be overflowed; the fish of passage will not be obstructed; ordinary navigation will be somewhat obstructed, which may be prevented by leaving an opening of eight feet in said dam, which may be closed by a plank or piece of timber, only at such times as it may be needed for navigation; and we are of the opinion that the health of the neighbours will not be annoyed by the stagnation of the water."

A summons was awarded against Jane Pitzer, to appear and shew cause why leave should not be given to build the dam; which summons was returned executed.

In this state of the cause, it was removed by certiorari to the circuit superior court.

On the 23d of April 1841, Robert Pitzer applied to be made a defendant in the 244 cause; and it appearing to *the court that he was one of the heirs of Bernard Pitzer deceased, and was living with the defendant on the land upon which the plaintiff proposed to abut the dam, he was admitted a defendant; but the order provided that the trial of the cause was not to be delayed thereby.

On the 24th of the same month, the court, on consideration of the inquisition and the evidence adduced, and all the circumstances, ordered that the said Elisha B. Williams have leave to build the said dam, leaving such a sluice as was mentioned in the inquest of the jury, and providing for the passage of fish; and that he become seized in fee of the acre of land mentioned in the inquisition, upon his paying the valuation thereof and the damages found by the jury, to the several parties entitled thereto.

Several bills of exceptions were filed. The first set forth, that before the trial of the cause, the defendant Robert Pitzer proved by testimony, that Bernard Pitzer, the father of the said Robert, was in his lifetime seized of the said land, and that he the said Bernard Pitzer died intestate, leaving a widow, Jane Pitzer, and the said Robert and others his children and heirs: that the widow Jane Pitzer, defendant in this proceeding, continued to occupy the mansion house and plantation belonging

thereto, of which the acre of land condemned in this case is a part, from the death of her husband until the commencement of this proceeding, and still continues to do so: that the said Robert Pitzer, during his minority and after he arrived at the age of 21 years, up to the institution of this application, resided at the same place with his said mother Jane Pitzer, and is still living there by her permission and consent: and that the said Jane Pitzer had never had dower assigned her in the lands of which her husband died seized. Upon these facts, the defendant Robert Pitzer contended

245 that he was one of the proprietors of the land aforesaid, *and that he ought to have had notice of the application, and also of the other proceedings in the case; and he moved the court to dismiss the case, because he was not made a party at the proper time, and had not had notice of the application. But the court, being of opinion that the said Jane Pitzer, the widow of the said Bernard Pitzer, not having had dower assigned her, was entitled to the possession of the said mansion house plantation, and was the tenant of the said land until such dower was so assigned, (she having actually held it since the death of her husband, and the said Robert only living on it by her consent and approbation) refused to dismiss the case for the cause aforesaid.

A second bill of exceptions stated, that on the trial of the cause, the defendant offered to introduce verbal evidence tending to prove that the lot of ground upon which the plaintiff has erected his carding machine had been dedicated by dr. James Merry to the public. But it being proved that the plaintiff had possession of the said lot of land, and had built a house thereon, the court refused to hear the said evidence.

A third bill of exceptions stated, that the defendant offered a record of a chancery suit decided in the circuit court of Alleghany on the 22d of September 1835, in the name of Hugh Lynch and others against Robert Skeen and others,* as evidence tending to prove that dr. James Merry had dedicated the strip of land upon which the plaintiff has erected the said carding machine house, to the public, as an easement, common way, &c. But it being proved that the plaintiff Williams is in possession of said land, claiming title, and has built a house thereon, the court refused to permit the said record to be introduced.

246 *Other bills of exceptions set forth, that the plaintiff gave in evidence an act of the general assembly of Virginia passed on the 30th day of March 1837, entitled "an act to authorize Elisha B. Williams to erect a wool-carding machine on Jackson's river near the town of Covington in the county of Alleghany," (Sess. Acts of 1836-7, p. 250, ch. 302,) and also offered an extract from the record of the proceedings

*Note by the reporter. The suit here mentioned is the same, no doubt, that is reported under the name of Skeen &c. v. Lynch &c. in Rob. 186.

of the James river and Kanawha company, in the words following to wit: "At a stated monthly meeting of the president and directors of the James river and Kanawha company, held in the city of Richmond on Saturday the 13th of April 1839: Resolved that the consent of the company be granted to Elisha B. Williams to erect a dam across Jackson's river at the town of Covington, of the dimensions and on the conditions stated in the application of William G. Holloway under date of the 9th of April 1839; provided said dam shall not be over one foot in height, and shall in no wise impair the navigation of the river; and provided also that no right or privilege granted by or claimed under this resolution shall continue after the company shall have commenced the construction of the improvement at Covington. Extract from the records. W. B. Chitenden secretary." The defendants objected to the introduction of this extract, upon the ground, first, that it is not legal evidence; and secondly, because the letter of William G. Holloway therein referred to was not produced, to shew upon what conditions the consent of the James river and Kanawha company to the erection of a dam across Jackson's river was given. But the court overruled the objection, and permitted the said extract to be read.

The other facts proved were also stated in the last bill of exceptions; but it is unnecessary to set them forth.

On the petition of Robert Pitzer, a super-seedeas was awarded.

247 *Eskridge for plaintiff in error.

The fee simple owner of the land sought to be condemned ought to have had notice of the application. The first section of the act directs notice to be given to the proprietor. 2 R. C. 225, ch. 235. That the term proprietor, as here used by the legislature, is synonymous with owner, is evident from the 4th section, which provides for the case of an application to abut a dam upon a rock or island, and directs that the owner of such rock or island shall have like notice of the application for such writ, and of the execution thereof, as is required to be given to the owner of land on the opposite side of a stream. *Id.* p. 226. The owner or proprietor of land is he who has the absolute dominion and property in the land. Neither of these terms is ever used to convey the same meaning as tenant in possession. Again, the 6th section declares, that if the party applying obtain leave to build the said mill, machine or engine, and erect the said dam, he shall, upon paying to the several parties entitled the value of the acre located and the damages, become seized in fee simple of the said acre of land. The proceeding then is one by which the applicant seeks to acquire, and by the judgment of the court does acquire, the fee simple property in the acre of land condemned; and being of this character, the legislature must have designed that the fee simple owner of the acre should have notice of the proceeding. The court is bound so to construe the law as not to encroach upon

any of the established rights of the citizen. It would be against common right and the principles of magna charta, to take away the property of the fee simple owner without giving him notice to appear and defend. Were the legislature to pass a law authorizing the property of one man to be taken from him and given to another, without compensation, and without notice to him of the proceeding, the court would be bound not to carry it into effect. The 248 supreme court of South Carolina, in the case of Bowman and others v. Middleton, 1 Bay 252, set aside, as against common right and the principles of magna charta, an act of assembly which took away the freehold of one man and vested it in another, without any compensation, or previous attempt to determine the right.

If, according to a just and reasonable construction of the act, notice of the application is to be given to the fee simple owner of the land, the court ought to have dismissed the case for the failure to give such notice. For the proceedings ought to conform strictly to the act of assembly. All laws which interfere with private rights, and authorize proceedings unknown to the common law, ought to be strictly complied with. The necessity of notice has been adjudged by this court in the case of Bernard v. Brewer, 2 Wash. 76.

The other points presented by the bills of exceptions, he submitted without comment.

Hudson and Peyton for the defendant in error. Under the first part of the first section, authorizing a person owning lands on a watercourse to apply for leave to build a mill, it has been adjudged to be sufficient that a party is in possession as visible owner. *Wood v. Boughan*, 1 Call 329. In a summary proceeding of this kind, the court cannot go into the question of title, or make any enquiry as to any future or expectant interests which persons may have in the land. The law, therefore, only requires that notice should be given to one in possession. Notice even to an agent is in some cases sufficient, by the express provision of the act. A fortiori, notice to a tenant in possession, who is himself interested, will suffice. A notice to such particular tenant will in general be notice to the remainderman. If the remainderman wishes to be formally made a party to the case, the court will give him leave to appear for that purpose, at any stage of the proceedings. See *Wingfield v. Crenshaw, 3 Hen. & Munf. 256. On the other hand, if he should not appear and make himself a party, his rights will not be affected by the proceeding. This is manifest from the 9th section of the act; 2 R. C. p. 228.

Here the appellant, upon his motion to dismiss the case, has introduced evidence of his title, in opposition to the inquest of the jury which found the title to the land to be in Mrs. Jane Pitzer. Upon questions of this kind, the court can only look to the inquisition. *Anthony &c. v. Lawhorne*, 1

Leigh 1. If the appellant, after making himself a party, could have maintained any motion upon the evidence which he introduced, it could only have been a motion that the inquisition should be quashed and a new writ awarded; not a motion to dismiss the case.

But all objections to the proceedings were cured when the appellant went to trial upon the merits. *Bernard v. Brewer*, 2 Wash. 76; *Coleman v. Moody*. 4 Hen. & Munf. 1.

II. The case of *Wood v. Boughan*, 1 Call 329, is an authority against the point made by the second bill of exceptions.

III. Extracts from the books of a public corporation (such as the James river and Kanawha company) the records of which cannot be conveniently removed, are evidence, without requiring the presence of the officer who made the entry; at least where the statements are adverse to the interests of the company. *Hodgson v. Fullarton*, 4 Taunt. 787; *Auriol v. Smith*, 18 Ves. 198; *Esq. on Ev.* 665. But another answer to the objection taken in the fourth bill of exceptions is, that the obtaining the consent of the James river and Kanawha company was altogether a work of supererogation.

Esckridge in reply. The defendant Jane Pitzer, to whom notice was given, 250 was merely the tenant of the *land at the will of the fee simple owners, having no fixed or permanent interest in the same. If deprived of the possession of the acre in question, the heir, in assigning her dower, would compensate her by giving her lands of equal value. She was not, therefore, the proper person to contest the application. But if it be considered that she was a proper person to have notice, still the heirs of *Bernard Pitzer* the fee simple owner, having a greater and more direct interest in the contest, ought also to have had notice.

The counsel for the appellee are wrong in supposing that the 9th section of the act would preserve to the appellant his private action, unaffected by the inquest and the proceedings had in the case. The jury are required to ascertain the true value of the acre of land; that is, its actual value to the fee simple owner, or its actual value as a fee simple. And in ascertaining its value, they necessarily ascertain the injury which will result to the fee simple owner of the land. They therefore estimate that injury; and the rights of the fee simple owner are consequently not protected by the 9th section.

The cases relied upon on the other side, to shew that all objections to the proceedings were waived when the appellant went to trial upon the merits, do not apply; because here the objection was taken in due time, and the appellant did not go to trial upon the merits until after the objection had been overruled. There is no ground for saying it was ever waived or abandoned by him.

ALLEN, J. It is contended that though the notice to *mrs. Pitzer* might have been

insufficient, yet as *Robert Pitzer* has appeared and contested the application on the merits, the objection taken by him to the insufficiency of the notice cannot avail him. The case cited in support of this proposition does not sustain it. In

251 **Bernard v. Brewer*, 2 Wash. 76, the court decided that notice to the proprietor should appear in the record, and reversed the judgment for that cause. The judges in delivering their opinions say, that if they could be satisfied from the record that the party appeared and contested the motion on the merits of the case, he could not afterwards avail himself of the want of notice in the first instance, to defeat the order; because a defence made on the merits would have amounted to a waiver of the objection. The reason assigned shews that the objection here would have been well taken, if no sufficient notice had been given. The objection was made at the first appearance of the party, and it was not until it had been overruled, that he contested the case on the merits. He cannot be said to have waived an objection which he made at the earliest opportunity, by contesting the case on the merits after the court had overruled the objection. This brings us to the main question, was the notice sufficient? *Mrs. Pitzer* was the tenant in possession of the plantation, of which the acre sought to be condemned was a part, and had continued in possession from the death of her husband. She was a tenant of the whole under the law, though her tenancy could have been terminated at any time by the assignment of dower. The law requires ten days previous notice to be given to the proprietor of the land, if he be found in the county, and if not, then to his agent therein, if any he hath. The term proprietor, as used here to designate the party to be notified, as well as the term owner, where the law speaks of the applicant, are somewhat indefinite as to the precise extent of the interest held in the land. In regard to the latter phrase, though the question was not expressly decided, the court in the case of *Wood v. Boughan*, 1 Call 329, strongly intimate, that the act does not authorize a contest in this summary proceeding about the title of the

252 parties, and *that the words "owning lands on one or both sides" are satisfied by the petitioner's being in possession as visible owner. In *Coleman v. Moody*, 4 Hen. & Munf. 1, the inquisition having found that lands of *Thomas Rowlett* deceased would be overflowed, a summons issued to *Coleman* as executor and trustee of *Thomas Rowlett* deceased. It was objected, that the law required the summons to issue against the proprietor or tenant, and that *Coleman* did not appear to be such. However, as he had appeared and contested the application on the merits, the court considered it too late to raise the objection that he was not legally summoned. In *Anthony &c. v. Lawhorne*, 1 Leigh 1, the inquest found that lands in the possession of *A.* would be overflowed, and assessed

the damages. The court gave leave to erect the dam without the payment of the damages; it appearing that the lands belonged not to A. but to the applicant. This judgment was reversed, because the right to the lands could not be thus collaterally tried. Judge Green, in delivering the opinion of the court, says, that where leave to erect a mill is given, the court is only authorized to impose conditions for preserving the passage of fish &c. and has no power to determine whether the damages are to be paid or not, or to whom they are payable. The statute, notwithstanding the leave given, imposes upon the applicant the duty of paying to the persons entitled the damages so assessed, as a condition upon which such leave is to be effectual for protecting him against the action of the person actually injured.

These are all the authorities having any bearing upon the question under consideration; and none of them expressly decides what extent of interest in the land will satisfy the requisitions of the law. On looking at the first, second and third sections, it seems to me that it was the intention of the legislature to designate the tenant in possession as the proper party to be notified in all cases. The 1st section requires notice to the proprietor of the land proposed for the abutment. When the inquest is taken, and it is found that lands above or below, of the property of others, will be injured, the jury are required to say what damage it will be of to the several proprietors; and on the return of the inquest, summonses are to be issued to the several persons, proprietors or tenants of the lands so located, or found liable to damage. The word tenants here applies as well to the land located and condemned, as to the land found liable to damage; and the use of it in this connexion shews that the terms proprietors and tenants were intended to designate the same interest,—a possession as visible owner or tenant. The 6th section provides, that upon paying respectively to the several parties entitled the value of the acre located and the damages, the applicant shall become seized in fee simple of the acre of land, &c. And it is argued that this provision shews the necessity of construing the term proprietor to mean the fee simple owner; otherwise his estate might be divested by a proceeding to which he is no party. This, it seems to me, is the necessary consequence of the construction which I give to the statute. And no such injustice is done as has been supposed. No man's property should be taken without just compensation. The law provides the mode by which that compensation is to be ascertained, leaving it to the applicant to pay to the party entitled, at his peril. Unless this were so, land for public improvements, or other necessary public purposes, could not be condemned where the owner was unknown; and thus enterprises of great utility might be arrested for this cause. This law itself merely requires notice to the proprietor or

his agent, when found in the county: but the land of any person may be condemned, no matter whether he be found within the county or not; and when it is so condemned, and the money is paid to the party entitled, the applicant becomes seized in fee simple. This proves, that in the contemplation of the legislature it was not essential that the true owner should be a party to the proceeding by which he is divested of the fee for purposes of this character: that where notice can readily be given, it should be done: but whether it be given or not, a just compensation should be secured to him.

I think, therefore, that notice to the tenant in possession, appearing as the visible owner, was sufficient; and that the court was right in overruling the motion to dismiss the proceeding.

For the same reasons, I think the court was correct in refusing to hear parolevidence of a dedication to the public, by a former owner, of the ground in possession of the applicant. It appeared that the applicant was in the actual possession and occupation of the property; and this is sufficient.

The other objections taken in the court below have not been pressed in the argument, and may be disposed of by remarking that it was supererogatory to introduce the order of the James river company. The order giving leave to erect the dam must be taken as subordinate to the rights of the company under their charter and the general law. On the merits, the court was clearly right in granting the leave to erect the dam.

The judgment should be affirmed.

The other judges concurred in the judgment of affirmance.

255

*Poling v. Johnson.

August, 1843, Lewisburg.

(Absent CABELL, P., and BROOKS, J.)

Chancery Practice—Pleading—Hearing of Cause—When Premature Statute—Effect.*—In a suit in chancery, when an answer is filed at rules in due time, four months from the time of the replication to the answer are allowed the parties for taking their depositions, by the act of February 17, 1823, in Sess. Acts of 1822-3, p. 20, ch. 37, § 1; Suppl. to Rev. Code, p. 120. And until the expira-

*Appellate Practice—Notice of Suit—Waiver.—By appearing to the action, and going to trial on the merits, the defendant dispenses with a formal service of process and waives any objection to the alleged irregularity, and cannot raise the objection for the first time in the appellate court. Pulliam v. Aler, 15 Gratt. 62, citing Cunningham v. Mitchell, 4 Rand. 189; Poling v. Johnson, 2 Rob. 255. See also, citing the principal case for the proposition, *note* to Mulre v. Falconer, 10 Gratt. 12; Ballard v. Whitlock, 18 Gratt. 243; Hall v. Bank of Virginia, 14 W. Va. 612. The principal case is also cited in Bartlett v. Bartlett, 37 W. Va. 220, 16 S. E. Rep. 422; Roney v. Heath, 2 P. & H. 215, 216.

tion of the said four months, neither party has the right (without the consent of the other) to set the cause for hearing.

Same—Same—Same—Same.—It appearing by the record of a suit in chancery, that the answer and replication were filed at August rules 1840; that at September rules 1840 the plaintiff set the cause for hearing; and that on the 5th of October 1840 the cause was heard upon the bill, answer, replication, depositions, exhibits, and arguments of counsel, and a decree made against the defendant, **HOLD**, the cause was prematurely set for hearing, and prematurely heard. The decree was therefore reversed with costs, and the cause remanded, with directions to the court below to send the case to rules, there to remain for two months before it shall be set for hearing at the instance of either party, (unless it be set for hearing before the lapse of the two months by the consent of parties,) and for such decree in the case after it shall be set for hearing, as may be proper. *Accord. Dalby v. Price, 2 Wash. 191.*

This was a suit in chancery in the circuit court of Randolph county, by Garrett Johnson against Henry Poling. The subpoena was issued the 2d of December 1839, returnable to the first monday in January following, and was returned "executed by delivering a copy to the defendant." The bill was filed at May rules 1840. At August rules 1840, the defendant appeared and filed his answer, to which the plaintiff replied generally. At September rules 1840 (according to the record) the plaintiff came by his attorney and set the cause for hearing.

And on the 5th of October 1840
256 *a decree was made against the defendant. It commenced as follows: "This cause came on this day to be heard upon the bill, answer, replication, depositions and exhibits, and arguments of counsel." The depositions were on both sides.

On the petition of the defendant Poling, an appeal was allowed from the decree. The petition assigned several errors, but only one need be mentioned; to wit, that the cause was prematurely set for hearing, and prematurely heard and decided, the same having been set for hearing on the first rule day after the answer filed and replication thereto, and having been decided by the court in the following month; all which was without the consent and against the will of the defendant.

George H. Lee for appellant. The subpoena having been returned executed, the bill ought to have been filed at the return day; and this not having been done, the suit ought regularly to have been dismissed under the act of assembly. The circumstance of the defendant having answered may preclude him from now requiring the suit to be dismissed; but it does not prevent him from making the objection that the suit was set for hearing in less than four months after the answer was filed. The rule formerly was, that upon an answer and replication filed, six months from the time of the replication were allowed the parties for taking their depositions; and the cause could not then be set

for hearing, nor heard and determined, before the expiration of the six months, without the consent of the parties entered of record. *Dalby v. Price, 2 Wash. 191.* The period has since been reduced to four months. *Sess. Acts of 1822-3, p. 39, ch. 37, § 1; Suppl. to Rev. Code p. 129.* But the case of *Dalby v. Price* still applies, when a cause is set for hearing (and then heard and determined) before the expiration of the time prescribed by the statute now in force.

257 *Price for appellee. If, at the time of the hearing, the defendant had any objection to the cause being heard, he ought to have made it then. It may fairly be inferred that the hearing was by consent. The entry that the cause was heard upon the arguments of counsel authorizes this inference. *Dalby v. Price* was decided before the act of February 27, 1828, which declares that no decree shall be reversed for informality in the proceedings, where the parties have proceeded to take their depositions, and it appears to the court that there has been a full and fair hearing upon the merits, and that substantial justice has been done between the parties. *Sess. Acts of 1827-8, p. 20, ch. 25, § 1; Suppl. to Rev. Code, p. 125.* Here, both parties proceeded to take depositions, and substantial justice has been done. The objection must be deemed invalid, if any regard be had to what would be the rule at law under like circumstances. If a declaration be filed in term, a plea then put in, issue joined and trial had, a defendant would not be permitted to object in an appellate court that the cause had been prematurely tried.

Lee in reply. The court cannot infer from the entry of the decree, that the arguments of counsel there mentioned were of the counsel on both sides. And if it could so infer, still this is not tantamount to an entry upon the record, that the defendant consented to the cause being heard; which it is held in *Dalby v. Price* ought to appear, to constitute a waiver of the objection. The act of 1828 cannot cure this error. 1. The parties must have proceeded to take their depositions; they must have taken all their depositions; which cannot be intended here, where the time has not elapsed which is allowed for the purpose. 2. When the party has not had the time intended for him to take his depositions, the court cannot say that there has been a full and fair hearing; and unless there has been a full and fair hearing,
258 *it is impossible to say that substantial justice has been done.

STANARD, J., delivered the following as the resolution of the court:

The court is of opinion that the case was prematurely set for hearing, that being done at rules at the instance of the plaintiff, one month after the answer and replication thereto; and as it does not distinctly appear that at the hearing of the case, the defendant, in person or by counsel, appeared and was heard, the court be-

low ought not to have proceeded to hear the case and render a decree therein. Had the record distinctly shewn that the defendant appeared at the hearing, in person or by counsel, the court might properly imply, that as no objection appears in the record to have been taken to the said irregularity at rules, the objection thereto was waived, and the cause heard by consent, though such consent was not expressly stated on the record. For the irregularity aforesaid, the court is of opinion that the decree is erroneous. Therefore the said decree is reversed with costs. And the cause is remanded, with directions to the court below to send the case to rules, there to remain for two months before it shall be set for hearing at the instance of either party, (unless it be set for hearing before the lapse of the two months by the consent of parties,) and for such decree in the case after it shall be set for hearing, as may be proper.

259

*Dawson v. Watkins.

August, 1848, Lewisburg.

(Absent CABELL, P., and BROOKE, J.)

Writ of Right—Constructive Seisin—How Disproved—

Case Approved.—The decision in *Green v. Watkins*, 7 Wheat. 27, that in a writ of right, where the demandant shews no seisin by a *pedis positio*, but relies wholly on a constructive seisin by virtue of a patent of the land as vacant land, it is competent for the tenants to disprove that constructive seisin by showing that the state had previously granted the same land to other persons, with whom the tenants claim no privity, approved and acted on.

Same—Same—Same—Case at Bar.—The demandant in a writ of right claims the land (of which the tenant is in possession) under a patent bearing date the 17th of June 1786, and the tenant disproves the constructive seisin of the demandant, by shewing a patent for a large tract embracing the

***Writ of Right—Constructive Seisin—How Disproved.**

—In *Breathed v. Smith*, 1 P. & H. 304, it is said: "It is well settled, that in a writ of right, where the demandant shows no actual possession (or seisin by *pedis positio* as it is termed), but relies wholly on a constructive seisin by virtue of a patent of the land as vacant land, it is competent for the tenant to disprove that constructive seisin, by showing that the state had previously granted the same land to other persons with whom the tenant claims no privity. *Green v. Watkins*, 7 Wheaton; *Dawson v. Watkins*, 2 Rob. Rep. 259. This principle is founded on the obvious reason that the commonwealth, having by patent divested herself both of possession and title, a subsequent patent can convey neither."

See also, citing the principal case, *Taylor v. Burnside*, 1 Gratt. 207; *Turpin v. Saunders*, 32 Gratt. 34; *Hollingsworth v. Sherman*, 81 Va. 674; *Harman v. Ratliff*, 93 Va. 253, 24 S. E. Rep. 1023; *Garrett v. Ramsey*, 26 W. Va. 380; *foot-note* to *Kolner v. Rankin*, 11 Gratt. 420.

See generally, monographic note on "Adverse Possession" appended to *Nowlin v. Reynolds*, 25 Gratt. 187.

same land, which issued as early as the first of December 1773. Whereupon the demandant, to establish a seisin in deed by a *pedis positio*, proves that the patentee under whom he claims came, in 1834 or 1825, to the county in which the land lies, and employed an agent to enter upon and survey the said land and various other tracts in the same county; that the said agent procured a surveyor and chain carriers immediately thereafter, who went upon the land in question, and surveyed and remarked the same for the patentee. **Held**, these facts are not sufficient to authorize a jury to find a seisin in the demandant.

This was a writ of right, brought on the 22d of September 1837 in the circuit court of Kanawha county, by William M. Watkins (trustee for Caroline M. R. Johnson wife of Edward Johnson) against John Dawson. The mise was duly joined, and at May term 1840 a jury was impanelled and a special verdict returned, which found the following facts.

That letters patent from the commonwealth of Virginia, bearing date on the 17th of June 1786, issued to Thomas Augustus Taylor assignee of Henry Banks for a tract of land containing 642 acres, lying then in the county of Greenbrier, now in the county of Kanawha.

260

*That Thomas Augustus Taylor, in the latter part of the year 1824 or the first part of the year 1825, came to the county of Kanawha, and employed an agent to enter upon and survey the said tract of land and various other tracts claimed by him in the county of Kanawha; that the said agent procured a surveyor and chain carriers immediately thereafter, who went upon the said tract of land and surveyed and remarked the same for the said Thomas Augustus Taylor.

That the said Thomas Augustus Taylor died intestate some time previous to the year 1830, leaving Thomas Osburn Taylor his only child and heir at law.

That Thomas Osburn Taylor died some time previous to the year 1835, having made his will, which, on the 2d of February 1835, was admitted to record in the court of the county of Powhatan (where the said Taylor in his lifetime resided and where he died), and which will was set forth at large in the verdict. After some specific bequests, it contained a devise by the testator of the residue of his property, both real and personal, unto Holden Rhodes and Archer L. Wooldridge as trustees for Caroline M. R. Johnson wife of Edward Johnson. And the said Rhodes and Wooldridge were also appointed executors.

That the executors named in the said will renounced their right to qualify as such, and administration with the will annexed was granted to Benjamin Watkins the sheriff of Powhatan county.

That the said Caroline M. R. Johnson wife of Edward Johnson, afterwards, to wit, on the 7th of October 1835, by her next friend W. M. Watkins filed a bill on the equity side of the circuit court of Powhatan county, against Holden Rhodes and Archer

L. Wooldridge as executors and trustees under the will aforesaid, for the purpose of substituting another trustee in the place and stead of the said Rhodes and Wooldridge; and by a decree of the said court

Higginson Hancock was substituted 261 *in the place and stead of the said Rhodes and Wooldridge; and afterwards, by a further decree of the said court, William M. Watkins the demandant in this action was appointed and substituted, in the place and stead of said Hancock, trustee to execute and perform the will of the said Thomas O. Taylor.

That a copy of the will of the said Thomas O. Taylor with the orders of the court of probate, and copies of the decrees in the suit aforesaid, have been admitted to record in the office of Kanawha county court.

That in pursuance of the first decree, the said Holden Rhodes and Archer L. Wooldridge and Caroline M. R. Johnson executed a deed of conveyance to the said Higginson Hancock, bearing date the 12th of October 1835, which deed, with the certificates of acknowledgment thereof, was duly admitted to record in the office of the county court of Kanawha on the 4th of July 1838.

That in pursuance of the last decree, the said Higginson Hancock and Caroline M. R. Johnson executed a deed of conveyance to the said William M. Watkins the demandant, bearing date on the 17th of March 1837, which last deed, after being acknowledged before two justices, was on the first of June 1837 admitted to record in the office of the county court of Kanawha.

That under an order in this cause, the surveyor of Kanawha county made a survey of the land in controversy, and returned a plat and report of the same.

That John Green, in 1809, built a cabin and cleared about three acres of land at and immediately below the mouth of David Dick's branch, represented on said plat by figure 2, and extending down Pontalico river: that in the same year, one Robert Atkinson built a cabin and cleared some land at and above the mouth of Grapevine branch, at letter G. on said plat: that in the fall of 1811, the tenant John Dawson purchased of Atkinson (who had previously bought out Green) the possessory 262 *rights of the said Atkinson and

Green to the improvements aforesaid, paying therefor a horse valued at 50 dollars: that neither the said Atkinson nor Green had any title to said land, but both were what is commonly called in the country squatters: that the said tenant John Dawson, in February 1812, took possession under his purchase aforesaid of the two improvements aforesaid, the lower one at the time of his purchase containing about four acres of cleared ground, the upper one, formerly occupied by Green, containing about three acres as aforesaid: that the said Dawson the tenant has continued to occupy, from that time to the present time, the lands so obtained and the intermediate land lying between the same, except that portion

lying above the line shaded with green, and between that and the said figure 2, at the mouth of David Dick's branch: that the said John Dawson has, from time to time since February 1812, continued to fence, clear and cultivate additional portions of said land, and for the last seven or eight years had enclosed and in cultivation all that portion of the land within the lines shaded with green on the said plat, and situate between the line dotted with red and the said line shaded with green, on the side next to the river: that the said Atkinson, during his residence on the said land, made sugar at or near the mouth of Grapevine at letter G. and for that purpose had a sugar camp, and used the trees for some distance up said creek; and that the said trees had been since used by said Dawson from time to time in making sugar: that the said Dawson, during the period of his occupation of said land as aforesaid, has never claimed any title to the said land, other than that derived from the said Atkinson as aforesaid.

That the land granted by the patent aforesaid to the said Thomas Augustus Taylor, and designated in the said plat by letters A. C. D. F. includes and comprehends within its boundaries all the 263 land occupied, held *or claimed by the said John Dawson as aforesaid, and designated on the plat by the lines shaded with green, beginning at letter G.

That during the colonial government of Virginia, to wit, on the 1st of December 1773, a grant was issued in the name of the king, and signed by the lieutenant governor of the colony, granting unto George Mercer, Andrew Wagoner and John West junior a tract of land in the county of Botetourt, now Kanawha, containing 6787 acres; and this tract embraces and comprehends within its boundaries the entire tract of land granted to Thomas Augustus Taylor by the patent aforesaid of the 16th of June 1786, and designated as aforesaid by the said plat.

That in the year 1826, Charles Fenton Mercer, one of the claimants under George Mercer one of the patentees in the said patent of the 1st of December 1773, employed a surveyor to go upon the land embraced in the said patent, and to run and mark the exterior lines of said patent, and revise and correct the partition lines which had been previously made, not less than five years before, between the patentees of the last named patent; and that said surveyor did go upon said land, and run and remark the exterior bounds last aforesaid, and did also revise and in some instances correct, and did generally remark, the partition lines last aforesaid.

If the law upon these facts should be for the demandant, then the jury found for the demandant the land laid down in the plat, and designated by the lines thereon shaded with green, commencing at letter G. at the mouth of Grapevine creek, and one cent damages; but if the law should be

for the tenant, then they found for the tenant.

The circuit court, being of opinion that the law was for the demandant, entered judgment for him accordingly.

264 *On the petition of the tenant, a supersedeas was awarded.

B. H. Smith for plaintiff in error. There is no seisin found in the demandant, or any one else under whom he claims, unless the employment of an agent to survey the land may be construed into a seisin. It is, however, obvious that seisin cannot be inferred from such an act as surveying the land. Seisin and possession are identical; see opinion of Carr, J., in *Bolling v. Mayor &c. of Petersburg*, 3 Rand. 570. According to this authority, constructive seisin does not follow or attach to a junior grant. The constructive seisin of the land in controversy could only be in those claiming under the grant of the first of December 1773. The demandant, then, has to insist that he has actual seisin. And the subsequent survey cannot possibly by itself give actual seisin. The survey as found does not amount even to an entry. The intent to take possession did not exist. The intent was to ascertain the identity of the land. To constitute actual possession, the taking of esplees is necessary. There must be some improvement of the land, and an application of it to some use of which it is susceptible, such as taking coal from a mine, or cutting timber from the land and using or disposing of it. And in every instance there must be the intent to take possession. The act and the intent necessary to constitute actual possession are both wanting in this case. In *Moss and others v. Scott*, 2 Dana 274, 5, it is expressly decided that a survey is not seisin. On this subject the court is referred to 1 Salk. 246; Smith v. Burtis, 9 Johns. 180; *Ellicott v. Pearl*, 10 Peters 442; *Ewing v. Burnet*, 11 Peters 53. If, from the facts which appear, the jury had been authorized to infer seisin, still it would be a valid objection to their verdict that the fact has not been found. But the facts did not authorize the jury to find either actual or constructive seisin. And without the

265 *one or the other, no writ of right can be maintained. *Watts v. Cole &c.*, 2 Leigh 664.

Cooke for defendant in error. A writ of right only brings into controversy the mere rights of the parties to the suit, and a better subsisting adverse title in a third person is no defence to it. *Green v. Lither and others*, 8 Cranch 233. The tenant Dawson, under this decision, could not avail himself of the outstading and superior title of Mercer, Wagoner and West. But in *Green v. Watkins*, 7 Wheat. 27, it is said, that where the demandant relies for proof of seisin solely upon a constructive seisin in virtue of a patent from the state of vacant lands, the tenant may shew that the land has been previously granted by the state; for that disproves the demandant's construct-

ive seisin. This doctrine however will not avail the tenant, because in this case the demandant did not rely solely on his constructive seisin. On the contrary he proved an actual seisin per pedis positionem, of the most solemn and notorious sort. Taylor had held title to the land in question, and many other tracts in Kanawha, from 1786 for nearly 40 years, without actual seisin or pedis positio. He went to Kanawha in 1824 or early in 1825, to fortify his title by actual entries. In order to shew the full effect and legal extent of each entry, he surveyed each tract and remarked its boundaries. He "employed an agent to enter upon and survey this tract." The agent procured a surveyor and chain carriers, who "went upon the said tract of land, and surveyed and remarked the same for the said Thomas A. Taylor." He found on the land a squatter, the tenant Dawson, who claimed no title to the land, and he did not turn him out. Why should he have turned Dawson out? It could have answered no purpose. He could not have taken possession of the land in a more formal and solemn way than he did, 266 *unless he had served express notice on all the neighbourhood, and uttered in their presence some form of words indicating his intention.

Smith in reply. The argument of the counsel on the other side leads to the conclusion that every junior grantee necessarily has seisin: for every junior grant is preceded by a survey. But it is impossible to construe an entry by an agent, with intent to identify the land by survey, into an actual possession, especially where there is an actual adverse possession. If Dawson was a mere tenant at sufferance, he was not the tenant of Taylor or of those holding under him, but the tenant of those who had the superior title, and his possession was therefore adverse to all the world but the true owner. *Jackson v. Shark*, 9 Johns. 167. Moreover the case of *Green v. Watkins*, 7 Wheat. 30, shews (as does also the case of *Watts v. Cole &c.*) that where seisin is to be made out by a pedis positio, a taking of the esplees or something equivalent thereto is essential.

ALLEN, J. From the special verdict it appears that the land in controversy was embraced in two patents, and the demandant claimed under the junior grant. The tenant in possession is not found to claim under the elder grant, nor is any privity shewn to exist between him and those claiming under the first patent. Facts are found tending to shew a continued possession of the land by him: but in the view I have taken of the case, I deem it unnecessary to express any opinion upon the character of his possession, and shall consider the question as if he were a mere occupant without claim or colour of title. Every possession of land has the presumption of right in its favour, and until such presumption is destroyed by proof, the possession is adverse: and the actual occupation

and enjoyment of land in the accustomed mode, without any recognition
 267 *by the occupant of title in another, or disavowal of right in himself, would, in the absence of all proof to the contrary, raise the presumption that he held as owner. Where, however, no claim of right has been made, the law adjudges the possession to be in subservience to the legal owner (*Jackson v. Thomas*, 16 Johns. R. 293); for he cannot claim the benefit of a legal presumption, who has shewn by his acts that no such presumption exists. But without dwelling on this branch of the case, involving, as it does, questions of deep interest to many individuals, it is sufficient here to say that the demandant by this proceeding admits the tenant, for the purposes of this action, to be tenant of the freehold. This seisin thus conceded is sufficient for the tenant, if he can establish that the demandant, or those under whom he claims, had no such seisin as is required to maintain a writ of right.

The special verdict does not, in terms, find a seisin in the demandant or those under whom he claims. This perhaps would of itself be a sufficient objection to a judgment in favour of the demandant on this verdict. In *Barnes v. Williams*, 11 Wheaton 415, it appeared that the claim of the plaintiffs was founded on a bequest of slaves, and it was essential to a recovery at law that the assent of the executors should be proved. Chief justice Marshall said, that although, in the opinion of the court, there was sufficient evidence in the special verdict from which the jury might have found the fact, yet they had not found it, and the court, on a special verdict, could not intend it. In *Watts v. Cole*, &c., 2 Leigh 662, it is said that seisin cannot be presumed by the court, even if the jury had found facts from which they might have properly presumed it. But passing this objection, which, if nothing more appeared, might require a *venire facias de novo*, have the jury found any evidence of the fact, which would have justified the finding of seisin in the demandant? If
 268 not,—if the *facts found disprove such seisin, it would be useless to send the parties back for another trial.

The commonwealth, according to the uniform course of decision, cannot be dis-seised of the public domain. Her estate is divested by her grant, and vested in the patentee. Such grant confers title on the grantee, and therefore must confer seisin, one of the essential requisites of a complete title. Accordingly it has been uniformly held that a patent confers constructive seisin in deed, sufficient to enable the patentee to maintain his writ of right. *Clay v. White* &c., 1 Munf. 162; *Green v. Litter* &c., 8 Cranch 229; *Green v. Watkins*, 7 Wheaton 27. But seisin of some kind must be shewn, either the constructive seisin in deed by the operation of the grant, or seisin in deed by the possession of the land and the perception of the profits. When seisin of either kind is shewn in the

demandant, according to the decision of the supreme court in *Green v. Litter* &c., it is not competent for the tenant to defeat the action by evidence of a superior outstanding title in a third person.

The special verdict in this case finds that the land was embraced in the elder patent to Mercer and others. That grant conferred upon the grantees the seisin of the commonwealth, and disproved the constructive seisin in deed in the demandant and those under whom he claimed. To sustain his action on his junior grant, he must prove that he had seisin in deed by the actual possession and perception of the profits. The land at the date of his grant was in the adverse seisin of those claiming under the senior patent; and as two claiming under different grants, and adverse to each other, cannot be seized of the same land at the same time, the junior patentee can only establish an actual seisin in himself by proving an ouster of those holding under the prior grant.

The only fact found tending to prove such ouster of the senior patentee and seisin by the demandant, is, *that in the
 269 year 1824 or 1825 the patentee visited the county of Kanawha, where the lands are situated, and employed an agent to enter upon and survey the tract of land in question, and various other tracts claimed by him in that county; and that the said agent immediately thereafter employed a surveyor and chain carriers, who went upon the said tract, and surveyed and remarked the same for the patentee. What acts of ownership will be sufficient to constitute an ouster of the senior patentee, and invest the junior patentee with actual seisin in deed, must in a great measure depend on the circumstances of each case. Where seisin of the latter kind is relied on, the rule is generally laid down that it must be evidenced by an actual occupation and taking of the esples. Cases may be put (as of a barren rock) where there are no esples; still there must be some application of the land to some purpose of which it is susceptible. It is not necessary that the land should be enclosed or built upon, or actually cultivated or cleared; but to operate a dis-seisin of one having right, the entry should be made under the claim of title, with the intention of taking possession, and be accompanied with such visible acts of ownership as from their nature indicate a notorious claim of property in the land. The character of the acts necessary to give such seisin must necessarily vary with the situation of the land and the condition of the country. In a settled and cultivated region, an actual occupation and pernaney of the profits might be required; whilst in the wilderness, a possession of a less definite character might suffice, if the jury should be satisfied that the property was not susceptible of a more strict occupation. However difficult it may be to lay down any precise rule adapted to every case, I am satisfied that the facts found in this verdict would not have warranted the jury in find-

ing an ouster of the rightful owner and a seisin in the demandant. It has
 270 *never been held that a subsequent entry and survey (acts which must precede a patent) of themselves worked a disseisin of the elder patentee. Here it does not appear with what intention the entry was made. The inference from the whole finding is, that the entry was made, not with the intent to take possession,—to give notice to adverse claimants and the community of an actual, visible and exclusive possession of the land, but with the intent to ascertain the boundaries of land claimed by the party, and to preserve the evidence with a view to some future occupation or act of ownership. To give to such a transaction the effect of an actual ouster of the true owner, would be establishing a principle by which every proprietor of vacant lands might be disseised without his knowledge or the possibility of protecting himself. There is great reason for requiring strict and satisfactory proof of such a possession as is notorious and exclusive, when seisin so acquired is alone relied on to counteract the effect of evidence adduced by the tenant, of an outstanding better title in a third person. For, if the possession of the tenant is without claim or colour of title, his possession is in subservience to the legal owner; he is in fact a tenant at sufferance of the holder of the better title, and such a possession could not be divested but by an actual *pedis positio* and taking of the profits.

I think the judgment should be reversed, and a judgment entered for the tenant.

The other judges concurring, judgment reversed with costs, and judgment entered for the tenant.

271

Radcliff &c. v. High.

August, 1848, Lewisburg.

(Absent CABELL, P., and BROOKE, J.)

Estoppel—Recital of Payment in Deed—Relief in Equity.—A deed conveying land contains an acknowledgment on its face that the purchase money has been paid, though in truth no payment thereof has been made. In an action of assumpsit for the purchase money, the defendant, by way of estoppel, relies upon the acknowledgment in the deed; and the plaintiffs, believing that the estoppel will prevent their recovery at law, dismiss their action, and file a bill in equity against the purchaser. **Held**, they are entitled to the aid of a court of equity. *Accord*. *Wilson's curator v. Shelton's adm'r*, 9 Leigh 242.

On the 10th of March 1835, a deed was made between James Radcliff and wife and Robert Wiley jr. of the one part, and Benjamin High of the other part, whereby it was witnessed, that in consideration of

*For monographic note on Receipts, see end of case.

†Estoppel—Recital of Payment in Deed—Relief in Equity.—The principal case is cited and approved in *Johnson v. Roanoke Land & Imp. Co.*, 82 Va. 288. See monographic note on "Estoppel" appended to *Bower v. McCormick*, 28 Gratt. 810.

the sum of 91 dollars and 50 cents to the said Radcliff and wife and Wiley in hand paid, the receipt whereof was thereby acknowledged, they conveyed to High all their right and title to a certain piece of land described in the deed.

In October 1839, Radcliff and Wiley exhibited a bill in the circuit court of Harrison, setting forth, that High promised to pay them the consideration money of 91 dollars and 50 cents within a few weeks after the deed was made: that they, confiding in his promises, took from him no obligation for the purchase money: that afterwards he refused to pay them, and they instituted an action of assumpsit against him to recover the said sum, in which action he, by plea of estoppel, pleaded and relied upon the acknowledgment in the deed that the purchase money had been paid by him: and the complainants, being satisfied that the plea of estoppel would prevent their recovery at

272 law, dismissed the action. *The

prayer of the bill was, that High should be decreed to pay the said purchase money with interest.

High admitted in his answer, that he did defend himself in the action at law, as stated in the bill; but he did not pretend that the consideration money had in truth been paid, and it clearly appeared that no payment thereof had been made.

Other grounds were taken in the answer against the claim of the plaintiffs, which, in the opinion of the circuit court, were sufficient; and that court accordingly decreed that the bill be dismissed, and that the complainants pay to the defendant his costs.

From this decree an appeal was allowed.

The cause was submitted without argument, by William A. Harrison for the appellants, and George H. Lee for the appellee.

STANARD, J., delivered the following as the resolution of the court:

The court is of opinion that the appellants were entitled to the aid of the court of equity, in recovering the amount agreed to be paid by the appellee, for the conveyance of their interest in the land mentioned in the deed from the appellants to the appellee, filed as an exhibit in the cause; the legal remedy for the recovery of the same having been successfully obstructed by the plea at law of the said deed, and the acknowledgment it contained of the receipt of the purchase money, as an estoppel to the claim in that forum. The court, without deciding whether this defence ought to have availed at law, is of opinion that in this case it is not for the appellee to say it ought not, while he enjoys the benefit of the successful use of it at law; and that the decree dismissing the bill is erroneous. Therefore the decree is reversed with costs. And this court proceeding to render such decree as
 273 the court below ought *to have ren-

dered, it is adjudged, ordered and decreed that the appellants recover of the appellee the sum of 91 dollars 50 cents with interest thereon from the 10th of March 1836 till paid, and the costs by them expended in the superior court in the prosecution of their suit.

RECEIPTS.

I. Definition.

II. Effect of Receipt.

1. When It Is Obtained by Fraud.
2. As Evidence.
3. Parol Evidence to Vary.
4. In Deeds of Conveyance.

I. DEFINITION.

Receipts are either mere admissions of payments or delivery, or they contain a contract to do something in relation to the thing delivered. *Tuley v. Barton*, 79 Va. 387.

II. EFFECT OF RECEIPT.

1. WHERE IT IS OBTAINED BY FRAUD.—

Where, by collusion with one of two administrators, a debtor to the estate of the decedent pays a part of the debt, and procures a receipt for the whole, knowing that the other administrator is the sole acting and responsible representative, the receipt is not acquittance for the whole debt, but equity will, notwithstanding, allow the debtor a credit for the payment actually made. *Laidley v. Merrifield*, 7 Leigh 346.

Alterations Render Receipt Open to Suspicion.—

Every alteration on the face of a written instrument, such as a receipt, detracts from its credit and makes it suspicious, which suspicion the party claiming under it is ordinarily bound to remove. *Elgin v. Hall*, 83 Va. 680. In this case it was held that alterations on the face of receipts offered in evidence, being unexplained, rendered them worthless.

2. AS EVIDENCE.

Generally—Where a receipt is not impeached for mistake, error or fraud, it is evidence of a settlement of accounts between the parties, and is a ratification and acceptance of the payments claimed as credits in said receipt. *Ruby v. Railroad Co.*, 8 W. Va. 269; *Tate v. Jones*, 98 Va. 544, 36 S. E. Rep. 984. Thus where a party accepts payment for certain work and receipts in full for all demands under his contract of labor; this receipt furnishes a complete defence to an action brought by him upon the contract in which action he claims damages for the alleged failure of the other party to perform his part of the contract. *Scott v. Norfolk, etc., R. Co.*, 90 Va. 241, 17 S. E. Rep. 882.

Receipt by Assignor Not Evidence against Assignee.

—The acknowledgment, written or verbal, of the assignor of a claim, that the same has been paid to him, is no proof against the assignee, unless it be proved to have been made before the assignment; and the burden of proving this lies on the debtor. In such case the date of the acknowledgment or receipt will not be taken as *prima facie* true. *Wilcox v. Pearman*, 9 Leigh 144.

As Evidence of Settlement of Fiduciary Accounts.—

In *Tate v. Jones*, 98 Va. 544, 36 S. E. Rep. 984, an administrator had a settlement with the residuary legatees, and received receipts from them in full of their interests in the estate. He afterwards col-

lected money on judgments in his favor as administrator. After the execution of such receipts, and until the administrator's death, a period of some seventeen years, all parties in interest treated the accounts as settled; and after the administrator's death no claim was made against his estate, except by complainant, an assignee of one of such legatees, who sued the administrator's estate, for a settlement of his accounts. It was held that it must be presumed that the money collected on the judgment was embraced in the receipts.

Best Evidence Rule—When Production Is Required.—

Under the rule requiring the production of the best evidence, where a witness introduced by the plaintiff speaks of receipts which he had taken, the evidence ought to be rejected, unless he shows that they were lost or offers some other valid excuse for the failure to produce them. *Hamlin v. Atkinson*, 6 Rand. 574.

3. PAROL EVIDENCE TO VARY.

Generally—It is a general and well-settled rule that parol contemporaneous evidence is inadmissible to contradict or vary the terms of a valid written instrument. The rigor of this rule, however, is relaxed in its application to receipts as contradistinguished from contracts generally. In regard to receipts, it is to be noted that they may be either mere acknowledgments of payment or delivery, or they may also contain a contract to do something in relation to the thing delivered. In the former case, and so far as the receipt goes only to acknowledge payment or delivery, it is merely *prima facie* evidence of the fact, and not conclusive; and, therefore, the fact which it recites may be contradicted by oral testimony. But in so far as it is evidence of a contract between the parties, it stands on the footing of all other contracts. *Tuley v. Barton*, 79 Va. 387; *Dolan v. Freiberg*, 4 W. Va. 101.

A receipt for money which purports to be "in full, on account, to date," does not import an agreement or contract between the parties, and is open to explanation or contradiction by parol proof. *Dolan v. Freiberg*, 4 W. Va. 101.

To Explain Receipt.—An attorney's receipt for claims for collection may be so far added to by parol testimony as to show a contemporaneous additional contract on the part of the attorney to receive the claims as collateral security for debts due him from the client. But the liability of the attorney or transferee is only for the exercise of due diligence to collect those claims; and in neither capacity is he responsible for their loss, unless such loss be occasioned by his negligence. *Tuley v. Barton*, 79 Va. 387.

Covenant in Receipt Cannot Be Excluded by Parol Evidence.

—An agreement that "all matters and things embraced by the within contract have been fully adjusted and settled, and this contract is, for value received, declared ended and settled," cannot, in the absence of fraud or mutual mistake, be shown by parol testimony to have referred only to money accounts between the parties to the contract, and not to have included a covenant therein, on the part of the party paying the consideration for the release, not to engage in a certain business with any one else for a certain time. *Bonsack Machine Co. v. Woodrum*, 88 Va. 512, 18 S. E. Rep. 994.

4. IN DEEDS OF CONVEYANCE.—Where a vendor of land executes a deed of conveyance to the purchaser, in which he acknowledges receipt of the purchase money, and subjoins to the deed a re-

celpt in full for the same, he is not precluded from claiming the balance due him in equity, where the whole purchase money was in fact not paid. *Wilson v. Shelton*, 9 Leigh 842; *Radcliff v. High*, 2 Rob. 271. See also, monographic *note* on "Estoppel" appended to *Bower v. McCormick*, 23 Gratt. 810.

Robinett v. Preston's Heirs.

August, 1843, Lewisburg.

(Absent CABELL, P., and BROOKE, J.)

Joint Tenants—Conveyance of Part by One Tenant—

Effect.—At the trial of the mise joined in a writ of right, after the demandants had introduced a grant to their ancestor, embracing the land demanded, the tenant introduced an earlier grant of the land to two grantees, and offered to give in evidence a deed from one of those grantees, conveying by metes and bounds a particular part of the land to a person under whom he (the tenant) claimed, and also offered other evidence tending to prove that partition had been in fact made, though without deed, between the two grantees. The circuit court, being of opinion that the conveyance by metes and bounds by one joint tenant, of a portion of the land held jointly, was void, refused to permit the same to go in evidence to the jury; and a verdict and judgment were rendered for the demandants. **Held**, the circuit court erred; and its judgment therefore reversed, the verdict set aside, and the cause remanded for a new trial, on which the conveyance, if offered, is not to be rejected on the ground that it is void.

This was a writ of right in the circuit court of Lee, brought by certain persons as the heirs of Walter Preston against Isaac Robinett. At the trial of the mise, the demandants introduced a grant of the com-

*Joint Tenants—Conveyance of Part by One Tenant—

Effect.—The principal case is cited in *McKee v. Barley*, 11 Gratt. 846, as authority for the proposition, that although a conveyance by one joint tenant of a part of the land might have no legal effect to the prejudice of the cotenant, yet it would be effectual to pass the interest of the grantor in the tract. And if upon partition, the share assigned of the cotenant did not include the part conveyed, the cotenant would get all he was entitled to, and the grantor could not deny his deed.

The principal case is further cited in this connection in *Cox v. McMullin*, 14 Gratt. 90; *Bogges v. Meredith*, 16 W. Va. 27; *Worthington v. Staunton*, 16 W. Va. 239.

See *foot-note* to *Cox v. McMullin*, 14 Gratt. 82, and monographic *note* on "Joint Tenants and Tenants in Common."

Same—Same—Same.—The principal case is cited in *Buchanan v. King*, 22 Gratt. 422, for the proposition that a conveyance by metes and bounds of part of an estate held in common, though valid against the grantor, cannot prejudice the rights of the cotenant, unless followed by entry and adversary possession. The grantee becomes thereby merely a tenant in common with the cotenants of his grantor; his possession is in presumption of law, the possession of all, and is to be deemed in support and not in derogation of the common title.

monwealth of Virginia, dated the 30th of May 1800, to Walter Preston for 1000 acres of land lying partly within the disputed territory comprised within or between

274 Walker's *and Henderson's lines; and the tenant admitted the demand-

ants to be the heirs of the said Walter Preston. Whereupon the tenant introduced a copy of a grant of the commonwealth of North Carolina, dated the 12th of July 1794, to Andrew and David Greer for 640 acres of land beginning on Henderson's line and lying south thereof, within the said disputed territory;* and the said tenant also introduced, as a link in his chain of title, and to connect himself with the grant to the said Greers, a deed dated the 26th of September 1797, from Andrew Greer, one of said grantees, to David Archer, conveying by metes and bounds 320 of the said 640 acres of land, being the northern half thereof. To the introduction of this deed as evidence the demandants objected, upon the ground that as no partition of this grant had been made by the grantees, it was not competent for one of them, a joint tenant of the granted land, to convey by metes and bounds such portion as he pleased, without the assent of his cotenant, and in prejudice of his rights; and that such conveyance is wholly void. The tenant contended, that from the great lapse of time, and other circumstances, the assent of David Greer, the other grantee, to this partition of Andrew Greer by his deed of conveyance aforesaid, was to be presumed; and in support of such presumption offered two depositions of William Wilson, mentioning an old survey by one Thompson for the purpose of partition, and also offered the conveyance by said Archer of this 320 acres of land to Lawrence Horn, and shewed that the sheriff of Hawkins county, Tennessee, levied on this land and sold and conveyed the same to John Hannah, who conveyed the same on the 27th of November 1804 to William Armstrong, under whom, in 1816, possession was first taken; which possession has been regularly transmitted, by various deeds

275 of conveyance, *down to the tenant, and to the commencement of this suit on the 24th of July 1837, and to this time. The tenant also introduced the following witnesses. Amos Grantham proved, that wishing to purchase some of the land, he went in 1816 to Knoxville, Tennessee, where he found George Wilson, a son in law of one of the said Greers, who claimed half of said North Carolina grant, and shewed the witness the grant, and offered to sell to witness half of it for 800 dollars, which witness refused to give; and Wilson said at that time, that the land had never been divided, that he had never seen it, and that he knew nothing of it except by information. Lincoln Amis proved that the common report in the neighbourhood of

*The land embraced by each of these grants is now wholly in Virginia, and was stated in the record so to be.—Note in Original Edition.

the land was, and is, that one Thompson a surveyor, wishing to purchase some of the land, had divided the same; but how he divided it, or by what authority, the witness has not heard and does not know. Stephen Wilborn proved, that more than 40 years ago he saw some one surveying this land for William Armstrong, as he understood; but whether it was Thompson, or who it was, the witness does not know. It appeared at the trial, that there was less than 640 acres in the North Carolina grant; that the quantity claimed by the tenant under Andrew Greer is about 220 acres; and that the land so claimed by the tenant is within the grant to Walter Preston. There was no evidence to shew what had become of the other half of the North Carolina grant, or whether it is possessed or claimed by any person, except the evidence before stated; nor did it appear which of the Greers was father in law to Wilson, nor whether they are living or dead, or whether there be any descendants or heirs of them or either of them.

The circuit court, upon the authority of certain cases decided by the supreme courts of Massachusetts, Connecticut and Vermont, (which it stated were to be found in 12 Mass. Rep. and 9 Vermont Rep. 276 or referred to *therein) held that the conveyance by Andrew Greer to David Archer, being a conveyance by metes and bounds by one tenant in common or joint tenant, of a portion of the land held jointly or in common, was void, and refused to permit the same to go in evidence to the jury. To this opinion the tenant excepted.

A verdict was found for the defendants, for so much of the land demanded as was held by the tenant, and for one cent damages; and judgment was rendered thereupon. To which judgment a supersedeas was awarded.

The cause was argued by the attorney general for the plaintiff in error, and M'Comas for the defendants in error. In the course of the argument, the following authorities were cited and examined: Porter v. Perkins &c., 5 Mass. R. 233; Porter v. Hill, 9 Mass. R. 34; Bartlet v. Harlow, 12 Mass. R. 348; Varnum v. Abbot &c., 12 Mass. R. 474; Starr v. Leavitt, 2 Conn. R. 243; Hinman v. Leavenworth, 2 Conn. R. 244, note (a); Mitchell v. Hazen, 4 Conn. R. 495; Griswold v. Johnson, 5 Conn. R. 363; Taylor v. Horde &c., 1 Burr. 108; 2 Co. Lit. 237 a., 237 b., 238 a., 238 b.

ALLEN, J. As between joint tenants, one cannot do an act to the prejudice of the other; but the joint tenancy can at any time be destroyed by a conveyance by one of the joint tenants to a stranger. Such conveyance severs the joint tenancy by destroying the unity of title, and also by destroying the unity of possession; for the alienee and the remaining tenant have several freeholds. 3 Cruise's Dig. title 18, ch. 2, § 10. But though cases of severance by the conveyance of one joint tenant are of frequent occurrence, this happens, it

is said, where such conveyance is of the joint tenant's estate in the land, but not where it is a part of the land. As between the joint tenants, there may

277 *be good reason for holding that a conveyance by one, of a specific parcel of the land, should not affect his cotenant. They are seized per mi et per tout, and neither has a right at his election to convey a particular portion, so as to affect or prejudice his cotenant. The cases in Massachusetts Reports, cited in the argument, establish the proposition that one shall not convey so as to prejudice the cotenant. And this is the extent to which they have gone. As between the tenant conveying and his grantee, in one of the earliest cases (Porter v. Hill, 9 Mass. R. 34), it is intimated that such conveyance may operate by way of estoppel against the grantor; which could not be if the deed were to be considered as entirely void.

The earlier cases in that court arose in controversies where the tenants were parties. But in Varnum v. Abbot &c., 12 Mass. R. 480, the question directly arose, whether such a conveyance had any effect as against the grantor and those claiming under him? After reviewing the cases in which it had been held that such a conveyance could have no legal effect to the prejudice of a cotenant, the court proceeded to consider its effect as against the grantor, and determined that it is effectual against him. If upon a partition the share assigned to the cotenant does not include the part conveyed, the cotenant has got all he has a right to, and the grantor cannot be permitted to deny his deed. So in the case of a release by the cotenant to the alienee, of his moiety in the part conveyed, the alienee would have a deed from each, and yet, if the first conveyance was merely void, it could not help the second; and so the party in possession, with deeds from each of the tenants who alone had any pretence of title to the land, would still be unable to maintain the possession. For these and other reasons given by the court, they determined that the deed is not absolutely void.

278 *With us, there are still stronger reasons (if any were required) for holding such deeds not to be void. All grants are to be most strongly construed against the grantor; and by our statute, 1 Rev. Code, ch. 99, § 20, p. 368, all alienations purporting to pass or assure a greater right or estate than the grantor may lawfully pass or assure, shall operate as alienations of so much of the right and estate as the grantor might lawfully convey. Under the covenants of such a deed as this, though it might be ineffectual to pass the particular tract as against the cotenant, yet as against the grantor and strangers it would be effectual to pass the interest of the grantor in the tract. Possession under it would support a release from the cotenant; and if the part conveyed were assigned to the alienee on partition, the title would be absolute at law. The deed being good against the grantor, the entry of the tenant

under it would be lawful; and though it might be inoperative so far as the rights of the cotenant were thereby prejudiced, yet as it would invest the grantee with the estate of the grantor so far as he could lawfully convey, the grantee would be tenant in common with the cotenant of his grantor, to the extent of the interest conveyed. His possession and seisin would be the possession and seisin of both, because such possession and seisin would not be adverse to the right of his companion, but in support of their common title.

I think, therefore, that the court erred in deciding that the deed was merely void.

Even if the matter were more doubtful than I think it is, still the court erred in excluding the deed. Evidence was introduced tending to prove that a partition had been made between the tenants. The jury were the judges of the effect of that evidence. If a partition had in fact been made, though without deed, and the parties had held in severalty afterwards for a period sufficiently long to bar a writ of

279 right, the jury might have presumed a deed. Whether the circumstances in evidence would have justified such presumption, it is not necessary to determine. The deed, in connexion with the other evidence, was admissible, as tending to prove facts from which such a presumption might arise.

The deed, too, was proper evidence on other grounds. The tenant (as the bill of exceptions discloses) relied on the possession. Whether the evidence would have made out such a possession as of itself would have been sufficient to bar a recovery, was a question of fact for the jury. If the tenant claimed to hold by virtue of the deed, though it might not have furnished evidence of title, it would have shewn that he claimed under colour of title, and was not a mere naked trespasser. In that point of view, and for the purpose of defining and designating the extent of his possession, the deed was proper evidence.

I think the judgment should be reversed, the verdict set aside, and the cause remanded for a new trial, upon which the deed, if offered, is not to be rejected upon the ground that it was merely void.

The other judges concurring, judgment entered accordingly.

280

*Tavener v. Robinson.

August, 1848, Lewisburg.

(Absent CABELL, P., and BROOKE, J.)

Deed of Trust*—Chattels—Discharge of Deed.—A slave conveyed by a deed of trust is sold, in the absence of the trustee, by the debtor with the concurrence of the trust creditor, to another creditor not secured by the deed, for a consideration compounded of the balance remaining due upon the trust, other debts claimed by the trust creditor, and a debt due to the purchasing creditor. **Held.**

that by this arrangement the trust deed was discharged, and the title of the trustee, so far as concerns the personal property embraced in the deed, divested; for in a conveyance of chattels personal the law disregards mere formalities of the instrument, and the payment of the debt secured thereupon completely extinguishes the incumbrance.

Fraud—Sale of Personalty—Retention of Possession by Vendor.—The vendor of a slave continuing in possession until an execution was levied on the slave more than a year after the sale, and the presumption arising from the inconsistency of the possession with the title claimed by the vendee not being repelled by any circumstances appearing in the case, but the circumstances on the contrary confirming the presumption of fraud, the sale declared void as to the execution creditor.

Executions—Title of Sheriff Purchasing at His Own Sale.—The owner of a slave sells her, but remains in possession. The slave is afterwards levied upon under execution, and the vendee forbidding the sheriff to sell, the creditor gives an indemnifying bond with security, and then the slave is sold by the sheriff, and the sheriff becomes himself the purchaser, though at the time in the name of another. In an action of detinue by the first vendee against the sheriff so purchasing, **held**, the question whether a sheriff can acquire title by a purchase at his own sale does not arise, but the proper enquiry is whether the title of the plaintiff is valid against the execution creditor.

This was an action of detinue, brought in the circuit court of Wood by James Robinson against Franklin Tavener, for a female slave named Zilpa; and the plea was the general issue.

At the trial in September 1841, it appeared by the evidence, that some years previously Charles H. L. *West moved from the state of Maryland to Wood county, and brought Zilpa with him; that West was an improvident and intemperate man, who became embarrassed in his circumstances, and indebted to divers persons; and that on the 21st of January 1834 he made a deed of trust, which was admitted to record in the office of Wood county court on the 22d of the same month, whereby,—after reciting that J. M. Stephenson had become surety for him in a forthcoming bond to William Tefft and Otis L. Bradford, for the use of Tefft, for 92 dollars 47 cents, and also surety for him in another forthcoming bond to Levi Wells for 36 dollars 51 cents, and that he was indebted to Stephenson 25 dollars by a single bill bearing date on that day, payable on demand,—the said West conveyed to Thomas M'Farland his interest in three several parcels of land, also a negro slave by the name of Sylph, two horses, one cow, &c. in trust that M'Farland should permit West to remain in possession of said land and personal property until default be made in the payment of the said forthcoming bonds, and then in trust that so soon as the said bonds

*Sale of Personalty—Retention of Possession by Vendor—Fraud Per Se.—See foot-note to Davis v. Turner, 4 Gratt. 422. The principal case is cited in Howard v. Prince, 12 Fed. Cas. 651.

*See monographic note on "Deeds of Trust."

should become forfeited, M'Farland should sell so much of said property as should be sufficient for the payment of the aforesaid bonds, or so much thereof as should remain unpaid, after having advertised the said sale 20 days at the door of the courthouse of the county, and should, out of the proceeds of sale, first pay all the costs attending the execution of his trust, and then pay off the amount of said bonds &c. or so much as might remain unpaid by the said West. The record did not distinctly state that Zilpa was the same slave that was conveyed by this deed by the name of Sylph, but it may be inferred that she was. The trustee M'Farland, it appeared, advertised a sale of the said slave to take place at the house of West on the 4th of March 1835; but on the day of sale, he being absent from the commonwealth, West executed a paper
282 under his hand and seal, authorizing and empowering Stephenson to make the sale in pursuance of the advertisement, and Stephenson proceeded to sell the said slave accordingly. She was struck off to the plaintiff Robinson for 88 dollars, and the following writing was thereupon executed by West and Robinson: "James Robinson this day purchased at public sale a negro girl of C. H. L. West, by the name of Sylph, for the sum of 88 dollars, which said girl is now in the possession of the said West; and it is agreed by the said Robinson that the said girl may remain in the possession of the said West for the present; the said West on his part agreeing to give up the said girl at any time on the request of the said Robinson or his assigns. Given under our hands and seals this 4th day of March 1835.

Chs. H. L. West, [Seal.]
Jas. Robinson, [Seal.]"

It was understood at the sale, that the forthcoming bonds mentioned in the deed of trust had been previously paid and satisfied, leaving the sum of money due Stephenson alone to be provided for by the sale. A computation was made previous to the sale, ascertaining West to be indebted to Stephenson about the sum of 60 dollars, which included 25 dollars mentioned in the deed of trust, with the interest thereon, and some additional accounts in which West stood indebted to Stephenson. West was also indebted to Robinson a sum which added to the amount aforesaid constituted an aggregate of 88 dollars. For this aggregate of 88 dollars Robinson made his first and only bid, and for this price the slave was struck off to him without competition. The only persons present at the sale, as far as recollected by the witness who deposed on the subject, were Stephenson, Robinson, West with his family, and two other persons. West, at the time of the sale,
283 was much embarrassed in his circumstances, and generally considered insolvent. The slave had been in the possession of West from the time of his removal to the county, up to the time of the sale; was present at the sale; and thereafter continued as before in the family and

service of West. At the time of the sale, Robinson, who had been the correspondent and agent of the uncle and brother of West (residents of Maryland), stated that Zilpa was the property of Arthur West the brother of the said Charles, and had been loaned to him for the use of his family, on his removal from Maryland to this county; that he was instructed by Arthur West to purchase her, so that she might be secured to the use of the family of the said Charles; that he was making the purchase for these purposes, and would give up all right in the said slave and convey her to Arthur West, on receiving the sum of money for which he had become the purchaser. No money was paid at that time, but some months afterwards Robinson liquidated the balance of the amount due Stephenson, having previously paid a part by a check drawn by the uncle of Charles H. L. West for 54 dollars. This balance Robinson stated he had received from Arthur West. Whether the remittance had been sufficient to cover the moneys due to Robinson did not clearly appear: the impression of the witness who deposed on the subject was, that Robinson informed him he had received 90 dollars. On the 25th of July 1836, a writ of fieri facias was sued out of the court of Wood county in favour of William Tefft against the goods of West, which was levied on Zilpa, who was then in his possession. Not being sold under the fieri facias for want of time, a venditioni exponas issued commanding the sale of her, upon which this return was made: "1836, October 17. The negro girl Zilpa sold to Rawley M. Kiger for 300 dollars, which sum more than satisfies this execution.

The balance is now in my hands. F. Tavenner D. S. for J. *Tomlinson S. W. C." While Zilpa was in the custody of the sheriff, another fieri facias issued from the same court on a judgment obtained by Alfred Beauchamp jr. against West, which was levied on the same slave, and the following return made thereon: "Satisfied by applying a part of the proceeds of the sale of a negro girl (Zilpa) sold to Rawley M. Kiger on the 17th October 1836. F. Tavenner D. S. for J. Tomlinson S. W. C." The defendant in this action was the acting sheriff who levied the executions aforesaid and sold the slave under the same. At the sheriff's sale, the plaintiff claimed the slave as his property, and forbade the sale; and on the requisition of the sheriff, Tefft, the plaintiff in the first execution, executed a bond with security for the sheriff's indemnity. The defendant procured Kiger to bid for and purchase in the slave for him, and she was knocked off at Kiger's bid for 300 dollars, and immediately thereafter went into the possession of the defendant, without Kiger's having any further agency in or control about the matter. The plaintiff's forbidding the sale of the slave probably affected the price for which she was sold. Some evidence was given tending to shew that the sale was hurried by the defendant, and

without sufficient time being given for deliberate and reflecting bids by competitors; but the court was not satisfied that the sale was conducted with any fraud or unfairness.

Upon the evidence being closed, the defendant moved the court to instruct the jury, that the legal title to the said slave being in M'Farland the trustee, the substitution of Stephenson, and a sale by him of the slave, did not vest in Robinson the purchaser such right and title as would enable him to maintain this action: but the court was of opinion that as M'Farland's was a naked power, not coupled with any interest, it was competent for West the grantor and Stephenson the creditor to unite in the sale, by which the title
285 of West to the slave might pass; and instructed the jury, that if the evidence satisfied them that the plaintiff Robinson had been repaid his purchase money, such repayment divested him of the title acquired by the purchase, under the terms and conditions thereof as herein before stated.

The jury found a verdict for the plaintiff, ascertained the slave to be of the value of 500 dollars, and assessed the plaintiff's damages to 200 dollars.

After the verdict, the defendant moved the court to set aside the same and to award him a new trial, on the ground that the verdict was contrary to the evidence. The court overruled the motion; and a bill of exceptions was filed, stating the facts as before mentioned.

Judgment being rendered for the plaintiff, a supersedeas was awarded thereto.

The cause was submitted without argument, by Fisher for the plaintiff in error, and William A. Harrison for the defendant in error.

BALDWIN, J. The sale of the slave in controversy, though ostensibly under the trust deed, was substantially a sale by the debtor, with the concurrence of the trust creditor, to another creditor not secured by the deed, for a consideration compounded of the balance remaining due upon the trust, other debts claimed by the trust creditor, and the debt due to the purchasing creditor. By this arrangement the trust debt was discharged, and the title of the trustee, so far as concerns the personal property embraced in the deed, divested; for in a conveyance of chattels personal the law disregards mere formalities of the instrument, and the payment of the debt secured thereupon completely extinguishes the incumbrance. I think therefore that the circuit court correctly overruled the instruction
286 asked for by the defendant there, it being founded upon the idea that the legal title to the slave in question was still outstanding in the trustee M'Farland.

But the debtor West's continued possession of the slave up to the time of the levy of the executions under which the defendant purchased, was inconsistent with the

title claimed by Robinson, and rendered his purchase in contemplation of law fraudulent and void as against creditors, according to the rule declared in *Edwards v. Harben*, 2 T. R. 587; *Land &c. v. Jeffries &c.*, 5 Rand. 211, 599; *Sydnor v. Gee*, 4 Leigh 536; *Mason v. Bond & co.*, 9 Leigh 181, and many other cases. There were no circumstances, such as are to be found in some of those cases, to repel the application of this rule. The sale was virtually made by the debtor, and cannot be considered as a fair, open and public sale made by a trustee. There was no obstacle to the plaintiff's obtaining immediate possession of the property. Nor was there a bona fide bailment of it for a valuable consideration, such as a hiring for a limited time. The unregistered agreement between West and Robinson, by which the former was to remain in possession of the property until it should be called for by the latter, comes within the very terms and spirit of the rule, instead of repelling its application. And if the legal conclusion of fraud needed confirmation, it would be found in all the material circumstances of the case,—the insolvency of the debtor, the gross inadequacy of the price, the total absence of competition, and the declarations of Robinson, calculated to prevent it, that he was purchasing in the property for the benefit of West's family. I deem it unnecessary to consider a question not yet decided by this court, whether a sheriff can acquire title by a purchase at his own sale. The title and possession of the plaintiff were fraudulent and void in regard to the creditors, the levy of whose executions was valid, however irregular the sale, and who have an
287 interest in the result of this controversy, arising out of the indemnifying bond, which guaranties against the consequences of the seizure as well as the sale of the property, and moreover warrants the title to the purchaser. My opinion therefore is, that the verdict of the jury was a plain deviation from the evidence, and that the circuit court erred in refusing a new trial.

The other judges concurring, the judgment was accordingly reversed with costs, the verdict set aside, and the cause sent back for a new trial.

288

*Tichanal v. Roe.

August, 1848, Lewisburg.

(Absent CABELL, P., and BROOKE, J.)

Patent for Land—Construction of Statute.—Construction of the act in 1 R. C. of 1819, ch. 86, § 40, p. 320, which declares that "no entry or location on any lands within this commonwealth, which have

*Tempus Regi Non Occurrit—Statutory Exception.—The principal case, *Gore v. Lawson*, 8 Leigh 458, and *Shanks v. Lancaster*, 5 Gratt. 110, are cited in *Levasser v. Washburn*, 11 Gratt. 578, for the proposition that there can be no adversary possession of lands against the commonwealth, and that no time

been settled thirty years prior to the date of such entry or location, and upon which quitrents or taxes can be proved to have been paid at any time within the said thirty years, shall be deemed valid;" and relinquishes any title that the commonwealth may be supposed to have thereto.

Same—Case at Bar.—In 1796, a person settled upon, cleared and improved a tract of land. In 1806, he conveyed a part of it by metes and bounds. And in 1834, the land embraced in this conveyance was granted by the commonwealth in conformity with a survey made in 1833. It appearing that the tenant claiming under the deed of 1806 had entered upon, settled and improved the land conveyed by this deed, and had, during the period he held it, paid the taxes thereon, and that a portion of this land was actually enclosed in 1796, when the tract of which it then formed a part was settled, HELD, it is competent for the tenant to connect his possession with the possession of those under whom he claims (the same never having been interrupted); and it thus appearing that the location on which the commonwealth's grant was founded was on lands which had been settled thirty years prior to the date of the location, and upon which taxes had been paid within that time, HELD farther, that the location was invalid, and that no title passed by the commonwealth's grant.

This was a writ of right brought in the circuit court of Harrison on the 10th of April 1835, by David Tichanal against John Roe. The mise was tried the 17th of October 1838.

At the trial, the tenant gave in evidence to the jury a deed bearing date the 4th of January 1806, from Thomas Bartlett to Jesse Bartlett, conveying by metes and bounds a tract of land in Harrison county, which was admitted to record in the court of the said county at June term 1806; and

289 also a deed bearing date the *7th of June 1806, from Jesse Bartlett and wife to John Roe for the same land, which was admitted to record in the same court at the same term. The said tenant proved by witnesses, that in the summer of 1806 he went upon said land, claiming it under his deed according to certain lines marked 1, 2, 3, 4, on the plat of the survey made under the order of court in the cause, and cleared a turnip patch within the said lines: that in the spring of 1807 he built a house about the middle of the area within these lines, and improved about 20 acres of the land: and that he has resided upon the land ever since, and claimed the whole of the area within the said lines, and paid the taxes thereof. In 1811, one Sanford Bartlett, now dead, shewed to Starling Bartlett, one of the witnesses, two white oak trees standing at figure 1, on the plat, and told the witness those two trees were a corner to his Sanford's land referred to in the tenant's deed; which trees were then

will bar her recovery, or that of her grantee, against the party holding, except only in the solitary case specially provided by the statute, of a settlement of thirty years accompanied by payment of taxes or quit rents within that time. See monographic *note*, on "Adversary Possession" appended to *Nowlin v. Reynolds*, 25 Gratt. 137.

marked. They are not now there, but there is a white oak stump standing where said trees stood in 1811. The surveyor who made out the plat of the survey in this case, proved that when he made the said survey, he began at figure 1, shewn to him by the witness Starling Bartlett as the place where said Sanford Bartlett had shewn him the two white oak trees as aforesaid, and he (the surveyor) ran out the courses and distances of the deed from Jesse Bartlett aforesaid, and did not find any corner or line trees marked on the lines from figure 1, to figure 4, on the plat. The tenant also proved, that the demandant had resided a near neighbour to the tenant ever since he the tenant first settled upon said land: that Thomas Bartlett before named lived upon a larger tract of land (which he got of Simpson) which included the tract of land in dispute, and had cleared, improved and cultivated a part of the land he lived on as early as the year 1796, and continued to

live on the same until some time after 290 he made *his deed to Jesse Bartlett: that the said Thomas Bartlett claimed the land in controversy as part of the tract on which he lived, but that the improvement made by the said Thomas Bartlett was not within the bounds of the land in controversy; and that in the year 1796 the said Thomas Bartlett fenced about one half acre of the land in controversy, including a lick called the Stone coal lick (claiming it as being part of his land), for the purpose of taking wild deer, and not for the purpose of cultivation. A witness for the tenant also deposed, that he thinks the tenant settled upon the land in controversy about 32 or 33 years ago (the witness was certain it was at least 31 years), and has continued in the actual possession thereof, claiming it as his own under the said deed. The demandant then gave in evidence a grant from the commonwealth of Virginia, bearing date the first of May 1834, whereby it appeared, that in conformity with a survey made on the 18th of March 1833, there was granted by the commonwealth unto David Tichanal a tract of land in Harrison county; and the demandant proved that the boundaries of the land so granted to him include the land in controversy, and also proved that in 1834 he entered the land so granted with the commissioner of the revenue for Harrison county for taxation, and has paid the taxes thereon ever since.

This being all the evidence in the cause, the demandant demurred to the same, the tenant joined in the demurrer, and the jury found a verdict subject to the opinion of the court upon the demurrer.

The question on the demurrer turned upon the act passed the 24th day of January 1798, declaring that "no entry or location on any lands within this commonwealth, which have been settled thirty years prior to the date of such entry or location, and upon which quitrents or taxes can be proved to have been paid at any time within the said thirty years, 291 shall be deemed valid; *and any title

which the commonwealth may be supposed to have thereto is hereby relinquished." Sess. Acts of 1797-8, ch. 10, § 1; 1 R. C. of 1819, ch. 86, § 40, p. 330.

The circuit court, under this act, held the evidence sufficient to maintain the mise joined on the part of the tenant, and entered judgment that he hold the tenement demanded against him to him and his heirs, acquit of the demandant and his heirs forever, and that he recover against the demandant his costs.

To this judgment a supersedeas was awarded.

The cause was submitted without argument, by William A. Harrison for the plaintiff in error, and George H. Lee for the defendant in error.

ALLEN, J., delivered the following as the resolution of the court:

The court is of opinion that on the demurrer to evidence, and as against the party demurring, the jury would have been justified in inferring, under the circumstances of this case, an actual settlement on and occupation of the land in controversy by Thomas Bartlett, as early as the year 1796; it appearing that as early as the year 1796 the said Thomas had settled upon, cleared and improved a tract of land, of which the land in controversy formed a part, and that he actually enclosed a portion of the land in controversy in that year. The court is further of opinion that as the tenant claims under a deed from said Thomas to his son Jesse, conveying to him the land in controversy by metes and bounds, and as the tenant has entered upon, settled and improved the land comprised within the boundaries described in the deed, and during the period he has so held the land has paid the taxes thereon, it is competent for the tenant to connect his possession with the possession of those under

whom he claims (the same *never having been interrupted), and to refer to the period at which the first settlement was made by Thomas Bartlett, to ascertain the date from which the time of the settlement should be computed. And it thus appearing that the said land in controversy was settled more than thirty years prior to the location which was the foundation of the demandant's patent, the land so settled by the tenant and those under whom he claimed was not liable to entry or location when the entry of the demandant was made; the title of the commonwealth having, by operation of law, been relinquished to and vested in the tenant prior to such entry. The court is therefore of opinion, for the reasons aforesaid, that the law upon the demurrer to evidence was for the tenant, and that there is no error in the judgment of the said circuit superior court. Therefore it is considered that the same be affirmed.

The other judges concurring, judgment affirmed.

Buckles v. Lafferty's Legatees.

August, 1848, Lewisburg.

(Absent CABELL, P., and BROOKS, J.)

[40 Am. Dec. 752.]

Principal and Agent—Purchase by Agent from Principal.*—The doctrine of the English chancery, that a person standing in the confidential relation of agent cannot, while that relation continues and before that confidence is withdrawn, make a purchase from the principal (that will bind the latter) of a subject within the scope of the agency, recognised and acted upon.

Same—Same—Legatees—Impeaching Purchase—Delay—Interest of Legatees—Ascertainment of—Resale—Upset Price—Proceeds of Resale—How Applied.—A testator (amongst other things) directed lands to be sold, and legacies to be paid out of the proceeds. The administratrix with the will annexed, on whom the power of making the sale was conferred, appointed an agent, who did the business of the *administration, and received the commissions allowed the administratrix. She was old, and had great confidence in him, and he acted in a great degree without her supervision, and practically conducted the administration without control. After several previous attempts by the agent to sell one of the parcels of land, it was put up at auction (as the sale bill announced) for the last time, and knocked down to a person requested by the agent to bid (for the purpose of promoting the sale) at 21 dollars 53 cents per acre, a higher bid than had been made on any previous occasion. Some persons present were willing to have given as much as 25 dollars per acre; and one of them, who was surprised when the land was knocked off and not to his bid, on the same day (immediately after sale) stated to the agent his willingness to have gone higher if necessary. A few weeks afterwards, the agent purchased the land from the administratrix by private contract

*Fiduciaries—Purchase of Trust Subject.—See footnotes to Bailey v. Robinsons, 1 Gratt. 4; Wellford v. Chancellor, 5 Gratt. 39.

Same—Same.—A purchase of trust property, made by one while holding the fiduciary or confidential relation, is voidable at the option of the *cestui que trust*, although the fiduciary may have given an adequate price, and gained no advantage whatever. For this proposition, the principal case is cited in Newcomb v. Brooks, 16 W. Va. 59, 68; Feamster v. Feamster, 35 W. Va. 13, 13 S. E. Rep. 57; Lewis v. Broun, 36 W. Va. 7, 14 S. E. Rep. 446; Tennant v. Dunlop, 97 Va. 241, 33 S. E. Rep. 620; Harrison v. Manson, 95 Va. 598, 20 S. E. Rep. 430; Ferguson v. Gooch, 94 Va. 9, 23 S. E. Rep. 397; Christian v. Worsham, 78 Va. 167; Howerly v. Helms, 20 Gratt. 7. See also, Carter v. Harris, 4 Rand. 204; Segar v. Edwards, 11 Leigh 213; Moore v. Hilton, 12 Leigh 1; Lane v. Black, 21 W. Va. 618; Anderson v. Fox, 2 H. & M. 245; McKey v. Young, 4 H. & M. 430.

†**Same—Same—Resale—Upset Price.**—In syllabus 5 of Howerly v. Helms, 20 Gratt. 1, it is said, that where land is resold, because the commissioner appointed by a decree in a partition suit to sell the land, became himself the purchaser, the usual and proper course is to offer the property at an upset price, to be fixed by the decree, according to the cases of *Buckles v. Lafferty*, 2 Rob. Rep. 292, and *Bailey v. Robinsons*, 1 Gratt. 4.

at 22 dollars per acre, and took a conveyance of it from her. This was in 1829. In 1836, a bill was filed by the legatees to rescind the sale and conveyance. The bill alleged that the proceeds of the sale were insufficient to pay the legacies, and it further alleged that most of the plaintiffs were nonresidents who had not been in Virginia since the sale, and that some were infants and femes covert. HELD. 1. A purchase by such an agent is in substance no better than a purchase from himself, and though it might bind him, is not binding on the legatees, unless ratified by them deliberately and on full information. 2. No such ratification appearing, the delay in this case to impeach the purchase (due allowance being made for the infancy of some and the nonresidence of others) does not deprive the plaintiffs of their right to the aid of equity. 3. The extent of the interest of the plaintiffs ought by a proper account to be ascertained, to the end that the purchaser may, if he thinks proper so to do, remove that interest by paying to the plaintiffs the parts unsatisfied of their legacies. 4. If the purchaser should not do this, the plaintiffs will be entitled to have the land reexposed to sale at a proper upset price, to be ascertained by debiting the purchaser with the profits of the land or with a fair annual rent therefor since his purchase, and crediting him first with his payments and interest on the same, and secondly with all his substantial and permanent improvements. The balance, with the addition thereto of a reasonable amount for the commission and charges of resale, is the sum at which the land should be set up, on a credit of 6, 12 and 18 months, bearing interest. 5. If the land and improvements should not sell for more than the upset price, the purchase should stand confirmed: if it should sell for more, then the

294 former sale should be vacated, the purchase money on the resale duly collected from the purchaser at the same, and a conveyance made to him, and the proceeds of the resale applied, 1st. to pay the charges of sale; 2dly, to pay the first purchaser the balance due him upon an account stated as before mentioned; and the surplus to the legatees, according to their respective rights.

Thomas Lafferty by his will bearing date the 20th of September 1824, after certain specific devises and bequests of lands and chattels, and a bequest to his wife Catharine Lafferty of one third part of the remainder of his personal property, devised as follows:

"Item 6th. It is my will that the balance of my property both real and personal, namely, the land joining line with the heirs of Coontz, Lucas, Selby and Remsburg, and the land joining line with Butler, Vendier and Ozburn, shall be sold by my executors, and after paying all my just debts, funeral expenses, &c. shall be disposed of as I shall now direct."

And then the testator directs that there shall be paid by his executors, out of the money arising from the sales of said lands and personal property, to his son George Lafferty 600 dollars, to his son Thomas Lafferty 500 dollars, to his son Samuel Lafferty 600 dollars, to his daughter Rebecca Harris 600 dollars, to his son David Lafferty

800 dollars, to his grandchildren the heirs of his son John Lafferty 400 dollars, and to his son William Lafferty 800 dollars. The 400 dollars bequeathed to the grandchildren he directed to be paid to them or their guardians, and appropriated to their education. And the 800 dollars bequeathed to his son William he desired should be put on interest by his executors, and the interest paid yearly to testator's wife Catharine Lafferty for the support of his son William. If William should live longer than his mother, he desired that Thomas Lafferty should take him, and directed his executors to pay Thomas the 800 dollars, which

Thomas was to put on interest, and apply the interest or so much of the principal as the necessities of William might require. Should William die before his mother, the will directed the executors to pay the 800 dollars to her for her own use, to dispose of as she might think best. If the two pieces of land directed to be sold, with the two thirds of the personal property, should not amount, after paying just debts and funeral expenses, to 4300 dollars, the aggregate of the sums given the legatees, the testator directed that they should lose in proportion to the sums given them; if there should be a surplus, he directed that surplus to be paid by his executors to his wife Catharine Lafferty, to will, use or dispose of as she might think best.

The county court of Jefferson refused to admit the will to record; but on an appeal from its judgment, the same was reversed by the circuit court on the 30th of August 1827, and the will recorded. Daniel Buckles, who alone was appointed executor, renounced the executorship. And thereupon Catharine Lafferty the widow qualified as administratrix with the will annexed, giving bond as such, with Daniel Buckles and others as her sureties, in the penalty of 1500 dollars.

On the first of April 1829, a deed was made between Catharine Lafferty as administratrix with the will annexed of Thomas Lafferty, of the one part, and Daniel Buckles of the other part, conveying to him, for the consideration of 2126 dollars 37½ cents, a tract of land containing 96 acres 2 roods and 26 poles, being the land described in the will as "joining line with the heirs of Coontz, Lucas, Selby and Remsburg." This deed was acknowledged before two justices of the peace the 15th of September 1829, and admitted to record in the court of Jefferson county on the 16th of September 1833.

At December rules 1835 a bill was filed in the circuit court of Jefferson, by the parties, or the representatives of the parties, to whom legacies were bequeathed out of the proceeds of the land, against the widow in her own right and as administratrix, and against Buckles, praying that the sale and conveyance to Buckles might be rescinded; that he might be compelled to account for the rents and profits of the land since it had been in his possession, and for all wood &c. sold and

taken therefrom; that the same might be offsetted against his advances; and that there might be a resale of the land, and other relief.

It was alleged in the bill, and admitted in the answer of Buckles, that the administratrix, upon her qualification, constituted him her agent, that he acted as such, and that he received the commissions allowed to the administratrix. As the respondent "did the business and bore the responsibility, he considered" (he said) "there was no sort of impropriety in the stipulation that he should be entitled to the commissions." But he positively denied that there was any thing fraudulent or improper in the sale, or that the price was inadequate. The transaction was stated by him to have been as follows. At a public sale by him as agent, on the 10th of March 1829, he had requested Mr. John T. Cookus to bid, for the purpose of preventing the land from going below its value; telling Cookus that if the land should be knocked off to him, he (the respondent) would take it off his hands. Cookus's bid of 21 dollars 52 cents per acre was the last and highest. He told Cookus, that if he was inclined, he might keep the land; but Cookus would not keep it, and the respondent felt bound to take it off his hands. Hearing afterwards that one of the Lucases had said he would have gone higher, the respondent, instead of claiming as the substitute of Cookus a right to the land at the price it was knocked off, purchased it by private contract from the administratrix on the 4th of April 1829, at 22 dollars per acre, which was not only more than the price at which it was knocked off, but more than had been offered for it on any previous occasion

297 when the attempt *had been made to sell it. And the respondent said he did not claim as purchaser from himself as agent, but as purchaser from Mrs. Lafferty, by private contract fairly made and for a full consideration. He exhibited with his answer the contract of the 4th of April 1829.

As to Mrs. Lafferty, the bill was taken for confessed.

Many depositions were taken by the plaintiffs to prove, and by the defendant to disprove, the charge made against him of actual fraud or covin. But the opinion of this court resting upon the relation of the parties, and upon the principle of law applicable to that relation, it is unnecessary to state more of the evidence than what follows.—It appeared that there had been an attempt to sell the land in the fall of 1827, when the highest bid was 19 dollars, and two other attempts in 1828, when the highest bid was about 17 dollars per acre: that Buckles declined letting the land go at either of those bids: that in March 1829 the sale bill announced that it would positively be the last sale; and that it was knocked down to Cookus (bidding for Buckles as stated in the answer) at 21 dollars 52 cents per acre. Some persons however, who were present, deposed that they

were willing at the time of the sale, if the land could not be got for less, to have given as much as 25 dollars per acre for it, and one of those persons seemed to have been surprised when he found that the land was knocked off and that it was not his bid. On the same day, immediately after the sale, he stated to Buckles his willingness to have gone higher if necessary. The evidence further shewed that Mrs. Lafferty was an old woman, who went from home very little; that she was not present at the attempt to sell in 1827 or 1828, or at the public sale in 1829; and that she had great confidence in Buckles, and entrusted the sales to him. It was alleged in the bill and not controverted by the answer, that the proceeds of the real and personal estate set apart by the testator for the 298 *payment of debts, funeral expenses and legacies, had fallen greatly short.

And the bill further alleged that most of the plaintiffs are "residents of the western country, and were so previous to said sale, and have not since been in Virginia, and had not, until very recently, known the facts, some of them being infants and *femes covert*." The parties plaintiffs were the administrator, widow and heirs of George Lafferty, one of whom was an infant suing by her next friend; the administrator, widow and heirs of Thomas Lafferty; the children and heirs of John Lafferty, some of whom were infants suing by next friend; Rebecca Harris, whose husband was joined as plaintiff pending the suit, and Samuel, David and William Lafferty; as to which last, upon a suggestion that he was a person of unsound mind, the bill was by consent amended so as to make him a plaintiff by his next friend.

The cause coming on to be heard the 16th of June 1838, the circuit court decreed that Buckles, on receiving back his purchase money with interest, should convey the land to Mrs. Lafferty to and for the uses in the will, and that he should account for the rents and profits of the same during his possession thereof.

On the petition of Buckles an appeal was allowed.

Arguments were submitted in writing (or printed) by Edmund J. Lee jr., Richard Parker, J. T. Dougherty and A. H. H. Stuart for the appellant, and by Green B. Samuels for the appellees. They were chiefly upon the question of fraud in fact.

The general principle that trustees, agents, and other persons acting in a confidential character are disqualified from purchasing, was not denied by the appellant's counsel. But they said this principle had not hitherto been acted on, in Virginia, with much strictness against executors. *Anderson &c. v. Fox &c.*, 2 Hen. & Munf. 245; *M'Key ex'or of Fuqua v.*

299 *Young*, 4 Hen. * & Munf. 430; 2 Rob. Pract. 65, 6. What chancellor Taylor spoke of in 4 Hen. & Munf. 430, as being common in his day, they said, continued

to be the practice, and was so generally understood to be admissible, that the maxim *communis error facit jus* ought to be applied. And they argued that even if the general principle before adverted to were to prevail in Virginia, it could not affect this case, because here Buckles purchased at a private sale from the administratrix, and not at a public sale made by himself. They further insisted that the legatees must have had the benefit of the purchase money which had been paid, and that their receiving the same and acquiescing in the sale for more than six years was sufficient to prevent the court from disturbing the transaction. Nor (they urged) could the circumstance of some of the plaintiffs being infants and others nonresidents help the case. For others of the plaintiffs were adults living here, prominent in the case in their own right and as the next friends of the infants, and the suit might have been brought in the same way as well six years ago as now. They were as well acquainted then with the grounds on which the bill rests as now. And the explanation of their delay was only to be found in the fact that land generally in the neighbourhood has since risen in value, and this particular tract is especially improved by judicious cultivation and by the industry of its present possessor.

STANARD, J., delivered the following as the opinion of the court:

The court is of opinion that the evidence in this case is insufficient to fasten on the appellant the charge of actual fraud or covin in the purchase of the land that belonged to the estate of Thomas Lafferty. The appellant, however, was confessedly the agent of the administratrix with the will annexed of Lafferty, on whom the power of making the sale was conferred by the will; *and, as the evidence shews, an agent acting in a great degree without the supervision of his principal, and practically conducting the administration without control. A purchase by such an agent is in substance not better than a purchase from himself, and though it might bind him, is not binding on the beneficiaries interested in the execution of the trust, unless ratified by them deliberately and on full information; and they, to the extent of their interest, are entitled to the benefit of any advance that may be realized on a resale. The court is further of opinion that no such ratification of the appellant's purchase appears in this case, nor does the delay on the part of the plaintiffs in the court below to impeach the purchase (due allowance being made for the infancy of some and the nonresidence of others) deprive them of their right to the aid of a court of equity.

The court is further of opinion that the plaintiffs, the legatees of Lafferty, were interested in the sale of the land and the proceeds thereof, to the extent only that those proceeds were necessary to pay their legacies; and if those proceeds, blended

with the other funds dedicated by the will to the payment of those legacies, were adequate to discharge them, the plaintiffs, having under the will no interest in the surplus, would have no interest, and consequently no title, to question the sale. The allegation of the bill that part only of those legacies had been paid not being controverted by the answer, the court was justified in proceeding on the assumption that part of the legacies remained unpaid; but as that gave to the legatees but a limited interest in cancelling the purchase of the appellant or having a resale, the extent of that interest ought by a proper account to have been ascertained, to the end that the purchaser, if his purchase was not effectually questioned by any other than the plaintiff legatees, might have the opportunity, if he thought proper to use it,

301 of removing the interest of those plaintiffs in, and consequently their right to, the experiment of a resale, by paying to them the parts unsatisfied of their legacies. If, on such an account, the purchaser should not avail himself of the opportunity to prevent the experiment of a resale, the plaintiffs would be entitled to have the land reexposed to sale at a proper upset price, to be ascertained in the manner following. An account should be taken, in which the appellant should be debited with the full amount of the profits of the land, or with a fair annual rent therefor, since his purchase, and credited, 1st. with the payments made by him for the purchase, with interest on those payments from the dates respectively at which they have been made available to the legatees, and 2dly, with all the substantial and permanent improvements made on the land since the purchase. The balance of such account, with the addition thereto of a reasonable amount for the commission and charges of resale, is the sum at which the land on a resale should be set up, on a credit of 6, 12 and 18 months for equal instalments of the purchase money, with interest on those instalments from the day of sale. If the land and improvements should not sell for more than the upset price, the purchase heretofore made by the appellant should in all respects stand confirmed. If it should sell beyond that sum, then the former sale should be vacated, and the case further proceeded in by causing the purchase money on such sale to be paid, and a proper conveyance to be made to the purchaser, and the proceeds of sale applied, 1st. to pay the charges of sale; 2dly, to pay to the appellant the balance shewn by the said account to be due for purchase money and improvements; and the surplus to the legatees of Lafferty, according to their respective rights. The court is consequently of opinion that the decree of the circuit superior court is erroneous. It is therefore adjudged, ordered and decreed that the

302 said decree be reversed, and that the appellees pay to the appellant the costs expended in prosecuting his appeal in this court. And the cause is remanded to the

circuit superior court, for further proceedings according to the principles above declared.

Note by the reporter.—The leading cases upon the principal question in this are *Whelpdale v. Cookson*, 1 Ves. sen. 9; 5 Ves. jun. 683; *Fox v. Meckreth* and others, 2 Brown's C. C. 400; 2 Cox 320; 4 Brown's Par. Cas. 358, (Tomlin's ed.) and *The York Buildings Company v. Mackenzie*, 8 Brown's Par. Cas. 42, (same ed.). The last two decisions were in the house of lords, where the subject underwent the ablest discussion; a discussion in which light was obtained from the writers upon the civil as well as from the judges of the common law, and the doctrine traced back to its original source. "It is," said the counsel for the York buildings company, (p. 63, 4.) "the constitution of nature itself, and is as old as the formation of society, and of course it must be universal. It proceeds from nature, and is silently received, recognized and made effectual wherever any well regulated system of civil jurisprudence is known. The ground on which the disability or disqualification rests is no other than that principle which dictates that a person cannot be both judge and party. No man can serve two masters. He that is entrusted with the interest of others cannot be allowed to make the business an object of interest to himself, because, from the frailty of nature, one who has the power will be too readily seized with the inclination to use the opportunity for serving his own interest at the expense of those for whom he is entrusted. The danger of temptation, from the facility and advantages for doing wrong which a particular situation affords, does, out of the mere necessity of the case, work a disqualification; nothing less than incapacity being able to shut the door against temptation where the danger is imminent and the security against discovery great, as it must be where the difficulty of prevention or remedy is inherent to the very situation which creates the danger. The wise policy of the law has therefore put the sting of a disability into the temptation, as a defensive weapon against the strength of the danger which lies in the situation." The doctrine is laid down in like general terms by the chancellor of New York in two recent cases, *Van Epps v. Van Epps*, 9 Paige 241, and *Torrey v. The Bank of Orleans*, 9 Paige 663. He says in the last, "It is a settled principle of equity that no person who is placed in a situation of trust or confidence in reference to the subject of the

303 sale, can be a purchaser of the property on his own account." He adds, "In the recent case of *Greenlaw v. King*, decided in the court of chancery in England in January 1841, (5 Lond. Jur. 18,) lord Cottenham held that the principle was not confined to a particular class of persons, such as guardians, trustees, or solicitors, but was a rule of universal application to all persons coming within its principle; which is, that no party can be permitted to purchase an interest, where he has a duty to perform that is inconsistent with the character of purchaser."

The decisions of lord Eldon strongly support the rule. In *Ex parte James*, 8 Ves. 345, he said, "This doctrine as to purchases by trustees, assignees, and persons having a confidential character, rests much more upon general principle than upon the circumstances of any individual case. It rests upon this,

that the purchase is not permitted in any case, however honest the circumstances; the general interests of justice requiring it to be destroyed in every instance, as no court is equal to the examination and ascertainment of the truth in much the greater number of cases." On a subsequent day he said, (p. 348) "My opinion in this case is purely upon the principle."—"The principle is, that as the trustee is bound by his duty to acquire all the knowledge possible, to enable him to sell to the utmost advantage for the cestui que trust, the question what knowledge he has obtained, and whether he has given the benefit of that knowledge to the cestui que trust which he always acquires at the expense of the cestui que trust, no court can discuss with competent sufficiency or safety to the parties." "The courts have said, it is better for the general interests of justice that in some cases a loss should be sustained by a cestui que trust, than a rule should be established which would occasion loss in much more numerous cases."

Lord Eldon must be understood here as alluding to a case in which the confidential relation still continues. For in *Ex parte Lacey*, 6 Ves. 686, he had said, the rule does not preclude the trustee from bargaining that he is no longer to act as such. "The cestui que trusts may," (he observed) "by a new contract, dismiss him from that character; but even then, that transaction by which they dismiss him must, according to the rules of this court, be watched with infinite and most guarded jealousy; and for this reason, that the law supposes him to have acquired all the knowledge a trustee may acquire; which may be very useful to him, but the communication of which to the cestui que trusts the court can never be sure he has made, when entering into the new contract by which he is discharged." Again, in *Ex parte James*, 8 Ves. 353, adverting to *Fox v. Meckreth*, he states the question properly to have been, "whether a person who had a confidential situation previously to the purchase, had at the time of the purchase

304 "shaken off that character, by the consent of the cestui que trust freely given after full information, and bargained for the right to purchase." And in *Coles v. Trecothick*, 9 Ves. 364, he says, "A trustee may buy from the cestui que trust, provided there is a distinct and clear contract, ascertained to be such after a jealous and scrupulous examination of all the circumstances, that the cestui que trust intended the trustee should buy; and there is no fraud, no concealment, no advantage taken by the trustee of information acquired by him in the character of trustee. I admit it is a difficult case to make out, wherever it is contended that the exception prevails."

These doctrines have been recognized in many other cases in England: *Ex parte Bennett*, 10 Ves. 398; *Randall v. Errington*, 10 Ves. 437; *Morse v. Royal*, 12 Ves. 873; *Sanderson v. Walker*, 13 Ves. 601; *Downes v. Glazebrook*, 3 Meriv. 207; *Woodhouse v. Meredith*, 1 Jac. & Walk. 223, and *Rothchild v. Brookman*, 5 Bligh N. S. 190. And they have also been approved and sanctioned by many of the courts in this country: in New York by chancellor Kent, as well as by the present chancellor, *Davoue v. Fanning*, 2 Johns. Ch. Rep. 52; *Hawley v. Cramer*, 4 Cowen 734; by chancellor Desaussure of South Carolina in *Butler &c. v. Haskell*, 4 Desauss. 706; by chief justice Marshall in *Teakle v. Bailey*, 2 Brock. 52; by the supreme court of the United States in *Wormley v. Wormley*,

9 Wheat. 421; and by this court in *Carter & Co. v. Harris*, 4 Rand. 204, and *Segar v. Edwards* and wife, 11 Leigh 213, as well as in the present case.

In the present case, it could not be said that the relation of the principal and agent had been changed; that the confidence in the agent had been withdrawn. And as strict a rule was applicable as that laid down by lord Eldon in *Gibson v. Jeyes*, 5 Ves. 271. He there said, "An attorney buying from his client can never support it, unless he can prove that his diligence to do the best for the vendor has been as great as if he was only an attorney dealing for that vendor with a stranger. That must be the rule. If it appears that in that bargain he has got an advantage by his diligence being surprised, (putting fraud and incapacity out of the question) which advantage, with due diligence, he would have prevented another person from getting, a contract under such circumstances shall not stand."—"From the general danger, the court must hold that if the attorney does mix himself with the character of vendor, he must shew to demonstration (for that must not be left in doubt) that no industry he was bound to exert would have got a better bargain." And the court in the present case might properly conclude, as lord Eldon did in that, "Therefore, without imputing fraud, a general principle of public policy makes it impossible that this bargain can stand."

305 *Calwells v. Shields & Somerville.

August, 1843, Lewisburg.

(Absent CABELL, P., and BROOKE, J.)

Judgments—What Constitutes—Record of Judgment Confessed—How Far Evidence Aliunde Is Admissible to Show the Action and Power of Attorney to Confess—Case at Bar.—On a motion for award of execution against three obligors in a forthcoming bond, one of whom is principal and the other two are sureties, the entry upon the record states that as well the plaintiffs came by their attorney, "as the defendant M." (the principal) "in his proper person, and the other defendants by their attorney, and the said defendants acknowledge judgment." In the same entry (after the judgment) is the following: "And the plaintiffs by their attorney here in court release to the defendants 183 dollars 60 cents, and agree to stay execution of this judgment until the first day of the next term." On a bill in equity by the sureties, claiming a discharge on the ground that the agreement to stay was without their consent or knowledge, it is alleged that the sureties did not appear by an attorney at law, but by an attorney in fact; that the power under which the attorney acted did not authorize him to confess judgment

with stay of execution; and that in fact he never consented to such stay, but the agreement for the stay was with the principal alone. The power of attorney is in these words: "We authorize J. M. to confess judgment for us and in our name, on a delivery bond in favour of S. & S. executed by us on the 18th November 1840;" and is signed and sealed by the three obligors. **Held**, 1. That the entry must be taken altogether, and regarded as the record of a judgment between the parties upon the confession of the defendants therein, with the condition of a stay of execution. 2. That it not appearing from that record whether the sureties appeared by an attorney at law or an attorney in fact, evidence aliunde is admissible for the purpose of proving that they appeared by an attorney in fact, and to shew the authority under which he acted. 3. That the power of attorney under which the attorney acted did authorize the confession of judgment with stay of execution. 4. That parol testimony is not admissible to prove that so much of the entry as relates to the stay of execution was without the consent of the said attorney: *dissentiente STANARD, J.*

On the 28th of September 1839, Fleming B. Miller and William B. Calwell executed an obligation to Shields & Somerville for 3000 dollars, payable nine months after date.

On the 9th of the same month, a deed of trust was made between Miller of the first part, James Calwell jr. of the second, and William B. Calwell of the third part, whereby, after reciting that William B. Calwell was surety in the bond executed by Miller to Shields & Somerville, that Miller was indebted to William B. Calwell 1000 dollars by bond, and that William B. Calwell was the endorser with Miller on a note of William Ross for 3000 dollars, due the Farmers bank of Virginia at Lynchburg, Miller conveyed to James Calwell jr. sundry slaves and horses, and his furniture and farming utensils, in trust that if Miller should pay the said bonds, and indemnify and save harmless William B. Calwell from liability on his said endorsement, then all right and title in and to the property should cease and determine in James Calwell jr.; but if Miller should fail in any of these engagements, and William B. Calwell should be compelled to pay the bond to Shields & Somerville, or the debt to the Farmers bank, or the debt of 1000 dollars should be unpaid at its maturity, then it should be lawful for James Calwell jr. to sell by public auction, after three months notice, all or any part of said property, for the full and adequate indemnity of William B. Calwell for the money he might have paid upon the debts aforesaid, and the payment of the bond to William B. Calwell.

On the first of May 1840 another deed of trust was made, between Miller of the first part, James Calwell jr. of the second, and William B. Calwell and Henry B. Calwell of the third part, whereby, after mentioning the same endorsement and bonds, and another bond of 750 dollars to William B. Calwell, and after mentioning that Henry

***Records—Conclusiveness of.**—Courts of record speak by means of their record, and the record imports in itself such uncontrollable credit and verity that it generally admits of no averment, plea or proof to the contrary. *Perry v. McHuffman*, 7 W. Va. 308, citing *Calwells v. Shields*, 2 Rob. 305. See also, citing the principal case for this proposition, *Craig v. Sebrell*, 9 Gratt. 134; *Ins. Co. v. Barley*, 16 Gratt. 385; *Richardson v. Jones*, 12 Gratt. 56; *Richardson v. Donehoo*, 16 W. Va. 718.

Judgments by Confession—Power of Attorney.—See monographic note on "Judgments by Confession" appended to *Richardson v. Jones*, 12 Gratt. 58.

B. Calwell is the security of Miller in a note to John Callaghan, one to Matthew W. Pettigrew, and one to Joel W. Flood, the same property and ten head of cattle were conveyed to James Calwell jr., upon trust that if Miller should pay off the debts due to William B. Calwell when they should become due, and should pay off the debts due to Sheilda & Somerville and to the Farmers bank, so that William B. Calwell should be entirely absolved from all liabilities for the same, and should also pay off the said debts for which Henry B. Calwell was surety, so as to absolve him from all liability for the same, then all the right and interest conveyed to James Calwell jr. should cease and determine. But if Miller should fail in any or all of these engagements and obligations, then it should be lawful for James Calwell jr. to sell at public auction, (the day and place of sale being advertised publicly for 3 months) at the request of either the said William or Henry, so much of the said property as would pay the said bonds due to William B. Calwell, and also all the money which he might have been required to pay either to Sheilda & Somerville or the Farmers bank, and also pay to Henry B. Calwell all money which he might be required to pay to Callaghan, Pettigrew or Flood.

Default being made in the payment of the bond to Sheilda & Somerville, they instituted an action thereupon in the circuit court of Greenbrier, and on the 21st of October 1840 obtained judgment against the obligors. A writ of fieri facias on the said judgment went into the hands of Joel M'Pherson deputy for John Mays sheriff of the county of Greenbrier, and on the 18th of November 1840 he took from Miller and William B. Calwell a forthcoming bond with James Calwell as surety, which recited the execution as amounting to 3344 dollars 77 cents. This bond being forfeited, M'Pherson took from the obligors the following writing:

"We authorize Joel M'Pherson to confess judgment for us and in our name, on a delivery bond in favour of Sheilda & Somerville, executed by us on the 18th November *1840. Witness our hands and seals this 10th day May 1841.

F. B. Miller, [L. S.]
W. B. Calwell, [L. S.]
Jas. Calwell. [L. S.]"

After this it was discovered that by mistake of the clerk the fi. fa. issued for interest from the 2d of June 1839, instead of from the 2d of June 1840, and therefore there was an excess included in the forthcoming bond of 180 dollars (the interest for one year) and the sheriff's commission of 2 per cent. thereon, being 3 dollars 60 cents, amounting together to 183 dollars 60 cents.

On the 15th of May 1841, the following judgment was entered:

"John N. Sheilda and Robert B. Somerville, merchants and partners trading under

the firm and style of Sheilda & Somerville, plaintiffs, against

Fleming B. Miller, Wm. B. Calwell and James Calwell, defendants.

"On motion for award of execution on a forfeited forthcoming bond, taken by virtue of an execution sued out of this court on the 27th of October 1840, in the name of the plaintiffs against the defendants Fleming B. Miller and William B. Calwell.

"This day came as well the plaintiffs by their attorney, as the defendant Miller in his proper person, and the other defendants by their attorney, and the said defendant acknowledge judgment for the sum of 6689 dollars 54 cents the penalty of the said bond, besides the costs by the plaintiffs about their motion in this behalf expended. But this judgment is to be discharged by the payment of 3344 dollars 77 cents with legal interest thereon from the 18th of November 1840 until *paid, and the costs. And the plaintiffs, by their attorney, here in court release to the defendants 183 dollars 60 cents with interest thereon from the 18th day of November 1840 till paid, and agree to stay execution of this judgment until the first day of the next term of this court."

On the 18th of August 1841, William B. Calwell, by a writing under his hand and seal endorsed on the deed of the 9th of September 1839, assigned and transferred to the president and directors of the bank of Virginia at Buchanan, for value received, his right and interest in and to the property conveyed in the said deed, and all benefit thereof. And on the same day he united with Henry B. Calwell in making a similar assignment on the deed of the first of May 1840 for their benefit. Afterwards, to wit, on the 21st of August 1841, a formal deed was executed between Miller of the first part, John S. Wilson of the second part, and the president and directors of the bank of Virginia at Buchanan of the third part, whereby Miller conveyed the same property, to secure the payment of two bonds to the said bank, in which William B. Calwell and Henry B. Calwell were joined with him. And at the foot of this deed two other writings were executed, one by William B. Calwell and Henry B. Calwell, bearing date on the same day with the deed, whereby they declared that the deed was executed with their privity and consent, and they released and transferred all their right and title to the property thereby conveyed; and the other by James H. Calwell, bearing date the 23d of August 1841, stating, that by direction of the parties, he transferred and assigned to the president, directors and company of the bank of Virginia such legal title as was vested in him by virtue of the deed of trust for the benefit of William B. Calwell and Henry B. Calwell.

In January 1842, William B. Calwell and James Calwell filed a bill to restrain proceedings against them on *the judgment of Sheilda & Somerville,

setting forth that William B. Calwell was surety of Miller in the original judgment, and James Calwell was surety of Miller and William B. Calwell on the forthcoming bond, and alleging, that to the agreement for the stay of execution on said judgment they were neither parties nor privies; that it was entered into without their knowledge or consent; that they have been informed and believe it was entered into by the plaintiffs with Miller in consideration of a waiver by Miller of an error in the execution on which the forthcoming bond had been taken, which probably rendered the bond invalid; that Miller had no authority of any kind to make any such agreement for them; that the power of attorney given to M'Pherson only authorized him to confess judgment for them, and in point of fact M'Pherson did not in any manner assent to said agreement for them or in their behalf. They charged expressly, that the agreement was completed between Miller and the plaintiffs without the assent of them or either of them, directly or indirectly given, either by themselves, or any one in any manner authorized or empowered to give such assent for them, and they insisted that by the agreement they, as the sureties of Miller, were released from all liability to pay the debt.

Sheilds & Somerville, in their answer, set forth the tenor of the judgment, as it appeared by a transcript thereof exhibited with the answer. And they stated they were informed by Alexander P. Eskridge esquire, their attorney at law, that the arrangement made was in fact with the knowledge of all the parties interested, or of those authorized to act for them; that Miller acted in the matter not only for himself, but as the known and authorized agent and attorney both of William B. Calwell and James Calwell; that Miller, for himself and as such attorney, objected in the first instance to the rendition of any judgment on the forthcoming bond,

311 because *of the mistake of the clerk in issuing the execution, (taking the ground that in consequence of that mistake the execution and bond were liable to be quashed); that, to obtain a judgment at that time against any of the obligors, he was compelled to agree to stay the execution of the judgment until the ensuing term of the court; and that after this agreement, and in consequence of it, judgment was confessed by Miller for himself and as attorney for the other obligors, and the agreement was entered of record. The answer then proceeded as follows:

"That Miller has been in the habit of acting as attorney for the Calwells since the commencement of his practice in the county of Greenbrier, is, these defendants are informed, a well known fact. He has so acted in their cases generally, and with their knowledge and approbation; and having so acted in other cases, the attorney aforesaid of these defendants regarded him as their attorney and treated with him as such in this case. It is well known, that ac-

cording to the practise in the courts of this commonwealth, no warrant of an attorney is produced to sustain the action of an attorney in any particular case, but when a gentleman has obtained a license to practise in the courts of this commonwealth, and has been admitted to practise in any particular court, it is enough for him to appear as the attorney for any party to a case in that court. In this case the defendants are informed by mr. Eskridge, not only that mr. Miller appeared as the attorney of the Calwells to manage this case for them, but that he has frequently appeared as their attorney in other cases, as before mentioned; and his authority to appear in cases as their attorney, and manage the same for them, has not been denied. It is wholly unnecessary to enquire whether an attorney at law is authorized to make an agreement on behalf of his clients for a stay of execution. For even if it be conceded that

312 Miller had no greater authority *from the Calwells than that of their attorney, (which would be conceding a great deal more than ought to be conceded) and even if it be also conceded that the authority of an attorney at law does not enable him to make an agreement for a stay of execution, these concessions would avail the complainants nothing, for the plain reason that Eskridge had no other authority than that of an attorney at law, and the rule must work both ways. If Miller, as the attorney at law for the Calwells, was unauthorized to make an agreement for a stay of execution which would bind them, Eskridge, as attorney at law for these defendants, was equally unauthorized to make an agreement for a stay of execution which would bind these defendants; and if the agreement was not binding on these defendants, no argument is necessary to shew it can avail the complainants nothing."

The defendants farther stated "that M'Pherson was present in court, knew of the agreement between Miller and Eskridge at the time it was made, and not only did not object to it, but approved it;" and the answer continued as follows: "So far from an unqualified and unconditional judgment being confessed by M'Pherson as attorney in fact, the fact is (as these defendants are informed) that neither M'Pherson nor Miller would confess the judgment, or agree to confess it, unconditionally; but on the contrary, the mistake of the clerk in issuing the execution was pointed out as a matter which vitiated the execution and bond, and there would have been no confession of judgment either by M'Pherson or Miller, except for the agreement aforesaid to stay the execution. That agreement having preceded the confession, the confession was an assent to the agreement," even if the confession were made by M'Pherson.

The defendants then referred to the two deeds of the 9th of September 1839 and first of May 1840, and said, that Miller having failed in paying off his obligation to them,

it became lawful for James Calwell jr. at *the request of William B. Calwell, to sell at public auction so much of the property conveyed as was necessary to satisfy the debts secured; but instead of causing such sale to be made, the said assignments, deed of trust and other writings of the 18th, 21st and 23d of August 1841 had been made. And they insisted that "if indeed William B. Calwell had the power to divert the property conveyed by Miller to secure the debt due to these defendants, from the purposes for which it was conveyed, and appropriate it to other debts, the exercise of such a power must deprive him of all right to the relief sought by the bill."

Eskridge, who had been the attorney for Sheilds & Somerville, deposed as follows: "When the motion for a judgment was about being made, Miller came to me, and remarked that he should move to quash the bond and execution in the case, as Mr. North (the clerk) had issued the execution for one year's interest more than it ought to have issued for; and called my attention to the bond upon which the suit had been brought. Upon examining the bond and execution, I discovered that a mistake had been made; and then told Mr. Miller I would postpone the motion to a future day of the court. On the day on which judgment was rendered, an arrangement was made with Miller, (acting, as I supposed, not only for himself but as counsel for the Calwells,) by which the defendants were to confess judgment, and I, on behalf of the plaintiffs, was to release the excess of interest, and to stay the execution until the first day of the succeeding term of the court. I believed when the arrangement was made, that Miller had full power and authority to make it on behalf of all the defendants. I would not have made such arrangement unless I had believed all the defendants were to be bound by it." On answer to a question by the counsel for Sheilds & Somerville, he said, "Mr.

314 Miller *would not have consented, as I understood, to a judgment on the bond without a stay of execution. It was considered, as well as I recollect, both by Mr. Miller and myself, that the parties would be placed in the same situation at the then succeeding term, as if the delivery bond and execution had been quashed and new execution issued. My impression was that Miller, throughout this transaction, was acting as an attorney for the Calwells, and for himself as a party concerned. My reason for this impression is, that I have known Miller, since he has practised in Greenbrier, acting as the attorney for the Calwells in all their cases, and in the arrangement made by him he assumed to act for all the defendants, and I did not think, as a member of an honourable profession, he would assume to act where he had no authority." In answer to another question he said, "I would not have made an arrangement with Miller alone, nor would I have entered into any agreement to stay the

execution, to which the defendants Calwells were not assenting by their attorney or agent; and if I had not firmly believed that Miller had the power as attorney to make the arrangement to stay the execution and confess the judgment, I would have made no arrangement with him."

On the other hand, Mr. Miller (who was objected to by the counsel of Sheilds & Somerville as incompetent) deposed as follows: "Before a motion for judgment was made upon the bond, I had discovered the error in the execution, and indicated it to Mr. Eskridge; upon whose motion the case was docketed and continued. Upon examination he admitted the error, and suggested a confession of judgment with stay of execution and correction of the error. To this I at once assented, confessed the judgment for myself, and have no recollection of any thing else that occurred about it. I did not see Mr. M'Pherson confess the judgment, nor had I any conversation with him, that I can recollect, in re-

315 lation *to it. I am certain that I did not direct or control his action upon it in any way whatever, nor did I ever hear the record read, or see it, until late in the fall. I was neither the agent of the securities, nor did I in any way assume to be such. I was the principal debtor, and wanted time to pay the debt, and felt confident of my ability to do so at the time which the limitation gave me." In a subsequent part of his deposition he said, "I was in this case not acting as the attorney for the securities, nor did I assume to be such."

M'Pherson deposed as follows: "I was authorized by a paper writing, filed with the papers in the case of Sheilds & Somerville, to confess a judgment on a delivery bond for William B. and James Calwell, which I did in open court. I had no other power granted me. I did not consent to the stay of said execution. I was not consulted in relation to the stay, and further it was a matter with which I had nothing to do." In answer to a question he said, "I was not aware that there was any objection to the bond, until the bond was directed to be docketed; and was informed (as well as I recollect, perhaps on the same day, or during the court) by Mr. North, that it was in consequence of an error in him as clerk, and not in me as sheriff. I was apprized of the stay of execution shortly after the rising of the court, about the time I received my executions from the office, or perhaps during the court; I cannot say certainly."

Mr. North, in his deposition, said, that he did not recollect that any other counsel than Miller had appeared for William B. Calwell and James Calwell since Miller's removal to Greenbrier, except in one action of trespass against James Calwell: that Miller was the attorney for them in all cases against them in the circuit court of Greenbrier in which pleas have been put in, since some time in the year 1840; that the original judgment in favour of Sheilds & Somerville was an office

316 judgment, *no plea having been put in: that at May term 1841, Miller examined all or most of the delivery bonds executed by James Calwell and William B. Calwell: that after he had examined the delivery bond and the original judgment in the case of Shields & Somerville, he understood from him that he intended to resist the award of execution on the delivery bond, because of a variance between the judgment and execution: and that on proving the notice, the motion was docketed and continued. "A day or two afterwards," he said, "I was informed (I think by Mr. Miller and Mr. Eskridge the attorney for Shields & Somerville) that the matter had been arranged; that judgment was to be confessed on the bond, with a stay of execution until the next court." According to his recollection, "Mr. Eskridge, Mr. Miller and Mr. M'Pherson, or perhaps Mr. Miller and Mr. M'Pherson, came to the clerk's office, and confessed the judgment as entered on the record: F. B. Miller confessed the judgment in person, for himself; William B. Calwell and James Calwell, by Joel M'Pherson their attorney in fact."

There was, however, a manifest difference between the entry of the judgment in this case and the entries in other cases (in the same court at this and a preceding term) in which judgments were confessed for the Calwells by M'Pherson as their attorney in fact. For while the entry in this case, as it regards the Calwells, was in the form that would have been used if the confession for them had been by an attorney at law, the entries in the other cases were as follows: "This day came as well the plaintiffs by their attorney, as the defendants by Joel M'Pherson their attorney in fact, and thereupon the said defendants, by their attorney aforesaid, acting under a power of attorney under the hands and seals of the defendants, acknowledge judgment" &c. Copies of five judgments in this form were filed as exhibits.

317 *The cause was heard the 19th of October 1842, before Duncan, J., upon a motion by the defendants to dissolve the injunction: On consideration whereof, the court, for reasons stated in a written opinion, decreed that the injunction be dissolved. The following is an extract from that opinion.

"A record is truth in contemplation of law, and, in the language of lord Coke, 'imports in itself such incontrollable credit and verity that it admits of no averment, plea of proof to the contrary.' And this is rendered necessary from principles of public policy; for if the verity of the records of courts of justice could be questioned, there would be no end to litigation, and no security for titles to estates. Hardships may sometimes arise from the inflexibility of the rule, but it is much better that they should be endured, than to encounter the pervading and extensive mischiefs that would result from its relaxation. The rule is not of modern origin, but can be traced up to the earliest history of the common

law; and no instance, I believe, has occurred of any departure from it down to the present day. The record in the present case states that the defendant Miller in his proper person, and the other defendants by their attorney, appeared, and the said defendants [that is, the said Miller and the two Calwells his sureties] acknowledge judgment for the sum &c. We may here stop to enquire, whether it would be competent for either of these parties to deny the facts stated in the record, so far as I have quoted it; that is, could the defendant Miller be admitted to aver and prove that he did not appear in person and confess the judgment? Suppose he offered to prove an alibi, such proof would necessarily be by parol, by facts in pais: and how could such proof compare with a record, having the solemn sanction of a court of record? Or suppose that the plaintiffs (the Calwells) offered to prove that the attorney

who confessed the judgment was not 318 authorized *by them to do so: if there is any force in the decisions upon this question, ancient or modern, they clearly would not have the right. In 1 Salkeld 86, the court of king's bench decided, 'that an attorney's consent binds the client, though contrary to his express orders;' and in another case reported on the same page, chief justice Holt said, 'The course of this court is, where the attorney takes upon him to appear, the court looks no farther, and leaves the party to his action against him.' In a modern case decided by a learned judge of the federal court, in an action brought against two defendants upon a judgment rendered in a state court, the record shewed that both the defendants 'appeared by attorney.' One of them pleaded, that at the time of the proceedings he resided out of the state; that he had no notice of the proceedings, nor authorized any person to consent for him to the plea. There was a demurrer, and the court sustained the demurrer. This case presented the ground of an alibi, (according to the hypothetical case stated by me in the first proposition,) and in all respects is a much stronger case than the case of the plaintiffs; yet judge Washington decided it upon the broad ground, that a record imports in itself such incontrollable credit and verity, that it admits of no averment, plea or proof to contradict it.

"So much as it regards what may be technically called the judgment in this case. I am clear in the opinion that the plaintiffs are estopped by the record from denying that there was such a judgment, and that it was rendered upon their confession by their attorney.

"But in the argument it was contended with great force and plausibility, that the agreement to stay execution was an extrajudicial act of the parties; that it constituted no part of the judgment of the court: and that whilst they admit the full force of the rule that the records of the courts must be considered a verity, yet the rule only applies to the judicial action of

319 the court, *and cannot be expended to embrace mere private agreements, which might as well be made out of court, and with which the court had nothing to do. It seems to me that this reasoning cannot be sustained. A judgment by confession is always the result of agreement, and frequently of compromise and concession; and I have shewn that a judgment by confession cannot be questioned. And so in reference to any agreement in the progress of a cause. We have seen in the case extracted from Salkeld, that an agreement by the attorney to join issue on a plea, (which the court says was a hard plea,) against the express orders of the client, was binding on the client. Thus I have shewn by express adjudication, that the agreement of the parties entered upon the record, in relation to a cause depending in the court, is of as high a nature as the record of the action of the court itself. And how is it in the case of an agreement of this character, entered upon record after a judgment has been rendered? Suppose the plaintiff, by his attorney, were to enter upon the record satisfaction of a judgment; can there be any doubt that it would be binding upon the plaintiff? I think there could be none. And as to an agreement to stay execution, suppose the record had stated that the defendants had in proper person appeared and agreed to it; would they not have the same right to controvert the fact of their having appeared in person, as they would of an entry upon the record that they had appeared by their attorney? I can see no difference. The agreement to stay execution is as much a part of the record as the agreement confessing judgment, and being contemporaneous with it, must be looked upon as a part of the same transaction. And that an agreement entered upon record to stay execution has all the characteristics of a record, is clearly inferrible from the decision in *Eppes & others v. Randolph*, 2 Call

186. Under our statute of executions, 320 we know that a judgment *creditor must sue out execution within a year after the rendition of the judgment: yet in the case to which I have just referred, there was a stay of execution for two years from the time of rendering the judgment, and the court of appeals recognized the right to sue out execution after the expiration of the time to which the stay of execution extended, though more than a year had elapsed from the date of the judgment. And I apprehend that the defendant could not have been entertained on a motion to quash the execution; on the ground that the record of the agreement to stay execution was an estoppel upon him. Such, I have reason to believe, has been the uniform course of the courts on this subject. But if it were competent to the defendants to question the verity of the record as to the agreement by them, by their attorney, to stay execution, is not the right mutual, and cannot the plaintiffs contest that matter also, and say that their attorney

made no such agreement, or that he transcended his authority? Suppose the plaintiffs had caused execution to issue before the expiration of the stay, can there be a question that the court would have instantly quashed it, even if the plaintiffs had been full handed with proof that the attorney made no such agreement to stay execution, or if he did, that he transcended his authority? And if the argument of the plaintiffs here rest upon the ground that the general power of an attorney at law extends only to the prosecution or defence of an action, and that after judgment is rendered his functions cease, how will that proposition affect the parties here? The plaintiffs' attorney, it is supposed, had no right to enter into an agreement for a stay of execution, so as to bind them. If this is admitted, then the attorney for the creditors had no right to make the agreement, so as to bind them. Therefore the agreement to stay execution was binding on neither party: it must consequently be

a nullity, and the judgment would 321 stand as if no such *agreement had been made. Now the principle is well established, that it is not the mere fact of indulgence by a creditor to the principal debtor that will exonerate the sureties: the indulgence must be the result of a valid agreement between the creditor and his debtor, which would be enforced either at law or in equity. This principle has been so often decided, that a reference to the authorities is unnecessary. It is not pretended that there was any other agreement to stay execution, than that disclosed by the record; and that agreement, if not binding on the sureties, cannot be binding on the creditors.

"But it is contended that the attorney for the defendants, mentioned in the record, was Joel M'Pherson, the attorney in fact. The answer to this is, that the record does not so state it: and a record must always be proved by itself; nothing aliunde is admissible. The term attorney, used in the record, implies an attorney at law. But suppose it does comprehend an attorney in fact: non constat that the attorney in fact was Joel M'Pherson; it may have been another: and non constat that the letter of attorney was the same filed in this cause; there may have been another: and to go into the enquiry would be to subvert the rule I have just stated, that a record must be proved by itself, and admits of nothing aliunde. Suppose, however, that the attorney mentioned in the record was Joel M'Pherson, and that his sole authority was the letter of attorney filed in this case: is the proposition a clear one, that he would have transcended his authority in making the agreement for the stay of execution? I doubt exceedingly whether it would not have been within the scope of his authority. He might have consulted thereby the interest of his principals. And when we take into consideration the fact, that they were actually in possession of a trust fund belonging to the principal debtor, intended

322 for their indemnity against this particular debt, in equity *they became principals themselves: therefore delay was precisely what they may have most desired. But I will not elaborate this branch of the case. My proposition is, that the record is conclusive against them."

William B. Calwell and James Calwell presented a petition for an appeal. In a note by Patton as their counsel, subjoined to the petition, it was insisted that the judge of the circuit court had misconceived the question in the case; that his opinion was founded on the supposition that the plaintiffs seek to impeach the verity of the record, when such is not the fact. "On the contrary," said the counsel, "they insist upon the verity of the record. They, by their attorney, did confess the judgment. They expected and intended that Miller their principal should also confess judgment. This, it is true, he did: but by an arrangement between him and the defendants in equity, without the knowledge or consent of the plaintiffs, or of any person acting for or authorized to act for them, he procured a stay of execution." The attorney of the plaintiffs made no agreement that the execution should be stayed; "they made no such condition. The record alleges no such thing. And the proof not only shews that neither they nor any one else for them (either attorney at law or attorney in fact) made any such agreement, but it shews who did make the agreement. The proof is clear beyond doubt, that Miller acted for himself, and for himself alone; and it is equally clear that the attorney in fact, who acted for the plaintiffs in confessing the judgment, knew nothing about the arrangement,—neither assented to it nor was consulted about it."

The appeal was allowed.

Price for appellants. There is no inconsistency between the allegations of the bill and the entry upon the record. The circuit court seems to have supposed that the entry of the appearance of the defendants 323 by their *attorney must mean that they appeared by an attorney at law. But that is not the necessary meaning of attorney: it means attorney at law or in fact, but does not necessarily mean either. And the record, therefore, does not estop the appellants from shewing by parol that the attorney meant was an attorney in fact. Not only did the circuit court hold it to work such estoppel, and to be conclusive proof that an attorney at law was meant, but it seems to have supposed that Miller must of necessity have been that attorney. For this supposition there is no foundation. The original judgment was by default, and no information is to be derived from that to shew who was the attorney in the case. Is it to be presumed that Miller, the principal debtor, had been employed as the attorney of the sureties? This would be a presumption not only without proof, but against proof: for Miller expressly dis-

claims acting for the Calwells; and M'Pherson proves that he confessed the judgment. But suppose the record is to be considered as importing that the defendants appeared by an attorney at law and confessed the judgment; how far have the plaintiffs advanced? Not a step. The record shews that the plaintiffs at law by their attorney, agreed to stay execution. This is the very thing complained of; and the record is therefore evidence in our favour. The record does not shew with whom the agreement was made; it certainly does not shew an agreement between the Calwells and the plaintiffs at law for the stay: and we may therefore well contend that the burthen is, by the record, thrown upon the plaintiffs at law, to shew that the Calwells were parties to or acquiesced in the agreement. At all events we may shew with whom the agreement was made,—that it was with Miller, without shewing the record untrue. So far as appears from the record, the agreement was voluntary; but we are authorized to shew by parol what was the inducement to it; and the proof shews

324 the consideration. *What then was the effect of the agreement? The cases all shew that if there be an agreement for delay between the principal and the creditor, by which the hands of the creditor are tied, the sureties are discharged. *Nisbet v. Smith* and others, 2 Bro. C. C. 579; *Rees v. Berrington*, 2 Ves. jun. 540; *Boulbee v. Stubbs*, 18 Ves. 20; *Samuel v. Howarth*, 3 Meriv. 278; *King v. Baldwin*, 2 Johns. Ch. Rep. 560; S. C. 17 Johns. R. 390; *Croughton v. Duval*, 3 Calf 69; *Ward v. Johnson*, 6 Munf. 6; *Hill v. Bull*, Gilm. 149; *Bennett v. Maule's adm'r*, Gilm. 305; *Norris v. Crummey &c.*, 2 Rand. 334; *Hunter's adm'r's v. Jett*, 4 Rand. 107; *Steele v. Boyd*, 6 Leigh 547. If there had been no agreement of record,—if there had merely been a paper written and filed containing an agreement between the plaintiffs and Miller that the execution should be stayed, it would operate to discharge the sureties. The entry on the record can have no other effect.

It will be contended on the other side, that Miller is incompetent. This case is like *Hill v. Bull* in this, that there, without Hite's deposition, there was other abundant testimony, and here the testimony is abundant without Miller's. But the objection there, that the witness was liable for costs, does not apply here. In *Steele v. Boyd* it was unanimously decided that the witness was competent; and the decision is in point. Here, though the Calwells got relief, Miller will not be released. His interest is equal on both sides. *Ware v. Stephenson*, 10 Leigh 155, is also a pertinent authority on the question of competency.

The objection that William Calwell was indemnified by Miller's deeds of trust, does not apply to James Calwell. But is there any force in the objection even as to William Calwell? What were the terms of the deeds? If William Calwell should

have the money to pay, the property might be sold. But unless he is bound, he will not have it to pay, and therefore the deeds cannot operate.

325 *Robinson for appellees. The ground of the bill is, that the agreement to stay, though made at the same time that the defendants confessed judgment, and entered of record contemporaneously with that confession, was without their knowledge or consent. Before enquiring whether the parol evidence sustains the allegation, the question arises how far such evidence is admissible to shew what took place in court? To what do we look "when the acts of a court of justice are the subject of evidence?" The answer is, that "courts of record speak by means of their records only." 3 Starkie on Ev. 1043. And the record imports in itself such uncontrollable credit and verity, that it admits of no averment, plea or proof to the contrary. 3 Tho. Co. Lit. 323; Field v. Gibbs &c., Peters's C. C. R. 155. This is not controverted; it is said that the appellants, so far from making any averment against the record, insist on its verity. If it had been averred that the Calwells had not appeared by attorney, and had not acknowledged the judgment, it is agreed that such averment would have been against the record, and no proof of it could have been received. But the argument is, that it is no contradiction of the record to aver that what is entered after the judgment, was without their knowledge and assent. An inspection of the record is sufficient to demonstrate the incorrectness of this proposition. The record states that the plaintiffs release to the defendants. This undoubtedly means, to all the defendants; to Miller, who had appeared in person, and to the other defendants, who had appeared by attorney. And if the release be to all the defendants, the agreement to stay the execution must be understood to be an agreement with all. It is only necessary to read the sentence, to see that this is its meaning. Agree with whom? Why, with the defendants, of course; with Miller, who had appeared in person, and with the other defendants, who had appeared by attorney.

326 No *other interpretation can fairly be placed upon the language, in the absence of words confining the agreement to Miller. Had it been understood to be with Miller alone, there would have been inserted, after the word "agree," the words "with the defendant Miller." Suppose, instead of one defendant appearing in person and the others by attorney, all had appeared in person or all by attorney, and the entry had stated that the defendants came in proper person or came by attorney, and had been in all other respects exactly as it is; surely the agreement must, in each of those cases, have been understood to be with all the defendants who appeared. And if it would have been so understood in those cases, it must be understood in the same way in this. The other side leave out of their consideration the word agree; they

would have the court to forget that this word necessarily imports that there is some person or persons with whom the agreement is made. If not,—if they admit that the import of the record is that there were two parties to the agreement, then the conclusion is irresistible, that, according to the record, the plaintiffs by their attorney constituted one party, and the defendants in person or by attorney the other party: just as in a case where a suit is entered dismissed agreed, the plaintiffs constitute one party to the agreement, and the defendants the other; or as in the case of articles of agreement between A. B. of the one part, and C. D. and E. F. of the other, where, it being said that A. B. agrees, the necessary conclusion would be that the agreement was with C. D. and E. F. both. The record in this case, then, must be considered as importing not only that the agreement was with the knowledge of all the defendants, but also that it was with the consent of all.

But it is not necessary that there should have been the express consent of all; it is enough if the agreement was with the knowledge of all. Now, as the record

327 *shews and the appellants admit that they appeared by attorney, this appearance charges them with knowledge of all the proceedings which took place in court in the case. And the agreement to stay being part of those proceedings, they cannot be heard to say that the agreement was without their knowledge. Suppose this were a case in which the defendants had all confessed judgment in proper person, the entry in other respects being as it is, and two of the defendants were hardly enough to aver that the agreement was without their knowledge; can it be imagined for one single moment that such an averment would avail? Surely not. For all that appears in the record is regarded as having been done publicly in court, and the parties who appeared are considered as present while there was action in the case, and privy to what was done. The agreement to stay, forming a part of the action in the case, must be held to have been made in their presence and with their knowledge, and no averment or proof could be received from them to the contrary. If this would be so in case all the defendants had appeared in person, how stands the case when one of them has appeared in person and the two others by attorney? The agreement to stay must, in this case, equally be held to have been made in the presence and with the knowledge of the attorney who appeared. It is in vain to urge that the agreement might in fact have been without the knowledge of the attorney. Either he must have known of it, or he might with reasonable care have known of it. With due attention, he could not have failed to acquire such knowledge, either on the day the proceedings occurred, or the next morning when they were read. 1 R. C. of 1819, ch. 69, § 46, p. 237. And if, for want of proper attention, he did not in fact obtain such

knowledge, though this may subject the agent to the action of his principals, it cannot relieve them from the consequences of that knowledge which he had or 328 might have had, *and which indeed they themselves might have had. In many cases, from considerations of policy, judicial proceedings affect third persons who are not parties to the case and have no actual knowledge of such proceedings, in like manner as if they had such knowledge. And in holding those who are parties to a case, and have appeared in it in person or by attorney, chargeable with knowledge of the proceedings in the case, the policy of the law is carried out with much more mildness, and upon grounds so reasonable that they cannot well be questioned.

In the view which has been presented, it is enough that the Calwells appeared by attorney: it is immaterial by what kind of attorney they appeared; and it can be of no avail to urge that the attorney who appeared for them was not authorized to agree to a stay of execution. Being authorized (as they admit) to appear in the case for them and confess the judgment, he was authorized at least to take notice of what took place, and inform his principals of it: it was his duty to take this notice and give this information; it must be intended that he performed this duty; and their failure to object at the time, or soon afterwards, is an acquiescence, in what was done. Moreover, the authority of an attorney to confess a judgment carries with it the authority to make arrangements as to the time of issuing the execution. If he may confess judgment with an immediate issue of execution, he may confess it also with a stay of execution. It may be said, there is a difference in this respect between the case of an attorney appearing under such a power as that to M'Pherson, and the case of an attorney having the general authority of an attorney at law. This is not admitted: but if there be such difference, this confession is entered in the mode in which it would have been entered if made by an attorney at law, and not in the mode in which judgments confessed at the

329 same term by *M'Pherson under powers of attorney were entered. It does not purport to have been confessed under a power of attorney, nor by him. But regarding the agreement as contemporaneous with the confession, it is wholly immaterial whether the confession was by an attorney at law or by an attorney in fact. For, as the authority under which the confession was made is unquestioned, the confession is binding, and must preclude the appellants from impeaching its validity because of any agreement which had been made before the confession, or which was made contemporaneously with it, as effectually as a confession made in that state of the case by the defendants in person would have done. Whether the attorney knew of the agreement to stay or did not know of it, the result will be the

same. If he knew of the agreement and still made the confession, he did that which he was clearly authorized to do, and this confession bound his principals. It must have been so, if the agreement to stay had been entered first, and the confession of judgment entered afterwards; and it cannot the less be so, because of the order in which the two things are entered, supposing them to be contemporaneous. On the other hand, suppose the agent, when he made the confession, had no knowledge of the agreement to stay, and suppose, if he had possessed this knowledge, he would not have made the confession, (both of which suppositions are unauthorized by the facts of the case;) still, if the agent might with reasonable care have known of the agreement, and injury has resulted to his principals from the want of this care, the whole effect of such want of care (as before remarked) is to subject the agent to the action of his principals.

These views are fully authorized by the general doctrines which pertain to the relation of principal and agent, and by the decision of judge Washington in the case of *Field v. Gibbs & Co.* before cited. Al-330 though he *held the plea in that case to be no bar to the action on the judgment, yet he entertained no doubt that if the plea was true, the attorney was liable for damages to the party for whom he appeared. That no injustice will be done by acting upon this doctrine in the present case, abundantly appears from the parol evidence, if it shall be found necessary to look into it. [The evidence of Eskridge and of North was here stated.] Well may Eskridge say, as he does say, that he did not think Miller, as a member of an honourable profession, would assume to act where he had no authority. He had a right so to think. No warrant of attorney is known among us. Counsel deal with counsel as authorized to act in those cases in which they assume to act. The courts act upon this supposition also. It is our usage, and a usage which must be respected when the objection is taken that the action of counsel does not bind the party for whom he has assumed to act. In this case, however, it cannot be doubted that Miller was authorized to appear and act for the Calwells in every case in which he thought proper to appear and act,—in this as well as the rest; and having acted for them as well as for himself, they are bound by his action. If they are not, still they are bound by M'Pherson's conduct. On the day the motion was directed to be docketed, he was aware of the objection taken to the bond. Yet he made no confession. He left Miller either to move to quash the execution and bond, or to make an arrangement with the plaintiffs' counsel, for the Calwells as well as for himself: and when Miller had made such an arrangement, M'Pherson united with him in making the confession. The confession thus made, being after that arrangement, was necessarily subject to it. He admits, too, that he was apprized of the

stay of execution; and as it was his duty to communicate this fact, we have a right to conclude that he did communicate it to his principals.

331 *The deposition of Miller, we insist, cannot be used by the Calwells, because he is interested that they should succeed. To Shields & Somerville he is only liable for the principal, interest and costs recovered by their judgment, not for damages pending the injunction of the Calwells. *Garnett v. Jones*, 4 Leigh 633. Neither is he liable to them for their costs in equity. But if the injunction of the Calwells be dissolved, they may recover over against Miller whatever they may have to pay, (including the damages pending the injunction, and the costs in chancery) and may also recover against him the costs of their suit or motion. See *Stowers adm'r of Bragg v. Smith's ex'x*, 5 Munf. 401. Miller is therefore more clearly incompetent than the principal obligor in *Riddle v. Moss*, 7 Cranch 206, or in *Jones v. Raine*, 4 Rand. 386. But if the deposition of Miller be looked to it is obvious, taking it in connexion with that of Eskridge, that Miller did not make the objection to the forthcoming bond merely for himself, but made it for the Calwells as well as himself, and that Eskridge's suggestion of the confession and stay was to Miller not only for himself, but as representing the other obligors; and that when Miller "to this at once assented," his assent was as well for the others as for himself. And all this may be so, though the confession of judgment for the Calwells was by M'Pherson.

The fact not being established that the agreement was with Miller alone, or that it was without the assent or knowledge of the sureties, it is unnecessary to enquire how far the agreement by the attorney for the plaintiffs is binding on them. This however is clear, that if the agreement had not been a part of the proceedings in court,—if there had merely been an agreement in pais between the plaintiffs' attorney at law and Miller that the execution should be stayed, such as was mentioned by the appellants' counsel, it would not operate to discharge the sureties; because "an attorney at law has *not, in virtue of his office, power to release the sureties of the principal debtor from whom he may have been employed to collect a debt, or to do any act which would have that effect, to his client's prejudice." This is the language of the court in *Givens v. Briscoe &c.*, 3 J. J. Mar. 533. And *Wilkinson & Co. v. Holloway*, 7 Leigh 277, so far as it goes, sustains the same doctrine.

But II. Upon what principle is it that William B. Calwell can come into equity and ask to be discharged, after he has diverted the property conveyed by Miller to secure him in respect to the debt due Shields & Somerville, from the purposes for which it was conveyed, and appropriated it to other debts of his own? If the case had been the other way,—if the deeds of trust

had been made in terms to secure the creditor, and the creditor had disabled himself from transferring the securities to the surety, he would be precluded from so much of his demand against the surety as the latter might have procured if the transfer had been made to him. The rule is one of equity, which regards the property as dedicated to the debt. On the other hand, where the property is conveyed in terms for the surety's benefit, the right of the creditor cannot be less. If a distinction in that respect be taken between a trust which is to cease and determine in case the surety be indemnified and saved harmless, and a trust which is only to cease in case the debt be paid, the answer is that these trusts are of the latter character. The terms are, that the right in the trustee shall cease if Miller shall pay off and discharge the bond. Certain it is, that when default was made by Miller in paying the bond, and William B. Calwell was required to pay it, and damnified by the suit of Shields & Somerville, from that moment a case existed in which there was a right to sell the property under the trust, and consequently in which the creditors had a right to be substituted to the then existing rights of the

333 surety. If the creditors had *then brought a suit to obtain such substitution, even if the sureties had become afterwards discharged by any act of the creditors, the creditors might yet be substituted to that right of the sureties which had become perfect before such discharge. And it may be questioned whether, by any transfer of the surety, this right of the creditors is destroyed. But undoubtedly, if, in consequence of William B. Calwell being the cestui que trust on the face of the deeds, his power over the subject was complete, and the right of the creditors to charge the subject thereby lost, William B. Calwell can have no pretence to the equity which he claims. The very ground of this doctrine as to the effect of an agreement by the creditor to give time to the principal debtor is, that if no such time had been given, and execution could have issued at the suit of the creditor or at the suit of the surety, the debt might perhaps have been made out of the principal's property. And the surety is not in a condition to ask equity to give him the benefit of this doctrine, when that which the doctrine supposes may perhaps have resulted from the creditor's agreement, has been done certainly and directly by the surety himself; viz. diverting the debtor's property from the debt. The case is yet stronger when we find the property diverted to effect other objects of the surety.

Patton in reply. We concede that where the record is certain and unequivocal in its statements, it cannot be contradicted or disproved, except in certain cases upon the ground of fraud or mistake. But we do not concede that it is an estoppel as to all that counsel may think proper to infer. The sense in which lord Coke considers the record as importing such uncontrollable verity, appears by the next sentence, where he

says, "And if such a record be alleged, and it be pleaded that there is no such record, it shall be tried only by itself." 3 Tho. Co. Lit. 323. What is the reason on

334 *which the doctrine rests? Lord Coke assigns it, immediately after the passage just referred to. "The reason," he says, "is apparent; for otherwise there should never be any end of controversies." Even between the same parties, the record is not always conclusive as to what appears on it. *Seddon v. Tutop*, 6 T. R. 607. The cases upon this subject are collected in the opinions delivered in *Wood v. Jackson*, 8 Wend. 1. It is a part of the rule laid down by De Gray, chief justice, in the case of *The Dutchess of Kingston* (which is one of those cited, p. 18), that a judgment is not evidence of a matter incidentally cognizable, nor of a matter to be inferred by argument from the judgment. And so it is laid down by Lord Coke, that every estoppel "must be certain to every intent, and not to be taken by argument or inference," and that "every estoppel ought to be a precise affirmation of that which maketh the estoppel." 3 Tho. Co. Lit. 431. In the present case, the record is wholly ambiguous and uncertain as to the material facts. It shews that the acknowledgment of judgment for the Calwells was by an attorney; but who that attorney was, or whether an attorney at law or in fact, does not appear. It shews that the plaintiffs agreed to stay the execution; but with whom they agreed, whether with Miller, or the attorney for the Calwells, or both, or whether the agreement was voluntary or not, the record does not shew. And yet the court is asked to supply all these matters about which the record gives no information, upon the ground that the record is conclusive. If the construction of the entry contended for on the other side were a more probable one than it is, still it would be a complete answer, that the conclusion is only arrived at by ingenious, protracted and inferential ratiocination, and the record is no estoppel as to what is ascertained by argument and inference. And there is another rule of law which would preclude

the appellees from relying on the estoppel, if otherwise they *might have relied on it. They have not only answered as to the matter of fact, but have proceeded to take evidence in support of their allegations. The rule of law is, that if a party having a right to rely on an estoppel does not plead it, but merely relies on it as evidence, the truth of the matter may be proved. *Wood v. Jackson*, 8 Wend. 18; *Davis's adm'r v. Thomas &c.*, 5 Leigh 1; *Vooght v. Winch*, 2 Barn. & Ald. 662; *Trevivan v. Lawrence*, 1 Salk. 276; *Outram v. Morewood*, 3 East 346; *Stoughton v. Lynch*, 2 Johns. Ch. Rep. 210.

As to the matters, then, about which this record is claimed to be conclusive, it can only be evidence so far as it goes, liable to have its defects supplied by parol proof. Indeed, parol proof is not only admissible to supply defects, but may be received to shew

that what from the record, in the absence of evidence, would be supposed to be the fact, is not so. *Shelton and others v. Ward*, 1 Call 538; *Stolers adm'r of Bragg v. Smith's ex'x*, 5 Munf. 401.

Of what is the record in this case evidence? It shews, it is said, that the release was to the defendants. Does it follow that the agreement for a release was with the defendants? It was not only the interest but the duty of the plaintiffs' counsel to make the release, whether there was any agreement for it or not. As it regards the agreement to stay, there is nothing to shew that it was by contract with any person at all; it may have been voluntary, having no more of the nature of a contract than an entry of the plaintiff's agreeing to dismiss a suit in which there was no appearance by the defendant. But if not voluntary, what is there to authorize the inference that the agreement was with all the defendants, rather than with Miller alone? It seems to be supposed that in articles of agreement inter partes, every agreement by the party of one part must necessarily be considered to be with all those of the other part. This will be so or not, just as the articles

336 shew *or do not shew that the agreement was with all or only one of them. *Platt on Covenants* 130. Reference was also made to the entry of a suit dismissed agreed. Such an entry purports an agreement between the parties, because it states that the parties came by counsel, and by their agreement, or by their consent, the suit is dismissed.

But it is argued that because the record shews that the defendants came by their attorney, whether the agreement was with them or not, they must have known of it. In such a case as this, it is necessary that there should have been actual presence and actual knowledge by some persons who had authority to assent or ratify. If the Calwells had been personally present at the time of the agreement to stay the execution, and had made no objection to it, they would have been bound; but if they were not present and did not know of it, then, whether the agreement preceded or followed the judgment, they will not be bound. The argument that the attorney of the Calwells either knew of the agreement or might have known of it, will not avail. Suppose he did know of it, was it his duty or had he any right to object? He had a right to conclude that it was either voluntary, or with Miller alone, or with his clients; and neither way was he bound to object, or communicate the matter to his clients. If the attorney had interfered when the agreement was with Miller alone, and would have operated to discharge the sureties, well might it be said that he would be liable to the action of his principals. It was his duty not even to tell his clients, if by telling them he exposed them to the danger of having the liability revived.

It is thought just that relief should be denied to the appellants, and they left to pursue either Miller or M'Pherson. Pur-

sue Miller for what? Was he their attorney? Does the record shew it? The attorney at law who is to bind the party must be the attorney on record.

And here the record gives the name of no attorney. Ought the appellants to pursue M'Pherson? What was his authority and what was he to do? He could do nothing which he was not expressly authorized to do. Livermore on Agency 69, 94, 97, 103; Paley on Agency 150. And he has done nothing but what he was authorized to do. Would it not be as just to send the appellees in pursuit of Eskridge? If loss is to be inflicted on any agent in this transaction, on whom should it be but him?

(Here Patton examined the evidence, and argued that the agreement to stay the execution was with Miller alone; that he was not the attorney for the Calwells in this case, never told Eskridge he was acting for them, and in fact did not act for them, but left M'Pherson to confess the judgment as their attorney; that though Miller had said, in the most explicit terms, he was their attorney and would confess judgment if there was a stay of execution, they would nevertheless not be bound, if he had not done what he said he would do; that though he had assumed to act for them, yet if he so assumed in a case in which they had another attorney, and in which he was not authorized to act for them, this would not bind them, Kennedy v. Gibbes, 2 Desauss. 380; but that in truth he had not assumed to act for them, for Eskridge's statement that he so assumed must be regarded not as a statement of a fact, but as his opinion upon the facts; that for this opinion Eskridge had no sufficient ground; that no authority to Miller to appear in this case could be implied from his appearing for the Calwells in other cases, Wolstenholm v. Davis, Freeman's Cas. in Ch. 289, especially as the Calwells, so far from leaving the matter open to him to appear or not, had constituted another attorney; and that if, upon the whole evidence, the court should regard the same as balanced, the burthen of proof was on the appellees, and they must fail.)

338 *It seems to be supposed that Eskridge, who is directly interested, and against whom this very record could be used by his clients to charge him, is competent, and that Miller is not. (Robinson. There being no exception to the competency of Eskridge, that question is not before this court; there is an exception to Miller's deposition.) On what ground is Miller to be held incompetent? It is objected that he is liable to the sureties for costs; and the cases of Riddle v. Moss, 7 Cranch 206, and Jones v. Raine, 4 Rand. 336, are referred to. Those cases do not apply. The costs there were a necessary incident to the obligation of suretyship. The costs here are not of that character; the surety comes here upon a new and independent ground. But the point is adjudged in Steele v. Boyd, 6 Leigh 547. That case shews that the principal is not liable for the costs in this

case. And if not liable for costs, he cannot be for damages. The damages are a penalty only upon the party who prosecutes the injunction. Miller is clearly not liable for them to the creditor. Nor is he liable to the sureties. In Stowers adm'r of Bragg v. Smith's ex'x, 5 Munf. 401, the damages and costs were incurred in resisting the liability in consequence of the contract of suretyship; and that case is therefore clearly distinguishable from this, in which the controversy is (as before mentioned) upon new and independent ground.

To the proposition in Givens v. Briscoe &c., 3 J. J. Mar. 533, as applied to the case in which it is found, there is no objection; but it can have no application here. In Norris v. Crummey &c., 2 Rand. 334, judge Green puts the case of a judgment with an entry of record staying the execution, as one of the modes by which sureties may be discharged. The principle is, that whatever an attorney does in the course of a suit is binding on his client: the client is bound although the attorney was ex-

339 pressly prohibited from doing it. Huston v. Mitchell, 14 Serg. & Rawle 307. This subject is well considered in Denton & others v. Noyes, 6 Johns. R. 26.

In concluding upon the main question, Patton referred to Skip v. Hue, 3 Atk. 91; Eyre v. Bartrop, 3 Madd. C. R. 221, am. ed. 120; Chichester's adm'r v. Mason, 7 Leigh 244, and to the other cases cited by Price as to the effect of an agreement between the principal and creditor by which the hands of the creditor are tied. He referred to them to show not only the general principle, but also the manner in which it had been applied.

II. He examined the validity of the objection that William B. Calwell was not entitled to relief because he had released property conveyed for his benefit. He argued, that both deeds were in terms for the purpose of reimbursing William B. Calwell what he might have paid; that though there might have been a power to sell if he had required it, still he was not bound to require a sale; that if the creditors had in terms given William B. Calwell a release, they could not afterwards come into equity and complain that property previously conveyed for his benefit, had, after the release, been discharged; that here William B. Calwell had been discharged as effectually as he could be by a deed of release, and being discharged, had done no wrong in giving up property conveyed for his indemnity, there being no obligation, either legal or moral, to hold on to the property for the benefit of the creditors.

BALDWIN, J., delivered the following as the opinion of a majority of the court:

The court is of opinion that the entry in the proceedings mentioned on the motion for award of execution upon the forthcoming bond, must be taken altogether, and regarded as the record of a judgment between the parties, upon the confession of the defendants therein, with the condition

of a stay of execution: that it not
 340 *appearing from that record whether
 William B. Calwell and James Calwell appeared by an attorney at law or an attorney in fact, evidence aliunde is admissible for the purpose of proving that they appeared by an attorney in fact, and to shew the authority under which he acted: that the power of attorney from said Calwells to Joel M'Pherson, under which the latter acted, did authorize the confession of judgment with stay of execution, appearing from said record: and that parol testimony is not admissible to prove that so much of said entry as relates to the stay of execution was without the consent and concurrence of said M'Pherson. It is therefore considered that the decree be affirmed with costs.

STANARD, J., dissented. He was of opinion that the injunction should be perpetuated, so far as it restrained proceedings as to James Calwell.

Browning v. Headley.

August, 1848, Lewisburg.

(Absent CABELL, P., and BROOKE, J.)

[40 Am. Dec. 755.]

Husband and Wife—Assignment of Wife's Choses—Reversionary Interest—Rights of Assignee.*—The rule laid down by sir Thomas Plumer in *Hornsby v. Lee*, 3 Madd. C. R. 16, American ed. 352, and *Purdew v. Jackson*, 1 Russ. 1, and afterwards confirmed by lord Lyndhurst in *Honner v. Morton*, 3 Russ. 65, 3 Cond. Eng. Ch. Rep. 298, that where a husband assigns personal property in which his wife has a reversionary interest expectant on the death of tenant for life, and the wife and the tenant for life both outlive the husband, the wife is entitled by survivorship in preference to the assignee, recognized as correct by ALLEN, J. Contra, opinion of GIBSON, C. J., in the case of *Siter & another*, 4 Rawle 471-483.

Same—Same—Present Interest—Rights of Particular Assignee.†—The rule laid down in *Lord Carteret v. Paschal*, 3 P. Wms. 197, 2 Brown's Par. Cas. 341 10, (Tomlin's ed.) and *Bates v. Dandy*, 2 Atk. 207; 1 Russ. 83, note, and 3 Russ. 70; 3 Cond. Eng. Ch. Rep. 801, note, that where the wife has a present interest in personal property, and the husband makes a particular assignment of that interest for valuable consideration, though the

thing assigned be no farther reduced into possession during the coverture, the title of the particular assignee will be good against the wife surviving, recognized as correct by judges ALLEN and STANARD.

Same—Same—Same—Effect of Divorce—Case at Bar.—

A testator directed his personal estate to be divided into shares, of which he gave one share to his daughter. The daughter's husband, for valuable consideration, assigned all the interest to which he was entitled, in right of his wife, in her father's estate. After this assignment, an act of assembly was passed by the legislature of Kentucky, in which state the husband and wife had become domiciled, declaring the marriage contract between them forever dissolved so far as respects her, and restoring her to all the rights and privileges of an unmarried woman, and further declaring her entitled, out of the estate of the husband, to receive alimony agreeably to the laws of the commonwealth. On a bill by the assignee against the testator's executor, the husband, and the wife, to recover her share of her father's estate, HELD by two judges, 1. That by the act of divorce, the right of the wife to her choses in action not reduced into possession during the coverture, is placed on the same ground as if the husband had then died; but, 2. That the interest of the wife in the subject assigned being a present, not a reversionary interest, and there being a particular assignment of that interest for valuable consideration, the title of the assignee is good against the wife.

Same—Same—Wife's Equity to Settlement;—Amount

Pat. & H. 29, 81. See foot-note to *Dold v. Geiger*, 3 Gratt. 98.

Same—Same—Reduction into Possession by Assignee.

—The principal case is cited in *Williams v. Sloan*, 75 Va. 149, for the proposition that if the husband assigns the chose the assignee must reduce it into actual possession, and even then the assignee takes it subject to all the equities against the assignor, one of which is the wife's equity to a settlement out of the chose in action so assigned.

In *Henry v. Graves*, 16 Gratt. 249, it is said: "A husband's assignment for value of his wife's legal chose in action is good against the wife, because it is equivalent to a reduction into possession. Having a right to reduce it into possession, he, in effect, does so, when he receives value for it. By selling it, he agrees to reduce it into possession for the benefit of the vendee; and a court of equity, in such a case, considers that as done which is agreed to be done. But the husband's assignment of a vested remainder of the wife has not that effect: because, not having then, a right to reduce the property into possession actually, he cannot do it constructively. The assignment for value by the husband, places the assignee in the husband's shoes, and invests him with the husband's contingent interest, which will become absolute in the assignee, when and as it would have become absolute in the husband if he had made no assignment. See *Browning v. Headley*, 2 Rob. R. 370, and the cases cited."

‡**Same—Wife's Equity to Settlement.**—See foot-notes to *James v. Gibbs*, 1 Pat. & H. 277; *Dold v. Geiger*, 2 Gratt. 98, and monographic note on "Husband and Wife" appended to *Cleland v. Watson*, 10 Gratt. 159.

The principal case is cited in *Poindexter v. Jef-*

***Husband and Wife—Assignment of Wife's Choses—Vested Remainder—Rights of Assignees.**—The principal case is cited in *Henry v. Graves*, 16 Gratt. 248, and *Taylor v. Yarbrough*, 13 Gratt. 192, for the proposition that where a wife has a vested remainder in personal estate expectant on the death of a tenant for life, and both the wife and tenant for life outlive the husband, the wife is entitled, by right of survivorship, to the interest or remainder, not only against the representatives and general assignees of the husband, but even against the particular assignee for valuable consideration.

†**Same—Same—Rights of Special Assignee.**—The principal case is cited in *Dold v. Geiger*, 2 Gratt. 112; *Williams v. Sloan*, 75 Va. 148; *Sherrard v. Carlisle*, 1

of Settlement.]-The doctrine of the english chancery, that where an absolute equitable interest is given to the wife, the court will not permit the husband to recover it without making a provision for the wife, and that the husband's assignee, whether general or particular, takes his interest subject to the same equity, recognized as binding upon the courts of this state. And the doctrine carried farther than it was carried in *Beresford &c. v. Hobson &c.*, 1 Madd. C. R. 361, american ed. 199, by sir Thomas Plumer, who considered that the court in no case had given the whole to the wife; not even "where the husband has left his wife and gone abroad."

Same-Same-Same-Same-Case at Bar.-A testator directs his estate other than slaves to be turned into money, and directs the slaves and money to be divided amongst ten legatees, any advances to whom are to be deducted from their respective shares. The husband of a daughter assigns her interest for valuable consideration. On a

342 bill by the assignee *against the executor, the husband, and the wife, it is insisted by the wife that a provision should be made for her. No evidence is taken by the assignee to shew that the whole interest would be more than an adequate provision. But it appears that the penalty of the executor's bond was only 80,000 dollars, and the consideration for the assignment only 1500 dollars; that the husband had received from the testator upwards of 2000 dollars in money and property, and that he had squandered the same, and then abandoned his wife, leaving her with 6 or 7 children in a destitute condition, in consequence of which she obtained a divorce. **Held**, under the circumstances, no enquiry before a commissioner is necessary, to ascertain what would be a reasonable provision for the wife; that it is plain the whole residue coming from her father's estate will not be more than an adequate provision for her; and the bill should be dismissed.

Same-Same-Consideration of Assignment-Evidence.-A share of the proceeds of a testator's estate being bequeathed to a feme covert, and her husband having assigned the same, a bill is filed by the assignee, which alleges that the assignment was in consideration of 1500 dollars. The executor and the feme both answer, but the answers do not deny the consideration, or call for proof of it; and the deed of assignment purports on its face to be in consideration of 1500 dollars. It seems, there being no such denial or call for proof, the deed is prima facie evidence of the allegation in the bill. *Accord. Scott & wife &c. v. Gibbon & Co. &c.*, 5 Munf. 86.

William Headley, then of the county of Frederick in Virginia, made his will bearing date the 4th of April 1836, by which he desired that all his estate except slaves should be sold, his funeral expenses and just debts be paid, and the remainder of his estate (including the slaves as well as money and bonds) be divided into ten equal shares, of which he gave one share to his

fries, 15 Gratt. 308; *Sherrard v. Carlisle*, 1 Pat. & H. 27.

§**Same-Same-Amount of Settlement.**-The principal case is cited in *Poindexter v. Jeffries*, 15 Gratt. 372; *Dold v. Geiger*, 2 Gratt. 105; *Sherrard v. Carlisle*, 1 Pat. & H. 31; *Adams v. Medsker*, 25 W. Va. 182.

daughter Winifred Browning. The nine other shares were given to other children, and the children of deceased children; and then there was this clause: "And whereas I have at sundry times made advances to my sons and sons in law, as will more fully appear by reference to instruments of writing now in my possession; now it is my will and desire that the advances alluded to shall be accounted for and deducted from the legacy or share of such son or son in law, 343 or from the children *of such, in case they are the legatees of such share or legacy." The will was admitted to record in the court of Warren county on the 28th of April 1836, and on the 29th of the same month Newton Headley qualified as executor, giving bond and security as such in the penalty of 30,000 dollars.

Winifred Browning was the wife of Joseph Browning; and he executed the following deed:

"Know all men by these presents, that I Joseph Browning, in consideration of the sum of 1500 dollars to me in hand paid by Willis Browning, have transferred and assigned, and by these presents do transfer and assign unto the said Willis Browning, his executors, administrators or assigns, all the interest to which I am entitled, in right of my wife Winifred Browning, in the estate of William Headley deceased, together with all the benefit and advantage that may be obtained thereby. And I do hereby grant to the said Willis Browning, his executors, administrators or assigns, full power to recover the same for his or their use. As witness my hand and seal this 31st day of May 1836.

Joseph Browning, [Seal.]"

On the day this deed bears date, it was acknowledged before two justices of the peace, and on the 2d of June 1836, it was admitted to record in the office of Warren county court.

Upon the application of Newton Headley executor of William Headley, the court of Warren county, on the 22d of December 1836, appointed commissioners to divide the testator's slaves among his legatees, and make report thereof to the court.

The report of the commissioners bears date the 2d of January 1837. It states that they had made the division, and mentions the part of Winifred Browning as follows: "Lot No. 5, allotted to Winifred Browning; viz. Rachel, Elias, Fanny and Eleanor (12 months old). Receives from lot No. 9, 27 dollars 50 cents."

344 *On the 9th of January 1837, "an act for the benefit of Winifred Browning," which had been passed by the general assembly of the state of Kentucky, was approved by the governor of that state. It declares "that the marriage contract heretofore existing between Joseph Browning and his wife Winifred Browning is forever dissolved, as far as respects said Winifred, who is hereby restored to all the rights and privileges of an unmarried woman, and that she be entitled, out of the estate of the said

Joseph Browning, to receive alimony agreeably to the laws of this commonwealth."

On the 23d of February 1837, the report of the division of the slaves was returned to the court of Warren county, examined by the court, confirmed, and ordered to be recorded, (there being no exceptions thereto).

Soon afterwards, to wit, on the 31st of March 1837, a suit in equity was commenced in the circuit court of Warren by Willis Browning. The bill, after setting forth the will of William Headley, and the legacy thereby given to Winifred Browning, alleges that Joseph Browning the husband of the said Winifred, on the 31st of May 1836, by a deed of that date, "for and in consideration of the sum of 1500 dollars," transferred and assigned to the plaintiff all the interest to which he was entitled, in right of his wife Winifred, in the estate of the said William Headley. It states, that though the testator left no debts that need procrastinate or embarrass the distribution of the estate, the executor refuses to assign to the plaintiff the share of the said state to which he is entitled by virtue of the said assignment from the said Joseph, and that there has been as yet no valid division of the negro property left by the said testator. The bill makes Newton Headley as executor, and also in his own right as legatee, Joseph Browning, Winifred Browning and the other legatees, defendants, and

prays for a legal division of the slaves
345 belonging to the *estate, a full distribution of the said estate, and the payment and transfer to the plaintiff of the share to which he is entitled by virtue of the said assignment.

The executor answered, admitting it to be true that the testator died seized and possessed of a considerable estate, real and personal, and stating, that in the spring of 1836, he made sale of the land and perishable estate upon a reasonable credit, and since then there had been a division of the slaves, which he was advised was legal; that the money for the sales had not yet been all collected; but that he had delivered nearly all the shares of the slaves to the parties entitled. Winifred Browning's share of the slaves he admitted was still in his possession. He had refused to deliver it to the plaintiff, he said, for several reasons, which he was advised were good. 1st. He was informed by his sister Winifred, that she had obtained from the legislature of Kentucky, where she resided, an act of divorce; and she had given him formal notice not to pay her portion of her father's estate to the said Joseph, or any one. 2dly. He was advised that before said Joseph Browning or his assignee could recover the property of the said Winifred, the court would compel him to make a settlement upon her of a reasonable portion; and the respondent was gratified that he had it in his power to secure to his unfortunate sister a part at least of the property her father had bequeathed to her; for, he added, her husband had spent all

that the testator gave to his daughter during his life, and for some years past had wholly abandoned her. 3dly. He found among the testator's papers a note given by Winifred Browning to her father in 1829, for a sum of money advanced to her by the testator, and he was advised the same should be deducted from her share. The note was filed as an exhibit. It was for 1000 dollars with interest from the 1st of January 1829; but on it were endorsements of credits, stating a balance to be due of 20 dollars 25 cents.

346 *Winifred Browning also put in an answer, which was sworn to before a justice of the peace of Kentucky in July 1837. She said, it was her misfortune to have become the wife of Joseph Browning, but for many years past they had not lived together; that during their residence together, she was doomed to suffer much distress of mind and body, in consequence of the bad temper and habits of her husband; that while they were living in the state of Kentucky, the said Joseph Browning finally abandoned her to the adversities of the world, and returned to Virginia, where they were first married; that he is still in Virginia, and she still lives in Kentucky, and is compelled to struggle alone for the support of herself and family; that being thus abandoned by her husband, she applied to the legislature of Kentucky, and obtained from that body an act of divorce. She says she is informed, with much pain and regret, that her late husband embraced the earliest opportunity after the death of her father, to wrest from her the pittance of property that had been bequeathed to her by her father, and to sell and transfer it to strangers. She is advised that the divorce put an end to his marital rights, and that neither he nor his assignee has any authority to call upon the executor of her father for the legacy bequeathed to her; and she insists that the plaintiff cannot recover it in this suit. In any event, she asks the court not to lend its aid to the plaintiff without first securing to her a suitable portion.

On the part of the plaintiff, depositions were taken (to prove the deed of assignment) of a person acquainted with the handwriting of Joseph Browning, and of the justices before whom the deed was acknowledged.

On behalf of Mrs. Browning, the deposition of Newton Headley her codefendant was taken in April 1838. He deposed that Browning and wife moved to Kentucky 10 or 12 years before; that she came to 347 Virginia *in the latter part of 1835 or the first of 1836, and he came in April 1836; that she returned to Kentucky with him in the spring or summer of 1836, soon after which time he left his family and had not since been with them; that he left 6 or 7 children with his wife, and left them in a poor and destitute condition; that he had been idle and extravagant, and treated his family very harshly; that he had received upwards of 2000 dollars of William Headley

in money and property, all of which he had squandered before he left his family; and that the witness had advanced Browning and wife 100 dollars, which he thinks was before he heard of the plaintiff's claim.

Browning, though served with process, filed no answer.

The cause came on to be heard before judge Smith the 30th of March 1839. On consideration whereof, the court, for reasons stated in a written opinion, decreed that the bill of the plaintiff be dismissed with costs. The following are extracts from that opinion:

"It appears there had been a bona fide change of residence by Joseph Browning and wife, from Virginia to Kentucky, and such residence in Kentucky had continued for 12 years previous to the act granting the divorce. Under such circumstances, I think it perfectly clear that the legislature of Kentucky had jurisdiction to pass the act in question, and that the divorce is valid. Indeed it is admitted to be so by one of the plaintiff's counsel; and I think it unnecessary to make any farther remark on that subject.

"The question then is as to the exclusive right of mrs. Browning to the legacy in question, founded on her having survived the coverture; the divorce having placed her claim on precisely the same ground on which it would have stood if Joseph Browning had died on the 9th of January 1837."

348 *(The judge first considered the effect of the order of court appointing commissioners to divide the slaves, and the proceedings thereon, and after coming to the conclusion that the plaintiff could not support his case on the ground of a reduction of the slaves into possession during the coverture, proceeded as follows:)

"We come now to the question whether mrs. Browning's right, based upon her having survived the coverture, is defeated by the assignment from Joseph Browning to the plaintiff.

"It is contended that the assignment was for a valuable consideration, and made at a time when the husband had the power to reduce the legacy into immediate possession; and the proposition is that such an assignment is equivalent to an actual reduction into possession, and defeats the wife's right of survivorship.

"In the case of *M'Mechin v. Heinzman*, in the court of Hardy, I had occasion to examine the authorities as to the effect of precisely such an assignment, in relation to the claim of the wife to a settlement; the coverture still existing, and the assignee applying to the court for a decree to enforce the payment of the wife's legacy to him. Upon a careful examination of the authorities, and especially *Earl of Salisbury v. Newton*, 1 Eden 370; *Jewson v. Moulson*, 2 Atk. 417; *Like v. Beresford*, 3 Ves. 506; *Wright v. Morley*, 11 Ves. 12; *Kenny v. Udall*, 5 Johns. Ch. R. 464; *Haviland v. Myers*, 6 Johns. Ch. R. 27; *Haviland v. Bloom*, 6 Id. 178. I was en-

tirely satisfied that according to authority, although there were some decisions to the contrary, the wife was clearly entitled to a provision out of the fund. It is admitted in his case that the wife is entitled to a settlement: the only question is as to her right of survivorship, the coverture being dissolved.

"The rule is that the husband is only entitled to such of the wife's choses in action as he may reduce into possession during the coverture.

349 *In the case of assignments by operation of law, as in the case of bankruptcy, and taking the oath of insolvency, it is well settled that the assignees stand in exactly the same situation, as to the choses in action of the wife, as the husband stood; and therefore in such cases the right of survivorship to the wife exists and must prevail, unless the choses in action be reduced into possession during the coverture, by the husband or his assignee. And the case of *M'Mechin v. Heinzman* was decided upon the ground that an assignment by the husband for a valuable consideration, although the property was immediately reducible to possession, stood precisely upon the same ground as an assignment by operation of law; that the husband by his assignment could not place the assignee in any other situation in relation to the wife's interest, than he himself occupied. And this principle, as I supposed, was applicable as well to her claim by right of survivorship, as to her equitable claim to a provision out of the fund during the coverture. Upon a reconsideration of the authorities, I am still of opinion that this is correct as a general rule. The only doubt I now have is whether the rule is not subject to some qualification. I had not adverted to any supposed distinction as to the subject matter of the assignment, or the terms in which it is made.

"I find, however, that a distinction has been taken in these cases. Judge Tucker in his commentaries, vol. 1, bk. 1, p. 118, (2nd edition) uses this language: 'But what is the effect of the assignment on the wife's right of survivorship, if the husband dies before the chose in action is reduced into possession? Here it is admitted that assignees of a bankrupt, &c. coming in by act of law, stand only in the husband's shoes, and of course the right survives to the wife, (1 Atk. 280; 1 Brown's Ch. R. 44, 50; 2 Dick. 492; 9 Ves. 87; 10 Ves. 578,) though there seem to have been some decisions the other way,

350 *1 P. Wms. 458; 3 Ves. 617. And so as to assignments by act of the husband; if of a general nature, the assignee stands in the husband's shoes, and the right survives to the wife. But an assignment of a particular chose in action for valuable consideration, is a complete disposition and reducing into possession.' He refers to *Newland on Contracts* 136-7.

"Newland, after revising the cases, says, 'It should seem that any assignment

by contract by the husband, of the above species of the wife's property,' (chose in action) 'if it be of a general nature, will not, though founded on a valuable consideration, bar the right of survivorship. For such an assignment places the assignee precisely in the same situation in which the husband stood. Upon that principle it was, that the former was obliged to make a provision for the wife out of her property. It appears to follow therefore as a necessary consequence, that such an assignee must also be liable to this right of survivorship. But this right will not prevail against the assignment by the husband, by contract for a valuable consideration, of a particular chose in action of the wife, or of a specific part of her equitable property of that nature. For such an assignment is considered a complete disposition of that property, and is equivalent to reducing it into possession.'

"A particular instance of a distinction between an assignment of a general nature, and of a particular chose in action, is given in the case of *Jewson v. Moulson*, 2 Atk. 417. A wife being entitled under the will of her father to the fourth part of his personal estate, her husband made an assignment to his creditor of all the share which in right of his wife he was entitled to in her father's personal estate. Per lord Hardwicke, 'This is not an assignment of a term of years, or a specific thing, but an assignment at once for all her fortune; and if I were to allow this practice to prevail, it would elude the care and caution of this court with respect to
351 infants; *for a husband then would have nothing to do but take up the money of a third person, and though neither he nor the lender knew exactly at the time what the fortune is, yet he may assign it over, and so defeat the care of the court entirely.'

"In the case of *Wiseman v. Mason*, 1 P. Wms. 459; (*Cox's note*), and *Pryor v. Hill*, 4 Bro. C. C. 139, the assignments were general, and it was held that the wife was entitled to a provision. It is true the question of survivorship did not occur in those cases, the husbands being still in life and the coverture existing: but being on the ground that the assignees were placed in the same situation in which the husbands would have stood, it would follow of course that the right of survivorship still existed.

"If therefore the distinction between a general and particular assignment does exist, and has the effect supposed, then the rule should be limited to cases of a general assignment. But if so, the right of *mrs. Browning* would not be affected by the limitation of the rule; for the assignment in this case is general, and almost in the very words of the assignment in the case of *Jewson v. Moulson*.

"These cases go strongly to sustain the correctness of the rule as to assignments of a general nature. As to the effect of an assignment of a particular chose in action for a valuable consideration, inasmuch as

that question does not arise in this case, I shall express no decided opinion upon it. Upon the whole, I am of opinion that in this case the right survives to the wife; and consequently the bill must be dismissed."

Willis Browning, by *William Green* esquire his counsel, presented a petition to the judges of this court for an appeal; from which petition the following is extracted:

"If it be conceded that the coverture was terminated by the divorce in question
352 as effectually as by death, *according to the judge's opinion, (as to which, however, see *Lottley's case*, *Russ. & Ryan* 237; *Tovey v. Lindsay*, 1 Dow's R. 117; 2 *Kent's Comm.* 99, 100,) and that the legal consequences of such a determination, in regard to the assignee's rights, are the same as if the husband were dead, (against which, however, a great deal might be said; and see 1 *Tucker's Comm.* book 1, p. 100,) still it does not follow that the assignee has no right to recover any thing by virtue of the assignment. Yet that is the proposition necessarily involved in the dismissal of the bill, and explicitly avowed by the judge. That the wife would be entitled to what is called her equity, that is, a settlement of some part of the property on her, according to the english authorities is clear; and at present it will not be controverted that she would be entitled to such a settlement in this case; although the supreme tribunal of this commonwealth has hitherto carefully avoided the adoption of those authorities. But still it does not follow that she is entitled, notwithstanding the assignment, to the whole subject in dispute. The judge himself admits, that in the cases upon which he relies, this question did not occur, because the coverture was in them still existing; but he supposes that the principles on which the wife's equity was allowed in those cases, lead to the conclusion that if the husband had been dead, she would have been entitled to the whole by survivorship. With submission, however, it would seem that there is a manifest fallacy in the argument. Numerous authorities shew that the assignee of a particular chose in action will prevail against the wife's right by survivorship; while, on the other hand, as many cases shew that her equity for a settlement will prevail against him. But not to go into a discussion of elementary principles, which would be out of place here, the case of *Earl of Salisbury v. Newton*, *Eden* 370, is in effect precisely the same with this case. There, as
353 here, the coverture was terminated:

*the assignee brought his bill against the surviving wife and others, to recover the choses in action which had been assigned; and instead of the bill being dismissed, it was decreed that the wife should have a settlement out of the property, and that the balance of it should be paid to the plaintiff. A distinction was thus made between her equity and her right by survivorship, which completely

answers the argument of the judge: the one prevailed and the other not, in one and the same case. And in other respects that case is also an authority in point. Whatever may be the distinction between a general and a particular assignment, the thing assigned in the present case was even less general in its character than in that of *Earl of Salisbury v. Newton*: for there the assignment was of all the wife's interest in her father's estate, which interest she might claim either under a deed or under a will, but not under both; and until accounts were taken, the election to take could not be determined. See also *Jewson v. Moulson*, cited from MS., 4 Ves. 524; *Purdew v. Jackson*, 1 Russ. 19, 20, and notes. The case of *Green v. Otte*, 1 Sim. & Stu. 250; 1 Cond. Eng. Ch. R. 125, appears to be a very strong authority against the claim of the wife to the whole, in consequence of the termination of the coverture by the divorce.

"It should be also observed, that there is a distinction between choses in action that accrue to the feme before coverture, and such as accrue afterwards and during the coverture. Over the latter the husband has a greater power of control than over the former. See *M'Neillage v. Holloway*, 1 Barn. & Ald. 218, and the cases cited in it. And there is the less reason for denying the right of the assignee, when it is considered that the release of the husband alone might have effectually cut off the interest of the wife forever, if such a release had only been made before the divorce took effect. See Bac. Abr. title Release, F. and cases *there cited. See also *Taliaferro & c. v. Taliaferro & c.*, 4 Call 93."

The appeal was allowed; and now the questions arising upon the record were fully argued.

Robinson for appellant. The opinion of the circuit court affirms, that though the assignment was for a valuable consideration, and made at a time when the husband had the power to reduce the legacy to immediate possession, it cannot place the assignee in any better condition than the husband would himself have occupied if there had been no assignment. This proposition, though plausible, is not sound. The law has been settled otherwise for more than a hundred years. The leading case is *Lord Carteret v. Paschal*, decided as early as 1734, and reported in 3 P. Wms. 197, and 2 Brown's Par. Cas. 10, (Tomlin's ed.) which has been followed by *Bates v. Dandy*, reported in 2 Atk. 207, and noted also in 1 Russ. 33,—by the *Earl of Salisbury v. Newton*, 1 Eden 373, and *Wright v. Morley*, 11 Ves. 12. There is a class of cases which may be relied upon on the other side, to wit, *Hornsby v. Lee*, 2 Madd. C. R. 16, American ed. 352, and *Purdew v. Jackson*, 1 Russ. 1. These are cases of a reversionary interest, in which, at the time of the assignment, there was an incapacity to make an actual reduction

into possession. We are told that when *Hornsby v. Lee* was decided, it was not acquiesced in, and was denied to be law. *Clancy on Married Women* 148; 1 *Roper on Property* 146. Sir Thomas Plumer, after reexamination in *Purdew v. Jackson*, decided as before, against the assignee of the reversionary interest. But it has never yet been decided that a bona fide assignment for valuable consideration, made by a husband to a third person, of a debt actually and presently due to the wife, does not divest in equity the title of the wife. This is the language of

355 **mr. justice Story on Cassell v. Carroll*, 11 Wheat 152. Sir Thomas Plumer himself, in adverting to the decisions as to the effect of an assignment of a present interest, while he says, "If it were now a new point, it would be difficult to understand how the assignee could be in a better situation than the husband himself," admits that "it is too late to consider this;" for, says he, "it is decided that an assignment for valuable consideration, being a disposition of the property, is sufficient to bar the right of the wife surviving." *Johnson v. Johnson*, 1 Jac. & Walk. 456. So the law is understood to be in England, by the writers who treat of the subject. 1 *Roper* 222; *Clancy* 121, 149. *Purdew v. Jackson* was decided after *mr. Roper's* work was published. In this case also sir Thomas Plumer recognizes the distinction between the assignment of a present right, which he says may be regarded as a kind of constructive possession, and the assignment of a chose in action not then capable of being reduced into possession, which cannot be construed as a reduction of the thing into possession. 1 Russ. 45, 59, 60. Whatever may have been considered the law in Virginia as to the husband's power to sell his wife's reversionary interests,* there does not seem to have been any question as to his power to make an effectual sale or assignment of her present interests. *Taliaferro & c. v. Taliaferro & c.*, 4 Call 93; *Wallace & ux. v. Taliaferro & ux.*, 2 Call 447; *Upshaw v. Upshaw & c.*, 2 Hen. & Munf. 389; 1 Tuck. Comm. 116. Chancellor Kent has examined the subject in *Shuyler v. Hoyle*, 5 Johns. Ch. Rep. 207, 210, and come to the conclusion that the husband may assign for a valuable consideration; and that the wife has 356 no right *by survivorship. There is, it is true, a material distinction between the case of assignees of a bankrupt or insolvent husband, taking his whole estate without reference particularly to the property of the wife, and the case of an assignment by the husband having refer-

*In this case it was not necessary for the counsel of the appellant to bring in question the decisions in *Hornsby v. Lee*, *Purdew v. Jackson*, and *Honner v. Morton*. In the case of *Siter* and another, guardians of *Jordan*, 4 Rawle 471-488, they are reviewed in an elaborate opinion by *Gibson, C. J.*, and the opinion expressed by him is opposed to them.—Note in Original Edition.

ence particularly to the property of the wife, and being of that property as distinguished from his. The last is a constructive reduction into possession; the former cannot be so considered. In the present case the assignment not only refers particularly to the wife's property, but is of a specific portion of that property. It is a particular assignment, like those in *Carteret v. Paschal*, *Bates v. Dandy*, *Earl of Salisbury v. Newton*, and *Wright v. Morley*.

So far, the case has been considered upon the supposition that, by the divorce, the claim was placed on the same ground as if Joseph Browning had then died; and it has been shewn that even in that case the assignee for valuable consideration would have been entitled to the subject assigned, and not the wife who survived. But is it clear that the divorce has the effect ascribed to it? The contract of marriage was made in Virginia: could it be dissolved by an act of Kentucky? If it could, on what ground could it be done? Is it that the parties had become domiciled in Kentucky? Can that ground be taken consistently with the reason assigned for the divorce, which is, that the husband had abandoned his wife, left the state, and gone to Virginia? The court will find the questions growing out of this state of facts to be full of difficulty. *Story's Conflict of Laws*, ch. 7, p. 168; 2 *Kent's Comm.* p. 106. They will find it doubtful, at least, whether it was competent to the legislature of Kentucky to pass any law affecting the rights of the husband, whose domicile was changed before the act passed. And accordingly the legislature of Kentucky seem to have desired not to exercise the jurisdiction as it respected him. The peculiar phrase-

357 ology *of the act seems to indicate this. To understand this act, it will be proper to examine the provisions of the general act of Kentucky regulating divorces in that state; *Statute Law of Kentucky*, vol. 1, p. 122. Here there was no such case as authorized the circuit courts to decree a divorce under that act: there was no abandonment for two years, nor was the treatment such as to endanger the wife's life. Hence the wife applied to the legislature. When they interfered, it is not reasonable to suppose that they intended to grant a divorce of a stronger character than would have been granted by the courts, had they acted. And the divorce granted by the courts does not appear to be an absolute divorce a vinculo matrimonii. Moreover, this particular act of divorce declares her entitled, of the estate of Browning, to receive alimony agreeably to the laws of the commonwealth. What those laws are, will be found in the 1st volume of the statute law, p. 121. The decree for alimony seems there not to follow, but to precede a divorce a vinculo matrimonii; p. 122, § 3. And this accords with the general principle, which is to allow alimony in case of a divorce a mensa et thoro, 1 *Black. Comm.* 441, 2; 1 *Tuck. Comm.* 98,

but not in the case of a divorce a vinculo matrimonii. The doctrine of the liability of a husband to alimony rests on the presumption of law, that by marriage the property of the wife vests in the husband, and that she is possessed of no property of her own. *Poynter on Marriage and Divorce*, p. 259, 60. It does not apply to a divorce a vinculo matrimonii, where the wife receives again such of the personal property which she had at the time of the marriage, as may not have been disposed of by the husband. 1 *Tuck. Comm.* 98. This then ought not to be regarded as a divorce a vinculo matrimonii; and if not so regarded, there is no foundation for the proposition that the choses in action, not reduced to possession before the divorce, are afterwards the property of the 358 *wife in like manner as if the husband had then died. For the divorce, to produce this consequence, must be a divorce a vinculo matrimonii. 1 *Tuck. Comm.* 978, "If a husband and wife are divorced a mensa et thoro, and a legacy is left to her, the husband may release it." *Bac. Abr.* title Release, F. vol. 6, of Lond. ed. of 1832, p. 624. The decision in *Green v. Otte*, 1 *Sim. & Stu.* 250; 1 *Cond. Eng. Ch. Rep.* 125, is a direct adjudication in favour of the validity of an assignment even of a reversionary interest, where the tenant for life died before the divorce took place.

[Stanard, J. Supposing the assignment to be held valid, will there not be a resulting question as to the right of the wife to a provision?] Though the court should think the english doctrine on that subject ought to prevail here, it would not prevent a reversal of the decree; the effect would merely be to send back the cause for an enquiry to ascertain what would be a reasonable provision.

Patton for appellees. It is not enough that there is a deed of assignment. The whole argument that the assignee stands in a better condition than the assignor, rests upon the ground that the assignment is for valuable consideration. And there is no proof of the fact that the assignment was for value, but ground to suspect it was a mere contrivance. Great care has been taken to adduce witnesses to prove the execution of the deed, and not a word is asked as to its consideration. The deed itself is no proof of consideration as against the wife. *Wilcox v. Pearman*, 9 *Leigh* 144.

Upon the question as to the authority of Kentucky to grant a divorce, it is sufficient to refer to *Story's Conflict of Laws*, p. 189-92, § 228, 229, 230. The court will see that in Scotland, Massachusetts and New York, it is held that the authority of that state in which the parties have been domiciled may grant a divorce to one 359 *party, no matter where the other is residing at the time. But it is argued, the divorce here is not a vinculo matrimonii. The marriage contract being

forever dissolved as respects the feme, and she being restored to all the rights and privileges of an unmarried woman, the divorce must be a vinculo matrimonii as it regards her. Nor can the effect of this language be restrained or impaired by the clause allowing her alimony. In the general act of Kentucky regulating divorces, there is authority to make provision for the wife out of the husband's estate; and this clause may fairly mean that such provision may be made for her. Neither should the construction of this act be affected by the use of the term alimony; for even though it be used elsewhere in reference to divorces a mensa et thoro, the legislature of Kentucky may use it in a way in which it has not been used before. Under the general act of Kentucky, the divorce is a complete divorce a vinculo matrimonii, except only that the other party cannot marry. Suppose Mrs. Browning had died after the act of divorce, would Joseph Browning have had a right to administer on her estate? Surely not. It is equally plain that from the time of that act he was absolved from all obligation to pay her debts. 1 Tucker's Comm. 98. She was also deprived of the right of dower or distribution in his estate. These propositions being unquestionable, does it not follow that the act of divorce is even more effectual than death would have been? Choses in action of the wife, not reduced into possession during the coverture, remain her property on the dissolution of the marriage. 1 Tuck. Comm. 100; Legg v. Legg, 8 Mass. R. 99; Lodge v. Hamilton, 2 Serg. & Rawle 491. And this principle applies in all cases of divorce a vinculo matrimonii, no matter what the ground of divorce. In this case, when the assignment was made, the husband had abandoned his wife. And there is no reason for restricting her to merely an equitable 360 provision. She *should be held entitled after such abandonment and such divorce, even if the assignee would have been entitled after the husband's death.

But would the assignee have been entitled against the wife surviving? In the argument of Purdew v. Jackson, sir Thomas Plumer propounded this question to the counsel: "Is there any case in which, the husband having assigned the wife's present chose in action, and having died before the assignee obtained possession of it, the assignee prevailed over the surviving wife?" and he added, "Suppose that in such a case the assignee were to claim the chose in action, in whose name would he make the claim, and in what form would he bring the action?" To this question counsel upon both sides answered, "We believe that such a case has not occurred." 1 Russ. 19, 20. Here then was a call upon counsel for a case establishing the very proposition now contended for, and the distinguished counsel in that case (Mr. Shadwell and Mr. Sugden) admitted that no such case could be produced: yet now we are told that that proposition has been long established, and several cases are cited to

shew it. Do they shew any such thing? Dicta undoubtedly there are in abundance; but are there any well considered decisions upon the point? If Lord Carteret v. Paschal is an authority upon this question, it proves too much; for there the surplus was taken away, as to which the assignment was only voluntary. But the real import of the decision is, that it was a case of an equitable extent; that the husband and wife were in possession. It was like the case of a term of years, which stands upon different ground from ordinary choses in action of the wife. And so as to Bates v. Dandy: that was a case of mortgages, one of which was of a term; between an assignment of which, and of choses in action generally, there is a distinction. The term stands upon the footing of personal chattels reduced into possession during

361 the coverture. There was, *besides, an agreement in Bates v. Dandy that the husband should have an interest in the subject. Something, it is true, is said about the husband's right to assign his wife's chose in action as well as her term, so that it be for valuable consideration; but what is said as to this matter is evidently a loose and ill considered opinion. In a note in 1 Russ. 20, in relation to the question propounded by sir Thomas Plumer, the reporter does not cite either of those as cases meeting the question; the only case which he mentions is Earl of Salisbury v. Newton. This case is briefly reported, appears to have been but little considered, and the decision in it does not well accord with the first part of the opinion. The other English case relied upon on the other side (Wright v. Morley) was the case of an assignment sought to be enforced during the life of the husband. The husband during his lifetime had a right to recover the property against the wife. It is impossible, then, to regard the law as settled by the English cases. When sir Thomas Plumer said in Johnson v. Johnson, that the question was decided, he had not then examined it with the care which he afterwards bestowed upon it in Purdew v. Jackson. In this last case he shews, by an examination of all the authorities, that there had been no such decision; and shews also that in his opinion there was no difference between the assignment of a present and of a reversionary interest. There is certainly no decision on the question in Virginia. This court is now to settle the law in reference to the matter; and it should make such a decision as may be consistent with what has been decided. The general rule is, that the husband is entitled to his wife's choses in action, provided he reduces them into possession during the coverture: in regard to all not reduced into possession, the right of the wife is the same as if she had not been married. And Purdew v. Jackson may properly be referred to for a principle 362 equally applicable to a present as to a reversionary *interest; it is, that the assignee can have no better right

than the assignor. If this be so, and the whole right of the husband be a right to reduce into possession during the coverture, how can the assignee acquire any thing more than a right to reduce into possession, if he can, during that time? It is said in some of the cases, or some of the books, that the husband may release, and therefore he may assign; that he may destroy, and therefore he may preserve. But the ground of the husband's right to release is, that he has the right to receive. Between the right to release and the right to assign, there is a want of analogy in several respects. In the former case there is no equitable right to a provision: in the latter there is. The husband could not assign a possibility, but he might release it. *Gage v. Acton*, 1 Salk 327. If he may release a possibility but not assign it, why may he not release a right not reduced into possession, and yet not be able to make an effectual assignment of it? It is impossible, by any sound and consistent reasoning, to arrive at the conclusion that the right to release gives the right to assign. If it does, why does it not give the right to assign without value, as well as with value? why does it not confer a right upon a general, as well as upon a special assignee? The release being the exercise of a legal right, there can be no doubt that it will operate at law, and extinguish the right, whether with or without consideration. But the assignment confers no legal right; it can only be enforced in equity. And when attempted to be enforced in equity, it is a mere equity against an equity with better legal right. There is something plausible in the idea that the assignment of the wife's property is a constructive possession, or the commencement of a taking possession. But the answer is, that a commencement is not enough. There is no right unless the husband does reduce into possession. He may commence a suit,

but if he dies before obtaining a decree, *the commencement of the suit will add nothing to his rights.

Moreover, if the assignment were equivalent to a reduction into possession, the wife would have no right against the assignee to an equitable provision: but this right she unquestionably has. The case of *Earl of Salisbury v. Newton* not only shews its existence, but shews that it exists as well against a particular as against a general assignee. If the right to a provision exists against the former as well as the latter, why shall there be a distinction between the two in regard to the wife's right by survivorship? In concluding upon this question, the attention of the court is called to *Mitford v. Mitford*, 9 Ves. 87, which contains a valuable review of the authorities; to the early cases of *Burnett v. Kinaston*, Prec. in Ch. 119, 121; S. C. 2 Vern. 401; S. C. *Freeman's Ch. Cas.* 240; *Packer v. Windham*, Prec. in Ch. 412; *Becket v. Becket*, 1 Dick 340, and to *Ward on Legacies*, p. 280, which is against the proposition contended for on the other side.

There is, however, no necessity for the court to decide the question in this case, which is different in circumstances and different in principle from the cases in which it must ordinarily arise. If there be any foundation for the doctrine contended for as to the validity of a particular assignment, it is that the wife has got the benefit of the consideration. And here that reason cannot apply, because the wife had been abandoned before the assignment was made. But 2dly, if the rule be established, there can no doubt that it is limited to the case of the assignee of a particular subject. Where the assignment is a general assignment of the wife's interests, (which is the character of the assignment here) the assignee takes subject to her right by survivorship, as well as her equity. *Jewson v. Moulson*, 2 Atk. 417; *Pryor v. Hill*, 4 Brown's C. R. 139; *Macaulay v. Phillips*, 4 Ves. 19; *Newland on Contracts* 136; 2 Tuck. Com. 115, 16.

364 In *Jewson v. Moulson* it was *argued that the assignment was special, and that the special assignee was not subject to the wife's equity; but the assignment was held to be a general assignment. The case of *Earl of Salisbury v. Newton* is open to the remark, that the wife had in fact no interest except the particular subject which was in controversy there. And 3dly, the decree was right in dismissing the bill, because, in any aspect, the wife is entitled to a provision, and the whole value of the subject assigned would be an inadequate provision for her. No person can doubt that her interest in her father's property was her whole estate. There is no proof, it is true, of the value of this interest, except the consideration expressed in the deed of assignment. But the other side must admit the assignment to have been for adequate consideration. Suppose, however, that the interest, instead of being only of the value of 1500 dollars, was worth 3000 dollars; would a provision to that amount be more than adequate for her? The following cases relate to this subject: in some of them, the court will find it to have been decided that the wife should have the whole property. Ex parte *Coysegame*, 1 Atk. 192; *Like v. Beresford*, 3 Ves. 506; *Elliott v. Cordell & others*, 5 Madd. C. R. 96, American ed. 150; *Kenny v. Udall &c.*, 5 Johns. Ch. Rep. 464; *Udall v. Kenny*, 3 Cowen 590; *Haviland v. Bloom &c.*, 6 Johns. Ch. Rep. 178; *Smith and others v. Kane and wife*, 2 Paige 303; *Van Epps and wife v. Van Deusen*, 4 Paige 64.

Robinson in reply. The bill alleges that the assignment was in consideration of the sum of 1500 dollars; the answers do not controvert the fact of consideration; and the deed of assignment purports on its face to be in consideration of 1500 dollars in hand paid. The case is in principle like that of *Scott & wife &c. v. Gibbon & Co. &c.*, 5 Mnrf. 86. It is needless to enquire whether, if the answers had denied the consideration and *called for

proof of it, the onus would have been on the assignee: it is enough that there has been no such denial or call for proof. In the absence of it, the deed is *prima facie* evidence of the allegation in the bill. The cause, moreover, has been proceeded in to a hearing upon the supposition that there was consideration, and the decision of the circuit court is on this supposition.

It is argued that the act of Kentucky is such a divorce a vinculo matrimonii, as entitles the wife to her personal estate not previously reduced into possession by the husband. Can it be regarded as importing this, when it entitles the wife to receive alimony? It is supposed that § 7, p. 123, (of 1 Statute Laws of Kentucky) may have been in the view of the lawmakers; a section giving power to divide the estate. But that can scarcely have been the meaning of the legislature; for that power is confined to the court which pronounces the decree of divorce. It is supposed, also, that the legislature has used the word in a sense different from that in which it is ordinarily used. But when they use it in this act, we must suppose it is in the sense in which it is used by them in other acts. And when we look to those other acts, we find no instance of alimony after a divorce a vinculo matrimonii. It is asked whether, if Mrs. Browning had died after the act of divorce, Joseph Browning would have had a right to administer? This is but another form of stating the proposition. If there were no valid divorce a vinculo matrimonii, the case of *Elliott &c. v. Gurr*, 2 Phil. 16; 1 Eng. Eccl. Rep. 166, shews that a decree of divorce which was invalid would not prevent his administering. And a decree though valid, which was not a complete divorce a vinculo matrimonii, would be attended with the same consequence. So also the husband's obligation to pay the debts of the wife, and her right to alimony in his lifetime or to dower or distribution afterwards, depend on the same considerations. The court should hesitate to

366 place an interpretation *upon the act which would deprive her of these rights, when there is ground to doubt whether such interpretation will be in accordance with the intention of the legislature. Though the ill treatment of the wife properly entitled her to a divorce a mensa et thoro only, still the legislature of Kentucky might allow her to marry again in Kentucky if they pleased, and such may have been their intention. But will it follow that there is such a divorce a vinculo matrimonii as is necessary here? It is laid down in 2 Burn's Eccl. Law 503, that divers acts of parliament for the divorce of particular persons in the case of adultery have allowed a liberty to the innocent person of marrying again. But on the same page of Burn (or rather 502 d.) it is laid down, that as to the having again the goods she brought, or so much as is not spent, that in the law books is meant only of divorce a vinculo, or where there was a nullity of marriage. No one supposes that

this act of Kentucky ascertains that there was really no valid marriage; that it was null ab initio; that the children of the marriage are bastards. And such an interpretation should be placed upon the act as will avoid these consequences.

But suppose the feme here entitled to all that the most complete divorce a vinculo matrimonii can give; what then are her rights? As to the idea that they are any greater against the assignee than would result from a dissolution by death, it will suffice to say that there is not the least foundation for it.

What then would be the feme's rights if the husband had died at the time of the act of divorce? If all that has been said on this subject were mere dicta, yet such and so many dicta, regarded as law for 100 years both in England and this country, and hitherto acted upon as such, would present reasons of the most cogent character against establishing a different doctrine now. But is there nothing but dicta?

367 It is conceded that *there is one decision, the case of *Earl of Salisbury v. Newton*; but that case, it is said, was but little considered. If the question was but little considered in that case, it was because there was no occasion to consider it,—because it had been most maturely considered and definitively adjudged in the two previous cases of *Lord Carteret v. Paschal* and *Bates v. Dandy*; In 3 Russ. 70, 3 Cond. Eng. Ch. Rep. 301, the court will find at large lord Hardwicke's opinion in *Bates v. Dandy*, which shews that in *Lord Carteret v. Paschal*, as well as in *Bates v. Dandy*, the precise point which we are now arguing was distinctly made, the very authorities of *Burnett v. Kinaston* and *Packer v. Windham*, which Mr. Patton now cites, were then cited and examined, and the point was distinctly adjudged in direct opposition to what he is now contending for. It is then an assumption to say that the whole right of the assignee of a husband to the wife's personalty, is to such personalty as may have been reduced into actual possession during the coverture. The same authority which might establish, as a general proposition, that the surviving wife had a right to whatever had not been reduced into actual possession during the coverture, might equally establish, as a modification of that proposition, that the right of the wife was gone where the husband had made an assignment for value. The law is the authority which has established the former as well as the latter. And this law has been adjudged, promulgated and acted upon for more than 100 years. No matter what may be the reason of the rule; whether it be founded upon the idea that the husband might release and therefore may assign; or upon the idea that the assignment is the commencement of a reduction into possession; or upon the idea that the assignment imports an agreement to reduce into possession, and equity considers that as done which ought to be done; either way, it is enough

368 that the rule is *established. It cannot be material now to notice particularly the authorities cited on the other side; the cases of *Burnett v. Kinaston* and *Packer v. Windham*, examined by lord Hardwicke 100 years ago, and found inapplicable; the case of *Becket v. Becket*, which was not an assignment for valuable consideration, but merely for love and affection; and the case of *Purdew v. Jackson*, a case of assignment of a reversionary interest, decided by sir Thomas Plumer, who considers it too late to question now the right of the assignee of a present interest for value. It is said, he made this remark before he examined the subject in *Purdew v. Jackson*. But he had before examined it in *Hornsby v. Lee*. And even in *Purdew v. Jackson* he admits that an assignment of a present interest may be regarded as the commencement of a reduction into possession. But since *Purdew v. Jackson* was decided, and with all the lights afforded by that case, a higher authority than sir Thomas Plumer, the lord chancellor himself (lord Lyndhurst), while affirming the doctrine of *Purdew v. Jackson*, has declared the law to be settled as it regards the assignment of a present interest. *Honner v. Morton*, 3 Russ. 65; 3 Cond. Eng. Ch. Rep. 298.

Upon the question whether this is such an assignment of the wife's property as entitles the assignee against the wife when claiming by survivorship, nothing need be added to the cases already cited, some of which were more general than this.

The english cases as to the wife's equity against the assignee to a provision will be found collected in 1 Roper 266. The doctrine has never yet been established in Virginia. *Gregory's adm'r v. Marks's adm'r*, 1 Rand. 372, 385; 1 Tucker's Comm. 114. And the court must consider whether it ought to be. But that doctrine, if established, will not sustain the decree dismissing the bill. As before remarked, all that could be done would be to direct an enquiry to ascertain *what would be a suitable provision. Reliance is placed on a remark of chancellor Kent in *Haviland v. Myers*, 6 Johns. Ch. Rep. 25, that the equity might be extended, if circumstances should require it, to the whole of the estate. But did chancellor Kent so extend it without any enquiry? Not at all. All that he did was to overrule the motion to dissolve the injunction, and let the cause proceed. We do not know whether the wife may not have other property of her own. To the extent of that, regard is always had. *Lady Elbank v. Montolieu*, 5 Ves. 744; *Green v. Otte*, 1 Sim. & Stu. 250; 1 Cond. Eng. Ch. Rep. 125. Neither are we informed as to the value of the interest assigned. There may have been a considerable estate besides slaves; and the will and the executor's answer shew that in fact there was. To give the assignee title, it is enough that he is an assignee for valuable consideration: we have no question in the pleadings, or in

the cause, as to the sufficiency of the consideration. The interest assigned may be of much greater value than 1500 dollars, double, treble, or quadruple; yet the court must hold the assignment valid. The court can with no propriety determine, upon the case as it stands, what would be a suitable provision: with still less propriety would it determine that a suitable portion of the property is the whole. [Baldwin, J. Does not the fact of the husband's abandoning his wife make a difference? Must she then be restricted merely to a portion?] It was argued by mr. Patton that the wife here should have the whole, because the husband had abandoned her. But that circumstance does not change the principle, which is simply that the wife shall have a reasonable provision out of the subject. The very terms of the rule indicate that she is only to have part of the subject. In *Wright v. Morley*, 11 Ves. 12, as well as in this case, the husband had abandoned his wife, and the whole fund there was 260 pounds a year; yet it was *said that the assignee would deal fairly towards the wife, if, out of the 260 pounds, he allowed her 100 pounds.

ALLEN, J. This case has been argued with great learning and ability; but time has not been afforded during the term to go into a review of all the authorities, or to discuss all the questions commented upon in the argument. I shall therefore content myself with a statement of the result to which an examination of the authorities and of the facts of this case has conducted me. The doctrine as to the main question involved, the right acquired by an assignee of the husband in the wife's choses in action, has been most ably commented on in the cases of *Purdew v. Jackson*, 1 Russ. 1, and *Honner v. Morton*, 3 Russ. 65; 3 Cond. Eng. Ch. R. 298, and in a note to the latter is found an accurate report of the opinion of lord Hardwicke in *Bates v. Dandy*: The rule established in *Bates v. Dandy*, and recognized in both the cases cited after a full review of all the authorities, furnishes the law of this forum, from which it seems to me we have no right to depart. That rule is, that the husband has no power to give effect to a conveyance of property of this description, unless circumstances so turn out as to put him in a situation which would have enabled him to reduce the chose in action into possession. If at the time of the assignment he is in a condition to reduce the chose into possession, the assignment operates immediately: if he is afterwards in a condition to reduce it into possession, the assignment will then have full effect: but if he dies before the event happens on which it may be reduced into possession, the assignment becomes altogether inoperative.

The assignment, to deprive the wife of her right by survivorship, must be for a valuable consideration, and must also be special. A general assignment of the husband's estate for the benefit of cred-

371 itors, an assignment *in bankruptcy, or an assignment under the insolvent laws, would not defeat the wife's right to take by survivorship a present interest, capable of being reduced into possession, but not actually so reduced during the coverture.

Treating the divorce, in the case under consideration, as a civil death, I consider the interest of the wife in her father's estate, at the time of the assignment, as a present interest susceptible of being reduced into possession; that the assignment was a special assignment for value; and therefore that she could not take by survivorship.

I am also of opinion, that by the well settled doctrines of the english chancery court, the wife is entitled to an adequate settlement out of her estate, whenever the aid of the court of equity is invoked by the husband to get possession of such estate, if there has been no previous adequate provision made for her: that the assignee, though the assignment be special, occupies in this respect the same position with the husband: that his doctrine of the chancery court was well established and fully acted on, when courts of equity were first organized in this state: and that the chancery courts here are as much bound by this principle of equity, as by any other principle of equitable jurisprudence (not inconsistent with our institutions) which has not been modified or abrogated by express enactment. In this case the claim was asserted in the answer; and there is nothing in the record which shews that the wife was not entitled to a settlement.

I am further of opinion, that upon a view of all the circumstances, the residue coming from her father's estate would not be more than an adequate provision for her; and that further enquiry was unnecessary. It is proved that the husband had squandered the advances made to him by the

372 *her with a family of small children dependent on her for support; and that in consequence of his misconduct she had obtained a divorce. The extent of the interest in her father's estate can only be inferred by reference to the consideration named in the deed of assignment. Taking the consideration expressed as the criterion of value, the amount would be but a small provision for a wife so situated. And it is not for the assignee to object that the consideration was grossly inadequate; for in so doing, he would shew that the assignment was not made in good faith. The claim was made by the answer, proof was taken to sustain it, and the plaintiff failed to produce any evidence tending to prove that the whole would be more than an adequate provision.

The claim of the wife derives additional strength from her divorce, which deprives her of all claim on the husband hereafter: and as, in consequence of the divorce, she will be entitled to hold as a feme sole, it

seems to me that the court did right in dismissing the bill.

BALDWIN, J. I have not formed, and am not to be understood as expressing, any opinion upon the question whether the assignee from the husband, for valuable consideration, of a chose in action of the wife not reduced into possession during the coverture, has a valid title against the wife surviving. Upon a view of all the circumstances of this case, I concur in the opinion that the decree should be affirmed.

373 STANARD, J. I concur in the opinion of judge Allen, that the effect of the act of divorce upon the rights of the wife is to place her in the same situation as if her husband had then died; and that the assignee from the husband, for valuable consideration, of a present (as *distinguished from a reversionary) interest of the wife, has a valid title against the wife though she survives her husband. I also concur in affirming the decree.

Note by the reporter. A review of the cases brought sir Thomas Plumer and chancellor Kent to very different conclusions in regard to the extent to which provision might be made for the wife. In *Beresford &c. v. Hobson &c.* 1 Madd. C. R. p. 361 of eng. ed. and p. 199 of american ed. the former concluded his opinion as follows: "In no case has the court given the whole to the wife. The question in most of the cases has been, how much the wife shall have; and in determining that, the court has exercised a discretion and has not tied itself down to any precise rule, but has never given the whole." This case is referred to by chancellor Kent in the opinion which he gave in *Kenny v. Udall*, (afterwards affirmed in *Haviland v. Bloom*, 6 Johns. C. R. 180, 81.) that the wife's equity, "if the case be deemed to require it, may be extended to the whole of the real and personal estate devised or descended." The matter about which this difference of opinion existed, it will be perceived, was not particularly discussed by the counsel for the appellant in the present case, it being in his view premature for the court to pass upon it before a reference to a commissioner. In dispensing with such reference, the court has departed from what has been heretofore deemed the regular course; and the reporter thinks he does not go too far, when he ventures to suggest that the precedent furnished by this case for such departure ought to be very cautiously followed. For, upon a reference, facts may appear which are calculated to affect and ought materially to affect the judgment of the court. Suppose, for example, the court in the present case had directed a reference, and upon the report of a commissioner it had appeared "that Joseph Browning and his wife remained divorced only until this case was decided in the court below," and that "immediately afterwards they were reunited in the holy state of matrimony, and have ever since been living together as man and wife;" can it be doubted that the result of the case would have been very different from that which has taken place? It may be said that this is supposing an extreme case, which is not likely to occur. But the reporter is informed by William Green esquire, that the supposition is only of that which actually occurred in this case.

374

***Findlay v. Toncray.**

August, 1843, Lewisburg.

(Absent CABELL, P., and BROOKE, J.)

Elegit—Lien of—Land Conveyed in Trust—General Warranty—Right of Elegit Creditor against Purchaser under Deed.—Under a deed of trust conveying land with general warranty to secure debts, the land is sold for more than enough to pay those debts. The purchaser institutes a proceeding against the grantor for unlawful detainer, and obtains a judgment against him. And then the purchaser insists, 1. that he was not bound to pay his purchase money (and therefore cannot be charged with interest on the same) until he obtained possession; and 2. that he may retain part of the surplus of purchase money to pay the costs recovered by the judgment on his complaint for unlawful detainer. The claims of the purchaser are objected to by a creditor of the grantor, who obtained a decree against him after the deed of trust, and sued out an elegit within the year. **Held** (per totam curiam) the claims so made by the purchaser cannot be allowed.—The purchaser further claims to apply other parts of the surplus to extinguish a dower right in the property existing at the time of the warranty, and to pay taxes

***Covenant of Warranty—How Treated.**—The principal case is cited in *Marbury v. Thornton*, 82 Va. 705, 1 S. E. Rep. 909, to the point that a covenant of warranty can never be treated as a covenant against mere incumbrances. See monographic note on "Covenants" appended to *Todd v. Summers*, 2 Gratt. 167.

Covenant of Title—When Action Lies—Actual Eviction.—The principal case is cited in *Jones v. Richmond*, 88 Va. 234, 13 S. E. Rep. 414, for the proposition that a covenant of title is supposed to be in fact and in essence substantially the same as a covenant for quiet enjoyment, and it is believed that no action lies upon it until actual eviction, or at least disturbance of the possession.

Same—Same—Same—Principal Case Disapproved.—But in *Sheffey v. Gardiner*, 79 Va. 315, the court said: "There are, undoubtedly, authorities which hold that there can be no breach of warranty of title, or warranty for quiet enjoyment, and there seems to be no difference between these warranties upon this point, until there has been an actual eviction, and this view has received some slight support from the dicta of certain of the judges in this state. *Dickinson v. Hoomes*, 8 Gratt. 353; *Findlay v. Toncray*, 2 Rob. 374. But such is clearly not now the accepted doctrine, nor is it supported by the weight of reason or authority, as a brief reference to a few of the many cases, elsewhere decided, in which this subject has come under review, will show."

Purchaser at Public Sale—Title—Special Warranty—Caveat Emptor.—A purchaser at a public sale of land, made by a trustee, must look to the title of the grantor of the land; and he is entitled only to a deed with special warranty of title. To such a sale the principle of caveat emptor applies. *Fleming v. Holt*, 12 W. Va. 163, citing *Petermans v. Laws*, 6 Leigh 529; *Saunders v. Pate*, 4 Rand. 8; *Sutton v. Sutton*, 7 Gratt. 237; *Findlay v. Toncray*, 2 Rob. 374; *Rawles on Covenants*, p. 418; *Goddin v. Vaughn*, 14 Gratt. 117.

The principal case is cited in *Jones v. Thorn*, 45 W. Va. 193, 32 S. E. Rep. 176. See foot-note to *Goddin v. Vaughn*, 14 Gratt. 102.

assessed on the property before the sale was made. **Held** by two judges (dissentient *STANARD, J.*) these claims also must be disallowed.

Case Approved.—The case of *Foreman v. Loyd* and others, 2 Leigh 284, recognized as a binding authority.

Rufus Soule executed deeds of trust on certain houses and lots in the town of Abingdon, to secure particular debts specified in those deeds. Afterwards a decree and various judgments were rendered against him. The decree was obtained by Lewis Toncray the 15th of October 1836, and upon it an elegit issued the 13th of June 1837, upon which the sheriff made the following return: "The defendant has no real estate but what is so encumbered by deeds of trust that it could not be extended, and no personal estate liable to this writ." The judgments were rendered some before and some after the decree. Upon all 375 the judgments writs *of capias ad satisfaciendum issued, which were levied on the body of the defendant. Some of them were levied before the decree and some after it; but in no case was the oath of insolvency taken until after the decree. Upon the levy of each the defendant obtained the benefit of the prison bounds; and he remained a prisoner in execution until the 31st of July 1837, when he was discharged as an insolvent debtor.

In January 1838, Toncray exhibited a bill in the circuit court of Washington, setting forth, that the houses and lots conveyed by the deeds of trust were sold in May 1837, and purchased by Alexander Findlay, the trustee in one of the deeds, for 3125 dollars. That the creditors of Soule disputing the validity of the sale, the property was again advertised, and a second sale made in September 1837, when Findlay purchased it for a less sum; but he Findlay admitted that he was bound to make good the first sum. That the debts secured by the deeds of trust, together with the expenses of sale, amounted only to 2964 dollars 65 cents, and the surplus of 160 dollars 35 cents was paid over by Findlay to Jacob Lynch, one of the trustees. That Findlay afterwards drew from Lynch 93 dollars 36 cents, that he might retain 4 dollars 60 cents, part thereof, for the town tax upon the property for 1837, which was charged by the town to Findlay, and might retain another part for a sum paid by him to extinguish the dower claim of Sarah Graham in said property, and the residue thereof as the amount of a judgment he had obtained against Soule, upon a warrant of forcible entry to recover possession of the property. That 66 dollars 99 cents yet remained in the hands of Lynch. The complainant insisted that the lien created by his decree upon the property was superior to that of any of the judgment creditors, and that he had a right to the 160 dollars 35 cents. The complainant farther 376 stated, that in paying over the money, Findlay retained *the interest for 6 months, amounting to 61 dollars 99

cents, which the complainant believed he had no right to retain. Findlay, Lynch and the judgment creditors were made defendants.

John D. Mitchell was allowed to answer with Findlay. Their answer stated, that Soule had conveyed to the trustees in the several trusts under which these respondents purchased, with general warranty, and that all which had been retained by them had been retained as upon contracts running with the land. Upon this ground, they claimed to retain 75 dollars paid Mrs. Graham for her dower; the taxes charged on the lots for 1837; the costs of the proceeding, made necessary by Soule's own act, to oust his possession, and interest on the amount of the several debts paid, from the day of payment till the date at which possession of the property was rendered. With their answer they exhibited a statement, whereby it appeared that if interest were charged on all the debts to the 25th of September 1837 (the time of obtaining possession), and the other deductions made as contended for by them, a balance would be due them of 34 dollars 97 cents. They insisted that whatever they might retain against Soule, they might also retain against the complainant, especially as Soule was insolvent.

The other defendants, though served with process or proceeded against by publication, did not answer.

The cause came on to be heard the 11th of October 1839. On consideration whereof, the circuit court was of opinion that the decree of the 15th of October 1836 constituted a lien in favour of the complainant, subject only to prior liens; that the sale of May 1837 being the one under which Findlay claimed, his claim for interest to September 1837 on the purchase money paid was unfounded; that he had no claim valid against the complainant for the costs of the warrant on the complaint for unlawful

377 *he purchased only Soule's right to the property, his subsequent purchase of the dower of Sarah Graham gave him no claim to retain any portion of the purchase money. It appearing that after disallowing these claims, there was a surplus in the hands of Findlay of 116 dollars 75 cents, and in the hands of Lynch of 66 dollars 99 cents, the court decreed in favour of the complainant against them respectively for the same, and decreed that Findlay pay the complainant's costs, with the exception of the cost of serving the process and printing the order of publication as to the other defendants.

On the petition of Findlay an appeal was allowed.

The cause was submitted (without argument) by B. R. Johnston for the appellant, and M'Comas for the appellee Toncray. And as the record contained no copies of the deeds of trust, decree and judgments mentioned in the bill and answer, they agreed that the same were correctly set

forth therein, and were to have the same effect as if copied at large.

BALDWIN, J. I think there is no reason to doubt that the plaintiff's decree in October 1836 was a lien upon the debtor Soule's equity of redemption under his deed of trust; for though the equity of redemption could not be sold under a *fi. fa.* and was not extendible, yet the decree constituted an equitable lien thereupon, entitled to priority over subsequent liens by judgment or otherwise. 1 Sugd. on Vend. 542; *Haleys v. Williams*, 1 Leigh 140; *Connts v. Walker*, 2 Leigh 268. This equitable was equivalent to a legal lien, and paramount to the rights, subsequently accruing, of the schedule creditors. *Foreman v. Loyd &c.*, 2 Leigh 284. It placed the plaintiff in the stead of his debtor, and entitled him to have his debt discharged out of the surplus moneys in the hands of the trustees.

378 1 Sugd. *on Vend. 545. And as this right is by force of the lien on the equity of redemption, it has relation to the date of the decree. The circumstance that the plaintiff's elegit was not sued out till after the sale under the deed of trust, is immaterial; for it is the judgment that gives the lien, which lien continues during the capacity to issue an elegit, except against an elegit actually levied. *Coleman v. Cocke*, 6 Rand. 629; *United States v. Morrison &c.*, 4 Peters 124.

The retainer claimed by the purchasers out of the surplus proceeds of the trust sale can be regarded only by way of setoff, and is therefore subordinate to the lien of the plaintiff. The only item of the claim which can have the colour of a lien is the money paid to extinguish a claim of dower in the property; and that must be, if at all, by force of the covenant of warranty in the trust deed. But how can that covenant be applied to the surplus proceeds of the sale? It was of course no lien upon the property conveyed by the deed, but a personal covenant to secure the title to that property. If the sale had been of enough only of the property to satisfy the trust, the covenant could not have operated as a lien upon the residue; and when the whole property was sold, as a matter of necessity or convenience, the conversion of the surplus from realty into personalty could have no effect upon the question of lien.

If the purchasers have a right to retain the value of the dower right out of the surplus, it must be upon the idea that they did not obtain the whole subject purchased, and so there was a partial failure of consideration. But this is not true in point of fact: they did obtain all that they purchased. They purchased subject to the claim of dower. The trustee sold nothing more than was vested in him by the deed, and with special warranty only. The dower right

379 was not conveyed by the deed, which could not convey or assure *a greater right or estate than the grantor might lawfully convey or assure. 1 R. C. of 1819, ch. 99, § 20, p. 368. The purchasers were

compensated for the incumbrance of the dower right by the consequently diminished price which they had to pay for the property; and if they are to retain the value of that incumbrance out of the surplus, then they will be twice compensated for the same defect of title. I deem it unnecessary to consider whether an action on the covenant of warranty could in any event be maintained by the purchasers, as assignees of the trustee, against the grantor, by treating it as a covenant running with the land. It is certain that they could maintain no such action until after eviction. 4 Kent's Comm. 471; Mitchell v. Warner, 5 Conn. R. 497. Until then the covenant is unbroken, and the extinguishment of the dower right by purchase can give no right of action against the covenantor, and much less the right to retain out of the surplus proceeds of the trust sale. A covenant of warranty cannot be treated as a covenant against mere incumbrances; and if it could, a covenant against incumbrances is a personal covenant, not running with the land or passing to the assignee.

I think the decree of the chancellor ought to be affirmed.

ALLEN, J. Upon the only question in regard to which there is a difference of opinion in the court, it seems to me that the purchaser at the sale made by the trustee is entitled, as assignee of the trustee, to the benefit of the covenants of warranty contained in the deed of trust; that as between the purchaser and the first vendor, the sale is to be considered as though the conveyance had been made directly to the purchaser by the debtor, instead of being made, as it was, through the intervention of the trustee. So regarding the transaction, the purchaser acquired the 380 vendor's title to the land, with a covenant of warranty to protect him against an outstanding superior title. As against his vendor, he could not be considered as purchasing subject to incumbrances. He had a right to rely on the covenant of the vendor to protect him against such incumbrances, and whenever evicted, could maintain his action on the covenant. His claim, however, to compensation rested in action until eviction. The purchaser, upon the faith of his title and warranty, agreed to give a specific sum for the property. Upon the surplus after satisfying the deed of trust, the lien of the judgment creditor attached before any breach of the covenant of warranty. Having so attached, it could not be destroyed by a subsequent breach, much less by a mere retainer to satisfy an outstanding incumbrance, when there never had been an eviction, and non constabat that there ever would be. I think the decree should be affirmed.

STANARD, J. The judgment creditors are not contesting before this court the priority that the decree has given to the claim of Toncray, and if they were, that contest would in all probability, under the authority of *Foreman v. Loyd & Co.*, 2 Leigh

284, be unavailing. Is the decree right as between Toncray, claiming a lien on the surplus under his decree against Soule, and Findlay the purchaser under the deed of trust, and for whose purchase the alleged surplus, if any, arises?

That Toncray's decree formed an equitable lien on Soule's equity of redemption in the property conveyed by the deed of trust, before the sale under the trust, and on what is properly to be deemed the surplus after the sale, is, I think, free of reasonable doubt. The equity of redemption having been converted before the assertion of the lien, and being represented, when the lien was asserted, by the surplus that might remain after the satisfaction of the 381 claims secured by the trust, *it is to that surplus that the lien in this case attaches. It is, I think, equally free from doubt, that this lien overreaches the lien of any creditor of Soule subsequently accruing, either general by subsequent judgment or decree in favour of other creditors, or specific by subsequent conveyance of the debtor. The consequence is that a purchaser under the deed of trust could not, were he a creditor of Soule, absorb by his debt the surplus of such purchase over the debts and charges secured by the trust, unless the debt constituted an elder lien. In other words, unless the debt, even if due to another, would be entitled to priority, a creditor of Soule could not, by becoming a purchaser at the sale under the trust, put his debt in advance of other debts in favour of which there were elder liens, and thereby give a destination to the surplus different from that it would have had if another had been the purchaser.

Applying these principles to the case under consideration, the result would be, that if the abatements claimed by Findlay from the purchase money were in the nature of retainer or setoff for responsibilities of Soule to him, such abatements ought not to be allowed in derogation of the prior and superior lien which Toncray has by virtue of his decree. The question then is, are the abatements claimed by Findlay of this nature? That which is claimed for the costs of the proceeding for unlawful detainer, is, I think, obviously of this nature, and ought not to be allowed. The claim for interest during the time possession was withheld, (which is in substance a claim for the detention of the possession, the interest being the equivalent for the use and occupation lost during such detainer,) partakes of the nature of the claim for costs incurred to obtain possession; and that too was properly disallowed. But I cannot agree that the abatement claimed for the incumbrances from which the purchaser has had to relieve the property, is in the nature of setoff of a distinct claim 382 against an amount ascertained to be due as purchase money, so far as the question affects the surplus. To my apprehension, it enters into and forms an essential element in the enquiry (at least so far as respects the ascertainment of a

surplus) what is the amount of purchase money that the grantor in the deed of trust, and his judgment creditor claiming under him with an investiture of all his rights and exempt from his independent responsibilities, can justly claim as due from the purchaser? So entering into that enquiry, the amount of purchase money cannot be correctly ascertained until due allowance is made for these incumbrances; and that only can properly be regarded (at least in equity) as the amount of the purchase money in respect to the debtor, and his judgment creditor claiming his equity of redemption or its avails, which is left after abatement for the incumbrances against which he warranted. The deed of trust conveyed the property with general warranty of the grantor. The deed subjected the property to be sold, and the surplus of the proceeds which might remain after discharging the enumerated debts was to be paid to the grantor. The trustees held under the deed beneficially for the creditors to the extent of their claim, and for the grantor to the extent of the surplus. In the execution of the trust by sale, the creditors, so far as they were concerned, may be regarded as vendors with special warranty, and to the extent of their interest the purchaser was bound for the purchase, though there might be a defect of title: and though for that defect the grantor was responsible on his warranty, that could not impair the obligation which the purchaser incurred to the creditors by his purchase. But how is it in respect to the surplus? The grantor to whom that surplus enured, and under whom it is claimed by his judgment creditor by virtue of the lien of his judgment, was, through the agency of the trustee, vendor with general warranty.

383 Any defect in or incumbrance upon the subject sold was, pro tanto, a failure of the consideration, inseparably connected with the contract of purchase, and operating on the nominal amount of the purchase money, not as a setoff of a distinct liability of the vendor against a liquidated amount of purchase money due from the vendee, but as an essential element to be taken into account in ascertaining the amount of the purchase money originally demandable of the purchaser. Suppose a sale with warranty had been directly made by the grantor, instead of being (as it was) a sale by him through the agency of the trustee, and there were a defect, either from deficiency of quantity or from an incumbrance within the scope of the warranty; would not the responsibility of the purchaser on his purchase, in a suit to charge him with the purchase money, be the amount stipulated to be paid for the full quantity and unincumbered title, minus the amount of the deficiency or incumbrance? In such a case I think it could not, with any propriety of legal language, be said that the purchaser is indebted the whole price of full quantity and unincumbered title, and the vendor indebted to him the value of the deficiency or the incumbrance,

and that the abatement from the price on account of the deficiency or incumbrance is the setoff of the debt for that against the debt for the purchase. The case supposed and that under consideration are substantially the same. My opinion therefore is, that an abatement should have been made from the nominal amount of the purchase, for the taxes and dower right from which the purchaser has had to disincumber the property, and that the decree, which has denied this abatement, is erroneous.

Decree affirmed.

384 *Wilson and Others v. Davison.

August, 1843, Lewisburg.

(Absent CABELL, P., and BROOKE, J.)

Vendor and Purchaser—Dower—When Precluded by Sale under Vendor's Lien.—The vendor of land conveys the same to the vendee in fee simple and receives part of the purchase money, but no security for the residue. On a bill in equity against the vendee to enforce the implied equitable lien of the vendor, a decree is made for the sale of the land, and the proceeds are more than sufficient to satisfy what remains due to the vendor. The surplus is claimed by creditors of the vendee who have obtained judgments against him, and taken him in execution, from which he escaped. With the vendee's assent, a decree is made in favour of those creditors for the surplus. Afterwards, the vendee dying, a bill is filed by his widow against those in possession of the land, to wit, one to whom the purchaser at the sale under the decree had aliened the whole, and two others to whom that one had aliened a part, claiming to be endowed. HELD by two judges (STANARD and BALDWIN) that the land in the hands of the purchasers is not chargeable to the widow, and that her bill must be dismissed; dissentiente ALLEN, J., whose opinion was, that the widow was entitled to dower in the surplus which remained after satisfying the vendor's lien, and that the amount to which she was entitled constituted a charge upon the land in the hands of the purchaser at the sale under the decree, and of those claiming under him.

Same—Same—How Enjoyed in Proceeds of Sale.—The principle laid down in *Herbert and others v. Wren* and others, 7 Cranch 380, that where land in which

***Vendor and Vendee—Land Sold for Purchase Price—Right of Widow of Vendee to Dower in Surplus.**—In the principal case it is held that where land is sold to satisfy the lien of the vendor for the purchase price the vendee's widow is not entitled to dower in the surplus. But see Va. Code, § 2269, changing this rule in conformity with the dissenting opinion of JUDGE ALLEN in the principal case. On this subject, see the principal case cited in *Elliott v. Carter*, 9 Gratt. 564; *Robinson v. Shacklett*, 29 Gratt. 107; *Holden v. Boggess*, 20 W. Va. 69, 70, 71, 84, 85, 88; *Roush v. Miller*, 39 W. Va. 641, 20 S. E. Rep. 664.

+Dower—How Right in Proceeds of Land Sold is Enjoyed.—The principal case approves the rule laid down in *Herbert v. Wren*, 7 Cranch 380, that where land in which there is a right of dower is sold in a suit, to which the tenant in dower is a party, the other parties interested have a right to insist that

there is a right of dower is sold in a suit to which the tenant in dower is a party, the other parties interested "have a right to insist that instead of a sum in gross, one third of the purchase money shall be set apart, and the interest thereof paid annually to the tenant in dower during her life," approved.

Dower—How Present Value Calculated.—The table of longevity referred to, which was made by professor Wigglesworth of Cambridge university, and published in the Transactions of the American academy, vol. 2, p. 133, and also republished in the American Jurist, vol. 11, p. 492, and in 3 Rob. Pract. p. 381. When the present value of a dower interest is to be calculated, the probable duration of the life by which it is limited, and the sum derived from it annually, are first to be ascertained, *and then the calculation is to be made, not by discounting simple interest, but by discounting compound interest. For the present value of an annuity is that sum which, being improved at compound interest, will be sufficient to pay the annuity.

By deed bearing date the 24th of July 1814, Daniel Davisson senior conveyed to George J. Davisson, in fee simple, a lot of land in the town of Clarksburg in the county of Harrison. The executors of Daniel Davission afterwards filed a bill in equity against George J. Davisson, setting forth that of the sum of 500 dollars expressed in the conveyance as the consideration thereof, 178 dollars was paid, and for the balance two single bills were executed

instead of a sum in gross one-third of the purchase money shall be set apart, and the interest thereof paid annually to the tenant in dower during her life. For this proposition the principal case is cited in *Blair v. Thompson*, 11 Gratt. 452; *Harrison v. Payne*, 32 Gratt. 389, 391; *Wilson v. Branch*, 77 Va. 70.

‡**Same—How Present Value Calculated.**—In *Harper v. Vaughan*, 87 Va. 431, 12 S. E. Rep. 786, it is said: "The amount which the widow is to pay, as her contribution to the principal, is such a sum as would equal the aggregate of her payments of annual interest (if she were to pay it during her life), reduced to cash, calculating at compound interest. The computation is made by taking from the tables of mortality her probable duration of life, and, having thus ascertained approximately for how many years she would continue to pay the annual interest, the present cash value, at compound interest, of each payment to be estimated, and the aggregate is the amount the widow must contribute. *Wilson v. Davisson*, 3 Rob. 384; *Am. Alm.*, 1836, p. 84; 1 *Lom. Dig.* 126, 51; 4 *Sim.*, 182 (*Earl of Portman v. Taylor*); *Pugh v. Russell*, 27 Gratt. 801, and cited cases." See also, citing the principal case *Strayer v. Long*, 86 Va. 563, 564, 10 S. E. Rep. 574; *Gaw v. Huffman*, 13 Gratt. 638.

Same—Deed of Trust Executed on Same Day as Conveyance.—On this subject, see the principal case cited in *foot-note* to *Robinson v. Shacklett*, 29 Gratt. 100; also, in *Ins. Co. v. Kloeber*, 31 Gratt. 745; *Summers v. Darne*, 31 Gratt. 801; *Waller v. Waller*, 33 Gratt. 86; *Coffman v. Coffman*, 79 Va. 508; *Hurst v. Dulaney*, 87 Va. 445, 12 S. E. Rep. 800. See generally, monographic note on "Dower" appended to *Davis v. Davis*, 26 Gratt. 587.

for 161 dollars each, one payable the 25th of July 1815, and the other the 25th of July 1816, and judgments had been obtained thereon, which remained unsatisfied. The bill prayed that the lot might be decreed to be sold, and the purchase money with interest paid out of the proceeds. A sale was decreed accordingly in 1826, and the proceeds were more than sufficient to pay the charges of sale and satisfy the vendor's lien. A petition was presented by Edwin S. Duncan and John L. Seehon, claiming the surplus, upon the ground that each of them had judgments against George J. Davisson, upon which writs of *capias ad satisfaciendum* had issued, under which he was admitted to the prison rules, and then escaped. And by consent of the said George J. Davisson, the court decreed to the petitioners the said surplus, to be applied towards the discharge of their demands in proportion to the respective amounts.

After the death of George J. Davisson, his widow filed a bill in the circuit court of Harrison against John Wilson, David Davisson and Deviemann D. Davisson, setting forth, that her husband became seized of the lot during the coverture, and erected valuable brick buildings upon it, and otherwise greatly improved it; that 386 at the *sale under the decree, it was purchased by Charles A. Swearingen for much less than its real value, and conveyed to him by a commissioner of the court; and that Wilson had become the owner of it under some contract with Swearingen, and had since conveyed a portion of it to the other defendants: and the complainant claimed that she was entitled to full dower in the property discharged of any lien for the purchase money, or at least to dower in the same chargeable with a proportionable part of the said purchase money.

The defendants first demurred, but their demurrer was overruled; and then Wilson answered, admitting the facts as before stated, but not admitting that the complainant was entitled either to full or partial dower in the property. He insisted that George J. Davisson only held the lot as trustee for the payment of the purchase money, and that if the complainant was entitled to dower at all, she was only entitled to the extent she would have been if the lot had been mortgaged by her husband before marriage, or mortgaged afterwards by a deed in which she joined; that it would be contrary to all principles of equity to subject him, his vendees, or the property, to any charge on account of said claim of dower, under the circumstances of the case; but she must, if endowed at all, be endowed of one third of the excess produced by the sale, and must look to that excess wherever it may be found.

David and Deviemann Davisson did not, in their answers, admit the complainant's claim; but if it were established, they insisted that as their vendor Wilson was before the court, he should be decreed against

surplus) what is the amount of purchase money that the grantor in the deed of trust, and his judgment creditor claiming under him with an investiture of all his rights and exempt from his independent responsibilities, can justly claim as due from the purchaser? So entering into that enquiry, the amount of purchase money cannot be correctly ascertained until due allowance is made for these incumbrances; and that only can properly be regarded (at least in equity) as the amount of the purchase money in respect to the debtor, and his judgment creditor claiming his equity of redemption or its avails, which is left after abatement for the incumbrances against which he warranted. The deed of trust conveyed the property with general warranty of the grantor. The deed subjected the property to be sold, and the surplus of the proceeds which might remain after discharging the enumerated debts was to be paid to the grantor. The trustees held under the deed beneficially for the creditors to the extent of their claim, and for the grantor to the extent of the surplus. In the execution of the trust by sale, the creditors, so far as they were concerned, may be regarded as vendors with special warranty, and to the extent of their interest the purchaser was bound for the purchase, though there might be a defect of title: and though for that defect the grantor was responsible on his warranty, that could not impair the obligation which the purchaser incurred to the creditors by his purchase. But how is it in respect to the surplus? The grantor to whom that surplus enured, and under whom it is claimed by his judgment creditor by virtue of the lien of his judgment, was, through the agency of the trustee, vendor with general war-

383 ranty. Any defect in or incumbrance upon the subject sold was, pro tanto, a failure of the consideration, inseparably connected with the contract of purchase, and operating on the nominal amount of the purchase money, not as a setoff of a distinct liability of the vendor against a liquidated amount of purchase money due from the vendee, but as an essential element to be taken into account in ascertaining the amount of the purchase money originally demandable of the purchaser. Suppose a sale with warranty had been directly made by the grantor, instead of being (as it was) a sale by him through the agency of the trustee, and there were a defect, either from deficiency of quantity or from an incumbrance within the scope of the warranty; would not the responsibility of the purchaser on his purchase, in a suit to charge him with the purchase money, be the amount stipulated to be paid for the full quantity and unincumbered title, minus the amount of the deficiency or incumbrance? In such a case I think it could not, with any propriety of legal language, be said that the purchaser is indebted the whole price of full quantity and unincumbered title, and the vendor indebted to him the value of the deficiency or the incumbrance,

and that the abatement from the price on account of the deficiency or incumbrance is the setoff of the debt for that against the debt for the purchase. The case supposed and that under consideration are substantially the same. My opinion therefore is, that an abatement should have been made from the nominal amount of the purchase, for the taxes and dower right from which the purchaser has had to disincumber the property, and that the decree, which has denied this abatement, is erroneous.

Decree affirmed.

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August, 1848, Lewisburg.

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Vendor and Purchaser—Dower—When Precluded by Sale under Vendor's Lien.—The vendor of land conveys the same to the vendee in fee simple, and receives part of the purchase money, but no security for the residue. On a bill in equity against the vendee to enforce the implied equitable lien of the vendor, a decree is made for the sale of the land, and the proceeds are more than sufficient to satisfy what remains due to the vendor. The surplus is claimed by creditors of the vendee who have obtained judgments against him, and taken him in execution, from which he escaped. With the vendee's assent, a decree is made in favour of those creditors for the surplus. Afterwards, the vendee dying, a bill is filed by his widow against those in possession of the land, to wit, one to whom the purchaser at the sale under the decree had aliened the whole, and two others to whom that one had aliened a part, claiming to be endowed. **Held** by two judges (STANARD and BALDWIN) that the land in the hands of the purchasers is not chargeable to the widow, and that her bill must be dismissed; dissentiente ALLEN, J., whose opinion was, that the widow was entitled to dower in the surplus which remained after satisfying the vendor's lien, and that the amount to which she was entitled constituted a charge upon the land in the hands of the purchaser at the sale under the decree, and of those claiming under him.

Same—Same—How Enjoyed in Proceeds of Sale.—The principle laid down in *Herbert and others v. Wren and others*, 7 Cranch 380, that where land in which

***Vendor and Vendee—Land Sold for Purchase Price—Right of Widow of Vendee to Dower in Surplus.**—In the principal case it is held that where land is sold to satisfy the lien of the vendor for the purchase price the vendee's widow is not entitled to dower in the surplus. But see Va. Code, § 2300, changing this rule in conformity with the dissenting opinion of JUDGE ALLEN in the principal case. On this subject, see the principal case cited in *Elliott v. Carter*, 9 Gratt. 564; *Robinson v. Shacklett*, 29 Gratt. 107; *Holden v. Boggess*, 20 W. Va. 69, 70, 71, 84, 85, 88; *Roush v. Miller*, 39 W. Va. 641, 20 S. E. Rep. 664.

†Dower—How Right in Proceeds of Land Sold is Enjoyed.—The principal case approves the rule laid down in *Herbert v. Wren*, 7 Cranch 380, that where land in which there is a right of dower is sold in a suit, to which the tenant in dower is a party, the other parties interested have a right to insist that

there is a right of dower is sold in a suit to which the tenant in dower is a party, the other parties interested "have a right to insist that instead of a sum in gross, one third of the purchase money shall be set apart, and the interest thereof paid annually to the tenant in dower during her life," approved.

Dower—How Present Value Calculated.—The table of longevity referred to, which was made by professor Wigglesworth of Cambridge university, and published in the Transactions of the American academy, vol. 2, p. 133, and also republished in the American Jurist, vol. 11, p. 492, and in 2 Rob. Pract. p. 381. When the present value of a dower interest is to be calculated, the probable duration of the life by which it is limited, and the sum derived from it annually, are first to
385 be ascertained, *and then the calculation is to be made, not by discounting simple interest, but by discounting compound interest. For the present value of an annuity is that sum which, being improved at compound interest, will be sufficient to pay the annuity.

By deed bearing date the 24th of July 1814, Daniel Davisson senior conveyed to George J. Davisson, in fee simple, a lot of land in the town of Clarksburg in the county of Harrison. The executors of Daniel Davission afterwards filed a bill in equity against George J. Davisson, setting forth that of the sum of 500 dollars expressed in the conveyance as the consideration thereof, 178 dollars was paid, and for the balance two single bills were executed

instead of a sum in gross one-third of the purchase money shall be set apart, and the interest thereof paid annually to the tenant in dower during her life. For this proposition the principal case is cited in Blair v. Thompson, 11 Gratt. 453; Harrison v. Payne, 32 Gratt. 389, 391; Wilson v. Branch, 77 Va. 70.

Same—How Present Value Calculated.—In Harper v. Vaughan, 87 Va. 481, 12 S. E. Rep. 785, it is said: "The amount which the widow is to pay, as her contribution to the principal, is such a sum as would equal the aggregate of her payments of annual interest (if she were to pay it during her life), reduced to cash, calculating at compound interest. The computation is made by taking from the tables of mortality her probable duration of life, and, having thus ascertained approximately for how many years she would continue to pay the annual interest, the present cash value, at compound interest, of each payment to be estimated, and the aggregate is the amount the widow must contribute. *Wilson v. Davisson*, 2 Rob. 384; *Am. Alm.*, 1835, p. 84; 1 *Lom. Dig.* 126, 51; 4 *Sim.*, 182 (*Earl of Portman v. Taylor*); *Pugh v. Russell*, 27 Gratt. 801, and cited cases." See also, citing the principal case *Strayer v. Long*, 86 Va. 563, 564, 10 S. E. Rep. 874; *Gaw v. Huffman*, 13 Gratt. 638.

Same—Deed of Trust Executed on Same Day as Conveyance.—On this subject, see the principal case cited in *foot-note* to *Robinson v. Shacklett*, 29 Gratt. 109; also, in *Ins. Co. v. Kloeber*, 31 Gratt. 745; *Summers v. Darne*, 31 Gratt. 801; *Waller v. Waller*, 33 Gratt. 86; *Coffman v. Coffman*, 79 Va. 508; *Hurst v. Dulaney*, 87 Va. 445, 13 S. E. Rep. 800. See generally, monographic note on "Dower" appended to *Davis v. Davis*, 25 Gratt. 587.

for 161 dollars each, one payable the 25th of July 1815, and the other the 25th of July 1816, and judgments had been obtained thereon, which remained unsatisfied. The bill prayed that the lot might be decreed to be sold, and the purchase money with interest paid out of the proceeds. A sale was decreed accordingly in 1826, and the proceeds were more than sufficient to pay the charges of sale and satisfy the vendor's lien. A petition was presented by Edwin S. Duncan and John L. Seehon, claiming the surplus, upon the ground that each of them had judgments against George J. Davisson, upon which writs of *capias ad satisfaciendum* had issued, under which he was admitted to the prison rules, and then escaped. And by consent of the said George J. Davisson, the court decreed to the petitioners the said surplus, to be applied towards the discharge of their demands in proportion to the respective amounts.

After the death of George J. Davisson, his widow filed a bill in the circuit court of Harrison against John Wilson, David Davisson and Deviemann D. Davisson, setting forth, that her husband became seized of the lot during the coverture, and erected valuable brick buildings upon it, and otherwise greatly improved it; that
386 at the *sale under the decree, it was purchased by Charles A. Swearingen for much less than its real value, and conveyed to him by a commissioner of the court; and that Wilson had become the owner of it under some contract with Swearingen, and had since conveyed a portion of it to the other defendants; and the complainant claimed that she was entitled to full dower in the property discharged of any lien for the purchase money, or at least to dower in the same chargeable with a proportionable part of the said purchase money.

The defendants first demurred, but their demurrer was overruled; and then Wilson answered, admitting the facts as before stated, but not admitting that the complainant was entitled either to full or partial dower in the property. He insisted that George J. Davisson only held the lot as trustee for the payment of the purchase money, and that if the complainant was entitled to dower at all, she was only entitled to the extent she would have been if the lot had been mortgaged by her husband before marriage, or mortgaged afterwards by a deed in which she joined; that it would be contrary to all principles of equity to subject him, his vendees, or the property, to any charge on account of said claim of dower, under the circumstances of the case; but she must, if endowed at all, be endowed of one third of the excess produced by the sale, and must look to that excess wherever it may be found.

David and Deviemann Davisson did not, in their answers, admit the complainant's claim; but if it were established, they insisted that as their vendor Wilson was before the court, he should be decreed against

in the first instance, or at all events, if there should be any decree against them, that they should have a decree over against him.

The cause came on to be heard in the circuit court before Duncan, J., and the following opinion was delivered by him.

387 *I look upon this as an interesting case, involving principles that I think have not been adjudicated.

"Dower, as I understand it, is purely a legal estate. The wife, although she claims under her husband, derives the right to do so under the law. At the common law, she was entitled to dower in the lands of which her husband was seized during the coverture, of an estate of inheritance; and by statute, which was designed to extend the principles of the common law, she is entitled to dower in the equitable estate of her husband. In the present case, the husband was seized of an estate of inheritance during the coverture. *Prima facie*, therefore, the wife was entitled to dower, never having relinquished it in the form prescribed by law; and no act of the husband could deprive her of the right. But the right to dower is subject to charges and incumbrances created prior to the marriage, such as mortgages &c. and, I suppose, to the vendor's lien, whether before or after the marriage. It would be strange were it otherwise. Although the right of dower is greatly favoured, yet it should not be at the expense of strangers. The wife's right, as I suppose, is coextensive with the interest of the husband, and cannot be carried further. If a husband, before or after marriage, purchase land and obtain a conveyance for it, and then die, not having paid any part of the purchase money, it would be unjust that the vendor should have perhaps his only security (the vendor's lien) impaired to the extent of the widow's dower. Without entering at large into the reasoning in support of my opinion, I will merely state, that I am of opinion that a widow's dower in her husband's land, on which there is a vendor's lien, must be subject to such lien, exactly in the same way that it would be subject to a mortgage or other incumbrance before marriage, or a mortgage in which the wife joined and relinquished her dower; with

388 this qualification distinguishing the rights of the widow in the *case of a vendor's lien from her rights where there was a mortgage before marriage, that in the former, as the husband was seized of an estate of inheritance during the coverture, the widow has a right to be endowed of the land, not of a mere equity of redemption, as would be the case where there was a mortgage before marriage, or a mortgage in which she joined. Perhaps, after all, this is a distinction without a practical difference. Probably in either case she has the right to redeem, and in neither could she be compelled to do so, but might await a foreclosure of the mortgage, or a sale under the vendor's lien, and then resort to the surplus if there be any, that

surplus being in fact the value of the estate out of which she is to have dower. Perhaps, however, the distinction is of importance in another point of view, having a material bearing upon these parties. I have supposed that the widow's right attaches to the land in all cases where her husband was seized of an estate of inheritance during the coverture; that it is a legal estate; that the widow, unless she had relinquished her dower in the manner prescribed by law, could not lose it in toto, but only that it might be reduced to the extent of the vendor's lien. Had the plaintiff not such an estate (and that is the real question) as all subsequent purchasers were bound to take notice of? Can a legal estate, or in other words an estate of dower at common law, be lost by reason of the incapacity of the wife to protect her rights during coverture? The plaintiff was no party to the suit for enforcing the vendor's lien; her husband was then living; she could not be an actor until his death; and in the mean time the estate is sold, and the proceeds of sale are exhausted in the payment of her husband's debts. The case of *Heth v. Cocke & wife*, 1 Rand. 344, is relied upon by the defendants as an authority against the plaintiff in this case. I think, however, that its tendency is otherwise. But the cases are widely different in many

389 *particulars. That was a case of a mortgage before marriage, which the husband never redeemed. Judge Coalter, in delivering the opinion of the court, remarks, that the legal title to dower never accrued, the husband never having been seized during the coverture; but that there was an equity of redemption, in which, under the statute, the widow could claim dower in equity. In the present case, the husband was seized of the legal title during the coverture, and the wife acquired a right to dower at common law: her estate was a legal estate, not an equitable claim to dower. In that case, suit was brought to foreclose the mortgage after the death of the husband: the widow's rights, whatever they were, had then accrued, and she had the capacity to assert them: she stood by, suffered a decree of foreclosure, permitted strangers to purchase the estate, and the surplus to go into the hands of the guardian of the children, by whom it was exhausted; and never asserted any claim until upwards of sixteen years had elapsed after her rights had accrued. In this case, the decree enforcing the vendor's lien was rendered during the lifetime of the husband, before the plaintiff had the right or the capacity to assert her claims; and she instituted suit as soon as she could do so. There are other points of difference between the cases, but I will not stop to notice them. It may be proper, however, to notice a remark of judge Coalter in his opinion in that case, because it is supposed to have a bearing on a question which I must next examine. The judge says: 'Where the mortgage was before marriage, suppose the

bill to foreclose is brought in the lifetime of the husband, must the wife be a party? And would the failure to make her a party in such case subject the purchaser to her claim for dower, in case of her surviving her husband? In the case put, I believe it never has been held necessary, since the act, to make the wife a party. It may, however, be well worthy of consideration, how far *it may be the duty of course, in such a case as that, to direct the balance of the purchase money to be paid into court, and to enquire whether there be a wife entitled, and make provision accordingly.' The chancellor who decided the case against Davisson would no doubt have performed that duty in that case, had it occurred to him; but as it did not occur to him, must Davisson's widow bear the loss, and have the laches of that able judge saddled upon her? or ought not the purchaser under his decree to have seen to it, and is the fault not his? For it must be kept in mind that judge Coalter is all the time speaking of an equitable right of dower, and not of a legal right; and I suppose, as Mrs. Davisson's is a legal right of dower, that all purchasers were bound to notice it.

"This brings me to the remaining point for consideration: does the plaintiff's right of dower attach to the premises, and was the purchaser bound to see to the application of the surplus purchase money? I think, for the reasons I have mentioned, the purchaser, for his own safety, was bound to see that the surplus was applied to the dower estate of the wife. It is true that her interest was contingent; she might not have survived her husband: yet her right was a legal right, and the purchaser was bound to know it. He could have protected both his own interest and her rights; but she was incapable of doing either. I look upon the claim of the widow as a charge upon the land, of which the purchaser had notice. It is well settled (see *Lloyd v. Baldwin*, 1 Ves. sen. 173, and 2 Sugden on Vendors, 9th ed. p. 32), that a purchaser will in some cases be bound to see to the application of the purchase money, although the estate be sold under a decree of a court of equity, or by virtue of an act of parliament. And I believe that this is as strong a case of the kind, as could well exist. It may be a hard case on the purchaser and his vendees; but if I am right, it is the law which imposes the hardship.

391 *"The decree will be, that the plaintiff have, in lieu of dower, a sum equal to one third of the interest on the surplus proceeds of the sale after satisfying the vendor's lien; which will constitute a charge upon the lot, to commence from the institution of the suit: or, at her election, a gross sum, to be ascertained by the tables laid down in 2 Rob. Pract. 380-382, which I presume is the rule adopted generally; although I am led to believe, from my experience thus far, that the tables of mortality which have furnished the rule

are much too favourable to annuitants. As I hope this case will undergo further examination, the rule just adverted to can then be tested, as well as the other matters embraced in this decree."

A report being made by a commissioner, it appeared by that report, as corrected by the court, that the surplus whereof the complainant was to be endowed was 451 dollars 2 cents, one third of which was 150 dollars 34 cents, and the annual interest of that third 9 dollars and 2 cents. The report shewed the complainant to be 48 years of age: and her expectation of life, according to the table of professor Wigglesworth, published in 2 Rob. Pract. 380, 81, being 22 years, the present value of an annuity of 9 dollars and 2 cents for 22 years was calculated in the mode in which, in 2 Rob. Pract. 382, the calculation is stated to have been made by Mr. Hilary Baker, one of the commissioners of the circuit court of Henrico, and appeared to be 122 dollars 39 cents. The circuit court held that the complainant was entitled to charge the property with her dower interest, either by way of a yearly charge thereon of said sum of 9 dollars and 2 cents during her life, or by an immediate charge of the present value of said interest, at her election; and the complainant by her counsel electing to take the present value, the court thereupon decreed that the said complainant recover against the defendants the said sum of 122 dollars 39 cents, with 392 interest *from the date of the report until paid, and the costs of suits; and declared the said sum, with interest as aforesaid, to be a charge upon the property itself.

On the petition of the defendants against whom this decree was made, an appeal was allowed them.

William A. Harrison, for the appellants, insisted that the decree was erroneous,

1st. Because the parties had not concurred in preferring a sum in gross. The defendants had a right to insist that, instead of a sum in gross, the interest on one third of the surplus should be paid annually to the complainant. *Herbert and others v. Wren and wife and others*, 7 Cranch 380; *Tabele v. Tabele and others*, 1 Johns. Ch. Rep. 45.

2dly, In holding that an annuity of 9 dollars and 2 cents, during the life of a woman now 48 years of age, is worth 122 dollars 39 cents.

3dly, In decreeing the gross sum against the appellants as their personal debt.

4thly, In decreeing against the appellants jointly, when it appears that they hold in severalty separate portions of the premises.

Upon these points the cause was first submitted by Harrison for the appellants, and by George H. Lee for the appellee. But afterwards the court suggested a doubt whether the widow had any right of dower which could be enforced against Wilson or his alienees, and called upon Lee to shew that she had.

Lee argued, that here there was a concur-

rence of the three requisites to dower,—marriage, seisin, and death of the husband: the wife had therefore a complete legal right to dower; and the only question was, how far this right would be respected in a court of equity. The seisin of the husband, it may be said, was not a beneficial seisin to his own use, but was that
393 of a trustee for *the benefit of his vendor. To the extent of the purchase money, this may perhaps be correct; but after the purchase by the husband, the value of the property was increased by permanent improvements put on it by him, and it was then worth much more than the balance of purchase money. The beneficial interest of the vendor was a very partial and limited one; it was merely an implied equitable right to subject the property to payment of the balance of the purchase money: it can scarcely be called an interest in the property. And as to the residue of the interest and estate in the property, other than this naked lien of the vendor, the husband was seized beneficially to his own use. The widow, therefore, seems fairly entitled to a dower interest in the property itself (into whose hands soever it may have come) by virtue of her complete legal right, commensurate with the residuary interest of her husband, which may be measured by the amount of the surplus proceeds of the sale under the decree.

If the widow's right had attached to the subject prior to the decree and sale, how can such decree and sale, in a cause to which she was no party, oust this right, and convert an interest in the realty into a right to a portion of the proceeds of sale? If the decree and sale had not been made during the life of the husband, her right to dower in the estate, subject to the lien for the unpaid purchase money, could not be questioned. Can the circumstance that the decree and sale were made during the life of her husband, and when she was non sui juris, wholly change her rights, and, by reason of such change, so operate in most cases as wholly to defeat them? The court of chancery, it is submitted, will not change the character of the right, but will restrict its extent, so as to render it commensurate with the husband's real interest, to be measured as before mentioned.

394 *If the property be considered as sold subject to the widow's right of dower in the premises, whatever that might be, the purchaser surely cannot complain. If it was a sale out and out, and the wife's interest be regarded as attaching to the surplus proceeds of sale, then the purchaser should be held bound to see to the application of the purchase money. The policy, and indeed the humanity of the law, forbid a conversion of the wife's interest in the estate of which her husband was seized, from a substance into a shadow. In this country, upon a purchase of real estate, it rarely happens that the whole purchase money is paid at the time of the purchase. And the consequence of a decision against

the widow's right here will be, that wherever, upon a purchase of real estate, there may happen to be a balance of purchase money due, as a court of equity (notwithstanding an absolute conveyance in fee simple, admitting payment, and a transfer of the seisin) will, if there be no other security, imply a lien on the property, and subject the same to sale, a husband, by submitting to a decree, in a case to which his wife is no party, for the sale of the property to raise the balance due, however small, will be enabled to appropriate the surplus proceeds to his own use, and thus effectually defeat his wife's dower interest in the estate. The husband ought not thus to be enabled to bar his wife's right of dower by a mode wholly unknown either to the common or the statute law. And the decree, sale, and deed of the commissioner to the purchaser, should not be allowed to defeat the wife's right to dower, any farther than the husband could defeat it by a deed in which she did not unite.

Suppose, in the case before the court, that Davisson the husband had conveyed the property to a third person, who paid him the whole purchase money without any notice of the latent equity of Davisson's vendor; the purchaser of the property
395 would clearly hold it discharged *of any lien of Davisson's vendor. But though the right of the purchaser from Davisson would thus be complete against Davisson's vendor, such a purchaser could not gainsay the right of Davisson's widow to dower in the estate. And thus it will have to be maintained that the widow's right to dower, though superior to the right of a purchaser without notice, is yet inferior to the vendor's lien, which is itself inferior to the right of the purchaser without notice. Again, the liens of the judgments in favour of the petitioning creditors to whom the surplus was paid, were surely subordinate to the widow's right of dower; yet if she is not to be allowed to look to the land itself for satisfaction of her claim, the creditors whose rights were subordinate to hers will have got every thing, and she will get nothing.

What is the fair inference from the decisions in *Holbrook v. Finney*, 4 Mass. Rep. 566; *Clark v. Munroe*, 14 Id. 351; *Stow v. Tift*, 15 Johns. R. 458, and *Gilliam v. Moore*, 4 Leigh 30, in case the vendor, after making a conveyance to the vendee, had taken no deed of trust or mortgage for the purchase money until a subsequent period, or, as in the case before the court, had taken none at all? If it was the divestiture of the husband's seisin by the deed of trust at the same moment at which it was vested, that defeated the right of dower, then, where there was no such contemporaneous divestiture, it would seem that the right of dower would attach to the land. Again, if a man sell and convey land to another, but fail, at the time of his conveyance, to take any deed of trust or mortgage to secure the purchase money, looking to the vendor's lien only, and subsequently

take a deed of trust or mortgage, it is well settled that the implied equitable lien of the vendor will merge in and be drawn down to the express lien. *Little &c. v. Brown*, 2 Leigh 353. Yet in such case would

396 not the wife, "as against the mortgagee or claimant under the deed of trust (in which she does not unite), be entitled to dower? And would her right not be discharged both of the vendor's lien and the mortgage or trust lien?—of the vendor's lien, because it is extinguished; and of the mortgage, because she did not unite in it? So that, if the vendor's lien ousts the widow's dower, the vendor is better off without an express lien, unless taken contemporaneously with his conveyance; and the right to dower is thus made to depend, not upon the three requisites which prevail at law, but also upon the subsequent act of others, to wit, her husband's giving, at a period subsequent to the conveyance to him, a deed of trust or mortgage (in which she does not unite), and its acceptance by the vendor.

In *Tabele v. Tabele and others*, 1 Johns. Ch. Rep. 45, the mortgagor's wife was held entitled to the use of one third of the surplus proceeds after satisfying the mortgage. Can there be any reason for holding the right of the vendee's wife to be less where no mortgage has been given, than where a mortgage has been given in which she united?

In *Stow v. Tift*, 15 Johns. R. 463, the court say that the substance of a conveyance, where land is mortgaged at the same time that a deed is received for it, is, that the bargainor sells the land to the bargainee on condition of his paying the price at the stipulated time, and if he do not, that the bargainor shall be resealed of the land, free of the mortgage; and this, whether one instrument or two be executed at the time. This, it is conceived, is not so in the case of a mere lien of a vendor who has made a conveyance. In such case, the legal title and seisin remain in the bargainee, and the vendor's lien constitutes a mere charge upon the land, to be enforced in a court of equity, by whose decree the interest of the bargainee, whatever it may

397 be, is sold subject to the just rights of the widow. As is "said in some of the cases, it is the folly of the bargainor to make an absolute conveyance of his land, without taking the proper means to protect it against such claim.

In *Nash v. Preston*, Cro. Car. 190, one seized in fee, by indenture inrolled, bargained and sold land to the husband for 120 pounds, "in consideration that he shall redemise it to him and his wife for their lives, rendering a pepper corn, and with a condition that if he paid the 120 pounds at the end of 20 years, the bargain and sale shall be void." The bargainee redemised accordingly; and his wife having, after his death, brought an action demanding dower, a bill in equity was filed to be relieved against this demand. Upon this question, the judges certified their opinion

to the court of chancery, that the wife of the bargainee was to have dower, and that a court of equity ought not to preclude her thereof. "For by the bargain and sale the land is vested in the husband, and thereby his wife entitled to have dower. And when he redemises it upon the former agreement, yet the lessees are to receive it subject to this title of dower; and it was his folly that he did not conjoin another with the bargainee, as it is the ancient course in mortgages."

If the court should be of opinion that the widow is not entitled to relief against the present defendants, but would be entitled to relief against the original purchaser if he were a party, it is submitted that the court ought not to dismiss the bill, but should remand the cause with leave to amend the bill and bring the original purchaser before the court.

ALLEN, J. The amount involved in this case is inconsiderable; but it raises questions for the first time brought before this court for decision. The principles involved deeply affect the rights of many, and are of great practical importance in the administration of justice. Marriage settlements are comparatively rare in

398 *this state. The wife usually depends upon the provision made for her in the will of the husband, or the interest secured to her in his estate by the law. Her right to dower, frequently the only resource left for her own support and the sustenance of her children, is a humane provision of the common law, and has always been much respected. The wife during coverture has a title to dower in all lands of which her husband was seized during the coverture. When he once becomes so seized beneficially for his own use, the title attaches, and at law it is complete. The seisin must be beneficial, and therefore the widow of a trustee would not, at least in equity, be entitled to hold her dower against the cestui que trust. And the seisin must have abided in the husband for some time. Therefore, where the vendor passed the title to the vendee and at the same time took a mortgage for the payment of the purchase money, the two instruments were held to be parts of the same transaction, and the seisin to be that instantaneous seisin, in which the land was merely in transitu, and never vested beneficially in the husband. *Gilliam v. Moore*, 4 Leigh 30. Where the mortgage is given to secure the purchase money, the bargainor sells to the bargainee upon condition that he shall pay the purchase money at the stipulated time, and if he does not, that the bargainor shall be resealed of the land. In the case under consideration, a conveyance was made to the husband; he took beneficially, entered, and was seized of the absolute fee, and improved the property. He owed a portion of the purchase money; and for this the vendor's lien existed. This was an implied lien, the creature of a court of equity, not recognized at

law, and therefore interposing no bar to the legal title to dower. That title attached the moment the seisin rested beneficially with the husband; and though in equity it may be subordinate to the implied lien for the purchase money, upon what principle is it to be held that it shall be divested to any greater extent?

399 *The case is distinguishable from the wife's right to dower in a trust estate created before the marriage, or in an equity of redemption. If the estate is subject to a mortgage in fee at the time of the coverture, and so remains during its continuance, there is no seisin in the husband to which the legal title to dower can attach; the whole legal estate of inheritance is in the mortgagee. The rule would be the same where a deed of trust had been given before marriage. In these cases, the right to dower in the equity of redemption is contingent, and never attaches upon the land during the coverture. Being contingent, it is liable to be defeated by a sale out and out during the coverture; such sale converting the surplus into personalty. So where, during the coverture, the wife unites in a deed of trust or mortgage, she has parted with her legal title to dower in the estate: her claim becomes contingent by her own act, and is liable to be defeated by a sale during the coverture, and a conversion of the surplus. In these cases her right to dower in the equity of redemption does not vest, so as to attach to the subject, until by the death of the husband the equity of redemption descends to the heir. And if, during the coverture, the husband should alien the equity of redemption without her joining, her right would, after the death of her husband, attach upon it in the hands of the alienee. For as the equity of redemption is an interest capable of descending, unless it has been converted, her claim to dower will attach. Such conversion, so as to defeat her contingent claim, could only be made under a deed existing at the time of the coverture, or a deed to which she was a party, executed during the coverture. The reason which deprives the wife of her dower after a sale under a deed of trust or mortgage executed before marriage, (or during marriage, she having united) has no application, as it seems to me, to a case like the present, where the title is a legal one, not contingent, and has actually vested by the beneficial seisin of the husband.

400 *The case of *Little & c. v. Brown*, 2 Leigh 353, determines that the vendor taking a mortgage of the subject to secure the purchase money, can only claim under the mortgage, as that supersedes his implied lien. Can it be doubted that in such case, where the mortgage was subsequent to the conveyance, and not part of the transaction, the wife's right of dower would be paramount to the mortgage? Such would be the effect, unless the court could give the mortgage relation back to the time of the conveyance; and if it could do so for the purpose of defeating dower, why

not with equal propriety give it the same relation for the purpose of defeating intermediate incumbrances?

In the case of a sale by the vendee to a purchaser without notice, put by the counsel in argument, the implied lien of the vendor, as against him, would be gone; yet the wife's right to dower could not be questioned: and then the anomalous state of things would exist, in which a lien, inferior to the title of the purchaser, would be superior to that of the wife, which yet would be superior to that of the purchaser.

Even where a mortgage has been given for the payment of the purchase money, it is not a legal title which a stranger can set up. Thus in *Coates v. Cheever*, 1 Cowen 460, Coates had purchased of Harmon, to whom he had, at the time of the purchase, executed a mortgage for the consideration money. Coates sold to the defendant, and conveyed to him in fee; and the defendant also procured an assignment of the mortgage. The court held, that where the tenant in possession enters by virtue of a purchase from the mortgagor, then the subsequent purchase of the mortgage by him is an extinguishment of it, and the widow's right relates back to the purchase by her husband, and she shall recover; but that where the tenant entered by virtue of a foreclosure, or after a forfeiture for the nonpayment of the money, then the estate

is deemed never to have vested 401 *in the husband, and the widow is not entitled to dower: thus shewing, that wherever the estate does vest in the husband, the legal title to dower attaches upon the land. There is no conflict between this case and *Jackson v. Dewitt*, 6 Cowen 317. In that case, the vendor and mortgagee accepted the release. There was a merger; but the same act destroyed the mortgagor's title. Up to the time of the release, the wife could claim no dower; and the release extinguishing the title, there never was an instant of time in which the widow was entitled to dower.

The case of *Pierce's adm'r & c. v. Trigg's heirs*, 10 Leigh 406, establishes no principle affecting the claim of dower in this case. Judge Tucker there said, that real estate purchased with partnership funds for partnership purposes, and used as a part of the stock in trade, is to be considered to every intent as personal property, not only as between the partners and their creditors, but as between the surviving partner and the representatives of the deceased. The partnership was the cestui que trust, and the holder of the legal title was but a trustee. This is the ordinary case of a trustee, whose widow is clearly not entitled to dower as against the cestui que trust.

If then the wife's title to dower was a vested interest which attached during the coverture, her legal title to dower in the whole subject could not be controverted at law: and in equity, as it seems to me, it can only be treated as subordinate to the implied lien of the vendor, to the extent of that lien, and no farther. She was no party

to the suit by which the legal estate passed out of her husband. A court of equity could only treat her husband as trustee for the vendor to the extent of his lien. Upon the surplus she has a legal claim, and she has done no act to divest her estate. The party purchasing from her husband, whether directly, or indirectly through the intervention of a court of equity and
402 *a judicial sale, was bound to notice her legal interest. It was his duty to look to the application of the surplus, and see that it received such direction as would protect him from the wife's title to dower. By his purchase, he became a party to the proceeding; he might have seen that the legal title was in the husband; and if he has neglected to secure himself against a title which, to the extent of the surplus, a court of equity must regard as attaching to the subject and running with it, he must suffer, and not the wife, who was not *sui juris* and could not protect herself. A contrary rule will furnish a new and convenient mode by which, in innumerable instances, a wife may be barred of dower in her husband's estate. He may consent to a sale out and out, of an estate of great value, for some trifling balance of purchase money, and after paying the amount, put the residue of the price in his pocket. Such a rule would be against the policy and humanity of the law.

I think, therefore, that the court was correct in holding the widow entitled to dower in the surplus, and that it constituted a charge upon the land in the hands of the purchaser and those claiming under him.

The court below decided, that the widow had a right to charge the property with her dower, after ascertaining what would be the yearly value of that interest by allowing her six per cent. upon one third of the surplus which remained after satisfying the vendor's lien and the costs; or, at her election, was entitled to a recovery of the present worth of her annuity. In holding that she had a right to elect to take a sum in gross, I think the court erred. Those entitled in reversion should be consulted; and where, as in this case, the property is charged in the hands of the purchaser, it may be convenient to pay the annuity, whilst a decree for the present value of it might result in a sacrifice ruinous to the purchaser. The true rule, it seems to me, is laid down in *Herbert &c. v. Wren*

403 &c., 7 Cranch 370, where *chief justice Marshall said, that the assent of one party cannot affect the others; that they have a right to insist that, instead of a sum in gross, one third shall be set apart, and interest thereon paid annually to the tenant in dower during life. The rule would hold a fortiori, where, instead of interest to be raised by setting apart a sum of money, the annuity, as in this case, was a charge on the subject.

In ascertaining the present worth of the annuity, the court adopted Wigglesworth's table of longevity, found in 2 Robinson's Practice 381, and the method of calculating

the present value of an annuity which is there said to have been adopted by Mr. Baker, one of the commissioners of the circuit court of Henrico. That method is manifestly erroneous, as is strikingly exhibited in the present case. The one third of the surplus is ascertained to be 150 dollars 34 cents, and the calculation gives the widow absolutely 122 dollars 2 cents, leaving to the reversioner, if there were one, but 28 dollars 32 cents. The error consists in calculating the discount at simple interest, instead of compound interest. The true rule, I think, is explained and illustrated very fully in a communication with which I have been favoured by Judge Smith, who has had occasion to investigate the subject, and has furnished me with an exposition of his views, which will be handed to the reporter to be published in a note to this case. There may possibly be some inaccuracies in the calculations, but the principle, I think, is the correct one. For these errors in the details of the decree, it seems to me it should be reversed, and the cause remanded to the circuit court.

BALDWIN, J. The vendor's lien is founded in natural justice, and the presumed intent of the parties to the contract. Both forbid that the vendee shall enjoy the property without payment of the consideration. 404 *This cannot be prevented, but by a rescission of the contract, which, in the absence of an express provision, is never contemplated by the parties; or by its complete execution, which can only be accomplished, where the personal responsibility of the vendee is inadequate, by subjecting the land to the payment of the purchase money. Such a case falls within the province of a court of equity, which gives relief by a sale of the property, and the due application of its proceeds. This is done without regard to the consideration whether the legal title remains in the vendor, or has been conveyed to the vendee: in either case, that title is employed for the purpose of conferring a complete right upon the purchaser under the decree. The power of the court extends to a sale of the whole property, whatever may be its relative value compared with the amount of the purchase money; but it may be restricted or modified in its exercise, by a discretion arising out of the circumstances of the case. Thus it may be expedient to sell a part only, where the subject is susceptible of division, and the whole is not requisite for the discharge of the incumbrance. On the other hand, the interest of the parties may require a sale of the whole to prevent a sacrifice, though the result may be a surplus of proceeds beyond the lien. These are matters merely for the discretion of the court, and do not affect its authority in regard to the sale; and the right of the purchaser under the decree is in no wise dependant upon a judicious exercise of that discretion.

This lien of the vendor is a kind of equitable mortgage, inherent in the contract

of sale, and qualifying the ownership of the vendee, whether that ownership be legal or merely equitable. It is of course paramount to the right of the vendee, and of all succeeding to his interest, in the whole or in part, by operation of law. In equity the vendee is not the owner adversely to the lien of the vendor, but is treated as a trustee for him until payment of the purchase money.

405 *A wife's right of dower is an emanation from the ownership of her husband, and subject to all its qualifications; though not to his alienations or incumbrances during the coverture, without her consent declared in the mode prescribed by law. Her right is dependant upon his, as existing at the inception of the coverture, or as acquired by him during its continuance. If he mortgage his land before marriage, her claim to dower is subordinate to the mortgage, and, if that be foreclosed, is completely divested. So if she unite, with the requisite solemnity, in his mortgage made after the marriage, the effect of a foreclosure is the same. If, during the coverture, he purchase mortgaged land, her title, like his, is subject to the incumbrance, and the foreclosure of it destroys both. The result is the same where an incumbrance is created by the very act of purchasing; for if the purchase money be unpaid and not secured, an equitable mortgage is embodied in the transaction itself, and if that be foreclosed by a sale of the property under the decree of a court of equity, the wife's right of dower is completely extinguished.

In the present state of our law, the right to dower springs from the substantial, not the formal ownership of the husband. At common law, it is true, the legal title only was regarded; and a mere legal seisin, without any beneficial ownership, enabled the wife to recover dower. Thus the wife of a trustee who had the legal estate in fee, and the wife of a mortgagee after condition broken, had a valid title to dower. But the courts of equity corrected this injustice, and in such cases restrained the widow and punished her with costs, if she attempted to recover by legal proceedings. Another consequence of the disregard by the courts of common law of any but legal rights, was, to refuse dower to the widow in trusts and other equitable estates, and consequently in the equity of redemption of a mortgage in fee. This narrowness, 406 instead of being *redressed, was followed by the courts of equity, and still prevails in the english jurisprudence. But in Virginia, New York, and other states of this union, it is corrected by legislative enactments. Our act of 1785 gives dower in equitable, in like manner as in legal estates: and in this, as in other respects, the rules and incidents of legal estates are now applied to trust and mortgaged property. The equity of redemption of a mortgage in fee descends to the heirs of the mortgagor; and though the widow is not entitled to dower as against the mortgagee, where the mortgage was executed

before the coverture, or during the coverture with her concurrence in the mode prescribed by law; yet in either case she is entitled to dower in the equity of redemption; for of that, or, what is the same thing, of the estate subject to the mortgage, the husband is to be considered as having died seized. *Heth v. Cocke & wife*, 1 Rand. 344; *Swaine v. Perine*, 5 Johns. Ch. R. 492; *Hale v. James*, 6 Johns. Ch. R. 258. This is equally true of the vendee's right of redemption in regard to the vendor's lien. His wife is dowerable of that, but of nothing more; or, what is in effect the same, she is dowerable of the estate purchased, subject to the equitable incumbrance for the purchase money.

A widow's right of dower, however, in an equity of redemption, or in other words in the land subject to the incumbrance, legal or equitable, is merely conditional, and dependant upon the fact of redemption. If the heir redeems, she is dowerable on contributing ratably; or she may herself redeem, to the extent of her dower, by like contribution. But if she submits to a foreclosure, her right is extinguished. 4 Kent's Comm. 39, 44, 45, 46; *Coates v. Cheever*, 1 Cowen 479; *Heth v. Cocke & wife*, 1 Rand. 344. And the validity of a foreclosure is in no wise affected by the circumstance that the land is of greater value than the amount of the incumbrance; or, where the 407 foreclosure is by a sale of *the property, that there is a surplus of the proceeds. *Heth v. Cocke & wife*.

Thus it will be seen that there is no longer any magic in the word seisin, by which the shadow may be made the substance, or the substance the shadow. A legal title in the husband is nothing as regards the wife's right of dower, unless accompanied by the beneficial ownership; and the beneficial ownership is every thing, though separated from the legal title.

But there can be no beneficial ownership in opposition to a paramount incumbrance, though there may be in subordination to it. The possession of a mortgagor, his perception of the profits, his improvements, give him no beneficial ownership as against the mortgagee. Upon the foreclosure of the mortgage, his possession, and enjoyment, and improvements are all swept away; and with them his wife's right of dower, if that be also subject to the mortgage. The practice of the english chancery is simply to foreclosure the equity of redemption, the effect of which is to vest the complete ownership of the property in the mortgagee. In Virginia the practice is to direct a sale of the property, and the effect is to confer the title upon the purchaser under the decree, and place the proceeds at the disposal of the court. The enforcement of the vendor's lien, by a decree for the sale of the property, is in like manner a foreclosure. In all, there is equally a foreclosure of the equity or right of redemption; and the only difference is, that in the first the title is established in

the mortgagee, while in the others it is transferred to the purchaser.

No distinction can be successfully drawn between a legal and equitable incumbrance, as to the effect, upon the wife's right of dower. In either case the question always is, whether the incumbrance be paramount or subordinate to the dower right. If during the coverture the husband pur-
 408 chase land, receive a conveyance, *and at the same time give a mortgage thereon to secure the purchase money, the wife's right of dower is subject to the mortgage. There the ownership of the husband is qualified by the nature of the transaction. The two instruments are justly considered as parts of the same contract, and the result is the same as if the provisions of both were embraced in the same deed. So if the executory contract of sale were to stipulate that the property should be liable for the payment of the purchase money, the vendor would have a lien therefor, even though a conveyance of the legal title were subsequently made to the vendee. And this is substantially the nature of the transaction, where the executory contract is silent upon the subject of a lien: equity supplies the omission, and presumes the parties to have so intended. This presumption, however, arises only where the parties omit to provide expressly for any security. If other security be stipulated, the idea of a lien is thereby repelled. So, too, the implied lien is rejected by the vendor's taking a mortgage upon the property at a period subsequent to the deed of conveyance. There the vendee becomes the owner, without qualification at the time of the purchase, and the inceptive dower right of the wife thereupon attaches; nor can it be divested by the subsequent incumbrance, without her concurrence therein in the manner provided by law. The equitable lien may, moreover, be lost by reason of a supervening equity in favour of a purchaser from the vendee; as where he obtains a conveyance, and pays the consideration, without notice of the nonpayment of the original purchase money. In that case the widow of the first vendee would be entitled to dower; the incumbrance being extinguished, and her legal right unaffected by any want of notice of it on the part of the subvendee.

That, in the case before us, the wife's right of dower was subject to the
 409 vendor's lien, there can be no room *to doubt; and the decree of the circuit court in her behalf is founded upon that idea, for otherwise it would have been for dower in the land, instead of the surplus proceeds of the sale. The questions therefore which we have to decide are, first, whether the wife was entitled to a share of the surplus proceeds; and secondly, whether the purchaser under the decree in the suit brought by the vendor, and the property in his hands, be liable therefor.

The effect of the sale at the vendor's suit was to convert the subject from realty into personalty. This is as precisely true in regard to the surplus, as it is in regard to

the amount applied to the discharge of the vendor's claim. Still the wife would have been entitled in equity to a due proportion of the surplus, if her right to dower subject to the incumbrance had been consummated. But this was far from being the case. Her husband was living at the time of the sale, and of the final decree by which it was confirmed; and the proceedings were, with strict propriety, against him alone as the only defendant in that cause. She had then no title whatever. Her right to dower subject to the incumbrance was merely inchoate and contingent, and could never be established but by her survivorship of her husband. The property sold was his, and its conversion from realty into personalty was not his act, but by operation of the paramount incumbrance. In its new form it was still his, after satisfying the incumbrance; but its character being changed, it was no longer subject to a future dower title as realty, but only to that provision which the law makes for a widow out of the personal estate of her husband, subsisting at his death, after payment of his just debts. If the husband had been dead and she surviving at the time of the sale, then her dower right subject to the incumbrance would have been ripened into a perfect title, and her interest in the surplus could not have been divested by
 410 the discretion *which the court had exercised, of selling the whole land, instead of such part only as might have been sufficient to discharge the incumbrance. In the language of chancellor Kent, in *Titus v. Neilson*, 5 Johns. Ch. R. 457. "If the right of dower be consummated by the husband's death before the sale, (for it is clear that she would have had no claim upon the proceeds after the satisfaction of the first mortgage, if the husband had been living) she has a good right in equity to have her dower satisfied out of the surplus proceeds, which represent the equity of redemption."

Thus I think it clear that the wife had no interest in the surplus of the proceeds of sale, and that it was properly applied, with the consent of the husband, to the satisfaction of his creditors. It is supposed by the counsel for the appellee that this doctrine would lead to abuse, and to the introduction of a new mode of barring the wife's right of dower. The argument against a just principle, however, founded upon alleged inconvenience in its operation, is always suspicious; and the inconvenience will generally be found the other way. If a case should occur of a combination, eluding the vigilance of the court, between a vendor or mortgagee and the husband, to expose the whole subject unnecessarily to sale, in order to defeat the contingent dower right of the wife, it will then be time enough to decide, upon a bill with proper averments, what is to be the effect upon that right of such a contrivance. A conspiracy of that kind is rather improbable, when we consider the facility with which husbands usually obtain relinquishments of

dower rights from their wives. But in the present case nothing, of the sort is pretended; nor is any complaint made of the manner in which the judicial power of the court was exercised; and it must therefore be taken, if that were material, to have been properly and discreetly exercised, with a due regard to the rights and interests of all concerned in the subject.

411 *In fact, the bill is not framed with a view to the recovery of a supposed interest in the surplus proceeds, but for the recovery of dower in the land itself, upon the utterly erroneous pretension that it was paramount to the vendor's lien, or, if not so, that the appellee had still a right to redeem upon contributing a due proportion of the incumbrance, notwithstanding its foreclosure by the sale and conveyance to the purchaser under the decree.

On the other hand, upon the supposition of an inchoate and contingent interest of the wife in the surplus proceeds, requiring the protection of the court, by what means was such protection to be afforded? I can conceive of none other than a sequestration of the surplus, or a sufficient portion thereof, during the coverture, to await the title of the wife, if a title on her part should ever accrue. The coverture might continue for half a century. In the mean time the fund would be locked up, to the prejudice of the husband's interest, and of the wife's too, as connected with his. And when the coverture is determined, if by the death of the wife, the precaution will have been merely mischievous, and if by the death of the husband, the value of the wife's interest, to be ascertained in reference to that period, may not exceed a single dollar. It seems to me an anomalous idea to set apart and withhold from the husband a portion of his estate, for the dower of the wife, if she should ever become entitled to it. Such an equity on the part of a feme covert would require her to be heard as a party in every suit against her husband for the foreclosure of a mortgage, legal or equitable. No one supposes that this would be proper; and the reason simply is, that she has nothing to be protected till the death of her husband.

But if all this were wrong, how is the purchaser under the decree of foreclosure, or the property in his hands, to be affected by the failure of the court to do

412 *its duty in that regard? He accepted the invitation of the court to become the purchaser, received by its order a complete title, and paid up according to its directions the full amount of the consideration. What more concern had he in the matter? Was it his duty to resist the mandate of the court? could he have resisted it? That was impossible. He was bound hand and foot by the authority of the court, and could not move a finger in opposition to its decree. And yet we are now called upon to subject him to loss because of his obedience. Can a court of conscience do this? Would it not be gross injustice, nay more, would it not be rank oppression? Establish such

a doctrine, and there will never again be a surplus at such a judicial sale.

It surely cannot be true that a purchaser under such circumstances is responsible for an error of the court in the disposition of the proceeds; or that he is bound to see to the proper application of the purchase money. The court itself made what it held to the proper application, and the purchaser had nothing more to do with it. There are some cases, sufficiently harsh, in which a purchaser has been compelled to see to the proper application of purchase money by the hands of other individuals; but none, I believe, where the application has been made by the hands of the court. If the court has jurisdiction of the subject, and the proper parties are before it, a purchaser under its decree is not affected by irregularities or errors in the proceedings, provided the sale be made according to the decree. Nor is he bound to see that only so much of the estate is sold as is necessary for the purposes of the trust; nor to see to the application of the purchase money, when the court takes upon itself the application. 2 Smith's Ch. Pract. 196; Bennett v. Hamill, 2 Sch. & Lef. 566; 1 Sugden on Vendors, 9th ed. p. 58; 2 Id. p. 34.

But let us suppose that the appellee had a valid claim against the purchaser 413 under the decree, and the *property in his hands; it is at best an equitable, not a legal claim; and if there be others against whom there is a stronger equity, they ought to be resorted to primarily, and the purchaser and the property only eventually. Now surely the creditors of the husband, who in this aspect of the case have improperly obtained the very fund in question, in satisfaction of their claims, ought to be subjected in relief of the innocent purchaser; and there can be no propriety in making him primarily responsible for what has been appropriated by them, without his default, to their benefit. If therefore the appellee's pretensions had been well founded, instead of being, as I conceive, utterly baseless, those creditors ought to have been brought before the court, and a decree rendered against them in the first instance, and only eventually against the purchaser and the property in his hands, or in the hands of those deriving title from him.

It is proper to add, that I think the decree also erroneous in the mode and measure of relief granted to the appellee; and on that point I concur entirely in the opinion of judge Allen, and in the valuable suggestions of the enlightened judge who has favoured us with remarks and illustrations upon the proper mode of calculating the present value of life annuities.

Upon the whole case, my opinion is that the decree of the circuit court ought to be reversed, and the plaintiff's bill dismissed with costs.

STANARD, J., said, that if he had been of opinion, with judge Allen, that the widow had a valid claim against the pur-

chasers, he should have concurred in the results of that opinion, both in respect to the right of election, and the principle on which the value of the dower interest was to be ascertained. But he was of opinion, with judge Baldwin, that the claim against the purchasers could not be sustained.

414 And therefore the *decree of this court was, that the decree of the circuit court should be reversed, and the bill dismissed with costs.

Note by reporter.—In the case of *Heyward v. Cuthbert*, 1 M'Cord 386, the widow had recovered a sum in gross, in full of her dower. This case is referred to by Nott, J., delivering the opinion of the court in *Wright v. Jennings*, 1 Bailey 280, in the following terms: "It appeared that the commissioners had assessed one sixth of the fee simple value of the estate, which assessment was sustained; and the same rule has generally prevailed since that period, and I believe has been approved by experience. We have no table of life annuities in this state, and if we had, the commissioners usually appointed for the performance of this duty would be very incompetent to apply it to the various cases that might arise. I think, therefore, that we had better adhere to the rule adopted in the case of *Mrs. Heyward*, except in extreme cases, of youth on the one hand, or of age and infirmity on the other; in which something more or less, according to circumstances, may be allowed." These are the views of the court of appeals of South Carolina. On the other hand the supreme court of Massachusetts, as a guide in estimating the probable duration of the life by which a dower interest is limited, adopted, upon its publication, the table made by professor Wigglesworth of Cambridge university, published in the *Transactions of the American academy*, vol. 2, p. 133. *Estabrook v. Hapgood*, 10 Mass. Rep. 315. That table may be seen also in the *American Jurist* for April 1834, vol. 11, p. 492, as well as in 2 Rob. Pract. 381. It may be inferred from the opinions in *Wilson &c. v. Davisson*, that in estimating the probable duration of life in Virginia, this table, in the absence of any other better adapted to our state, may be generally used as a guide; liable of course to be departed from, where the particular circumstances of any case shall make it proper to do so. After fixing upon the probable duration of life, it is to be then ascertained, by a proper mode of calculation, what any given sum, payable annually for the estimated term, is worth at present. In *Rees's Cyclopaedia*, vol. 2, title *Annuities*, much information is furnished on the subject. The following is extracted from that article.

"Annuities may be considered as payable yearly, halfyearly, or quarterly. The present value of an annuity is that sum which, being improved at compound interest, will be sufficient to pay the annuity.

"The present value of an annuity certain, payable yearly, and the first payment of which is to be made at the end of a year, is *calculated in the following manner. Let the annuity be supposed to be £100: the present value of the first payment of it, or of an hundred pounds to be received a year hence, is that sum in hand, which, being put out to interest, will increase to £100 in a year. In like manner the present value of the second payment, or of £100 to be received two years

hence, is that sum in hand, which, being put out to interest, will increase to £100 in two years. The like is true of the value of the 3d, 4th, 5th &c. payments; and the sum of the values of all the payments is the value of the annuity.

"Let the interest be supposed to be 4 per cent. The sum which, improved at 4 per cent. interest for a year, will produce £100 at the end of the year, is the sum which bears the same proportion to £100 that £100 bears to £100 with 4 added to it, that is, to £104. Say, then, as £104 is to £100, so is £100 to a fourth proportional, which will be 96, 15, or 296 3s. the value of the first payment.

"Again, the sum which, improved at 4 per cent. for two years, will produce £100 at the end of two years, is the sum which, being now put out to interest, will produce in a year that sum which in one year more will produce £100; that is, it is the sum that will produce in a year 296 3s.; for it has been just shewn that 296 3s. will in a year produce £100. Say, then, as 104 is to £100, so is 296 3s., or 96, 15, to a fourth proportional, which will be 92, 46, or 292 9s. The value therefore of the second payment is 292 9s.

"By proceeding in this method, it will be found that the values of the 3d, 4th, 5th &c. payments are £88, 89, £85, 48, £82, 19, &c. The sum of 10, 20, or 100 of these values, is £811, £1350, £2450, respectively, or the present value of an annuity of £100 payable for 10, 20, or 100 years. The sum of an infinite number of these values is £2500, of the value of a perpetual annuity of £100 at 4 per cent."

In the communication referred to in Judge Allen's opinion, Judge Smith remarks that the results produced by taking Wigglesworth's table as a guide in respect to the duration of life, and calculating the discount by simple interest, have been so glaringly incorrect, that the table has been often thrown aside under an idea that the error must be in that, whereas the error (he says) is in the mode of calculation. Judge Smith does not question the correctness of the table as a guide in cases generally; but, taking the expectation of life as correct, he considers the true rule to be to calculate the discount by compound interest. He refers to Pike's *Arithmetic*, 2d edition enlarged, p. 268, where it is said, "The purchasing annuities by simple interest is unjust and absurd, which may be easily made to appear by one instance only: the price of an annuity

of £100 to continue 30 years, discounting at six per cent., will amount to nearly £2000, the interest of which for one year only exceeds the annuity; would it not therefore be highly absurd to give a sum which would yield me nearly £120 yearly forever, for an annuity of £100 to continue only 30 years?" He refers also to the American edition of Nicholson's *British Encyclopedia*, title *Annuities*, where it is said, "The present value of an annuity is that sum which, improved at compound interest, will be sufficient to pay the annuity;" and then proceeds as follows: "This is the correct rule according to Pike, who, to facilitate calculations, has made out a table (p. 325), shewing the present worth of an annuity of £1 for any number of years from 1 to 40, calculating by compound interest. I have found it very accurate, and will send you herewith an extract of so much of it as gives the present value at 6 per cent., only changing the £1 into \$1, as being more convenient. You will find it marked A. I may also remark that I

have seen in Jessee's Arithmetic a table corresponding precisely with this, and the author gives it as the true rule.

"I have endeavoured to test the correctness of these tables, and the principle upon which they are constructed; and I think I can give my views best by supposing a case, and sending you the calculations I have made, for your inspection. Let us suppose then that a widow, having her life estate in dower land worth annually \$60, agrees with the reversioner that they will sell out and out, and divide the money by the correct rule; that the land sells for \$1000, and it is estimated and agreed that her expectation of life shall be put down at ten years: then, by a fair division of this money, the owner of the life estate ought to have what would be equivalent to \$60 per annum for 10 years, and the reversioner ought to have what would be, in cash, a just equivalent for \$1000 ten years hence. I have made a calculation of the value of the life estate, or rather the annuity for 10 years, discounting by simple interest; and it appears to be \$458.93 3-10 cents. I send it that you may compare it with the others. It is marked B." [The principle of calculating by compound interest being that approved by the judges of the court of appeals, it is thought unnecessary to publish the table B.]

"I have also made a calculation, taking the discount of compound interest, which I contend is the true rule; and by this the life estate would be of the present value of \$441.00. You will find this calculation marked C.

"If, in dividing the \$1000, the owner of the life estate gets \$441.00, there will be left for the reversioner \$558.40. Let this sum be improved at compound interest for 10 years, to ascertain whether the reversioner will then have his proper sum of \$1000. It comes out precisely. I send this calculation marked D.

417 * "Let me try this rule by another test.

Suppose the owner of the life estate puts out her \$441.00, taking bond for it, and stipulating that the borrower shall annually pay \$60, to be credited on the bond: let us calculate when the bond would be discharged by such payments. It will be seen by the calculation I send, marked E, that the bond would be discharged precisely at the end of 10 years, and that the owner of the life estate will have received her \$60 annually for the 10 years. Does it not follow that \$441.00 is the true value of the life estate?

"But let us suppose for a moment that the expectation of life in the case I have been discussing were put down at 30 years, instead of 10 years; then it would be seen by calculation, if made according to the rule of simple interest, that of the \$1000, the amount of the sale, there would be nothing to give to the owner of the reversion as his share. In fact, there would not be quite enough to make up the share of the owner of the life estate. The rule of simple interest must therefore, I humbly conceive, be abandoned."

[A.]

A Table shewing the present worth of an annuity of \$1 for any number of years from 1 to 40, at 6 per cent., calculating discount by compound interest.

Years.	Present worth.	Years.	Present worth.
	\$		\$
1	0.94339	21	11.76407
2	1.83339	22	12.04158
3	2.67301	23	12.30335
4	3.46510	24	12.55035
5	4.21236	25	12.78335
6	4.91732	26	12.00816
7	5.58288	27	12.21053
8	6.20979	28	12.40816
9	6.80169	29	12.59072
10	7.36008	30	12.76483
11	7.89687	31	12.92908
12	8.41384	32	13.08396
13	8.91268	33	14.22917
14	9.39498	34	14.36618
15	9.71225	35	14.49333
16	10.10589	36	14.61738
17	10.47726	37	14.73311
18	10.82700	38	14.84046
19	11.15511	39	14.94270
20	11.46992	40	15.03913

418

*[C.]

Calculation to shew present value of an annuity of \$60 for 10 years, by discounting at compound interest.

1st year.	\$60.004 with 1 year's int.	- \$60
2d	58.40 " 2 years' compound int.	- 60
3d	50.377 " 3 " "	- 60
4th	47.525 " 4 " "	- 60
5th	44.885 " 5 " "	- 60
6th	42.297 " 6 " "	- 60
7th	39.958 " 7 " "	- 60
8th	37.044 " 8 " "	- 60
9th	35.513 " 9 " "	- 60
10th	33.508 " 10 " "	- 60

\$441.001, present value.

By Table A. an annuity of \$1 for 10 years is \$7.36008

Multiplied by 60 (the annuity) is equal to \$441.60480

Variance only 3-10 of a cent.

[D.]

Calculation of \$558.40, reversioner's share, improved at compound interest for 10 years.

	Sum	\$558.40
1st year, add 1 year's int.		33.504
		591.904
2d year, add year's int.		35.514
		627.418
3d year, add int.		37.645
		665.063
4th year, add int.		39.908
		704.966
5th year, add int.		42.297
		747.263
6th year, add int.		44.835
		792.098
7th year, add int.		47.535
		839.633
8th year, add int.		50.377
		890.000
9th year, add int.		53.400
		943.400
10th year, add int.		56.604
		<u>1000.004</u>

419

*[E.]

Calculation, supposing \$441.60 put to interest, bond taken, and \$60 paid annually and credited.

Amount of bond	\$441.60
Add 1 year's int.	28.496
	469.096
Deduct 1st year's credit	60
	408.096
Add 2d year's int.	24.485
	432.581
Deduct 2d year's credit	60
	372.581
Add 3d year's int.	22.354
	394.935
Deduct 3d year's credit	60
	334.935
Add 4th year's int.	20.096
	355.031
Deduct 4th year's credit	60
	295.031
Add 5th year's int.	17.701
	312.733
Deduct 5th year's credit	60
	252.733
Add 6th year's int.	15.163
	267.895
Deduct 6th year's credit	60
	207.895
Add 7th year's int.	12.473
	220.368
Deduct 7th year's credit	60
	160.368
Add 8th year's int.	9.632
	169.990
Deduct 8th year's credit	60
	109.990
Add 9th year's int.	6.599
	116.589
Deduct 9th year's credit	60
	56.589
Add 10th year's int.	3.395
	59.984
Deduct 10th year's credit	60
Error in calculation, 1 6-10 cent only.	

Calculation of discount by compound interest may be stated in the rule of three, thus:

1st year.	As 106 : 100 :: 60	: 56.604
2d year.	As 106 : 100 :: 56.604	: 53.40
3d year.	As 106 : 100 :: 53.40	: 50.377

420

*Young v. Warne & C.

October, 1843, Richmond.

(Absent CABELL,* P.)

Guardian and Ward—Action for Necessaries—Witness.†
—In an action brought by keepers of a boarding

*He was prevented by indisposition from attending at this term, to wit, from the 15th of October to the 10th of December.

†See monographic note on "Guardian and Ward" appended to *Barnum v. Frost*, 17 Gratt. 398. The principal case is cited in *Gayle v. Hayes*, 79 Va. 549.

school against a guardian, for board, tuition, and other necessities furnished to the ward, the administrator of a previous guardian is a competent witness for the plaintiffs. But if it appear that the board, tuition, and other necessities were furnished at the request of the previous guardian, and no express promise has been made by the second guardian to pay therefor, the action against the second guardian for the same cannot be maintained.

This was an action of assumpsit, brought in the circuit court of Mecklenburg by Joseph Warne and George L. Baker. They were teachers in a female academy at Boynton in Mecklenburg county, and rendered services as teachers to Eliza Redd, an orphan, and furnished her with board, books and stationery. Miss Redd was sent to them by her mother and guardian Elizabeth Redd, and was at the academy three sessions, to wit, two in 1826 and one in 1827, the last commencing the 1st monday in January and ending the 20th of June. In March 1827, Elizabeth Redd died. Upon her death, Christopher Haskins qualified as her administrator, and thereafter Samuel Young became guardian of Eliza. This action was brought against Young, by the name of guardian of Eliza Redd, to obtain compensation for the services rendered, and the board, books and stationery furnished, as before mentioned. The declaration, besides counts in indebitatus assumpsit for those services and supplies, contained the money counts, including a count for money had and received by the defendant, as guardian, to the use of the plaintiffs. The plea was the general issue.

421 *At the trial (which was in April 1830, before judge Saunders) the plaintiffs introduced Christopher Haskins, the administrator before mentioned, as a witness. He was objected to by the defendant, but the court overruled the objection. Haskins proved the facts already mentioned, and also the following, to wit: that Elizabeth Redd received, a year or two before her death, 213 dollars for her ward's proportion of a certain estate; that he (Haskins), as administrator of Elizabeth Redd, had paid the defendant as guardian 200 dollars in money, and delivered him five negroes; and that the ward, after this suit was brought, and while yet an infant, had married. The defendant also gave in evidence a copy of the will of miss Redd's father, whereby he directed that his wife should have the use of all the property bequeathed by him to his said daughter (until she attained the age of 21 years or married) for the purpose of supporting and educating her. And thereupon the defendant, by his counsel, moved the court to instruct the jury, that in the absence of all proof of any express contract between him and the plaintiffs, the action could not be maintained against him; but the court overruled the motion. The defendant excepted to both opinions of the court, as well the opinion admitting Haskins as a witness, as that refusing the instruction.

Verdict being rendered for the plaintiffs for 253 dollars damages, with interest from the 12th of June 1827 till paid, the court gave judgment accordingly for the said damages and interest, and the costs of suit.

On the petition of the defendant, a super-seedeas was awarded.

Taylor for plaintiff in error. Whether the administrator of Mrs. Redd was a competent witness or not, the judgment of the circuit court cannot be sustained. For the second guardian made no contract whatever with the plaintiffs. Mrs. Redd 422 the mother and first guardian *contracted with them, and there is no principle on which her contract can be shifted from her or her representative to the second guardian. Perhaps the guardian was supposed to be liable on the ground that the board and tuition may be considered as necessities for the ward. But there are at least two sufficient objections to any such ground. 1. A contract of the second guardian to pay for those necessities, which were the subject of express contract by the former guardian, cannot be implied. And 2. where necessities are furnished to a ward at his own instance and request, he is the proper party to be sued. An infant is as competent to contract and bind himself for necessities, as an adult; and when he does so contract, the suit cannot be maintained against the guardian, under the idea of an implied contract by him, unless it can be shewn that he gave authority to his ward to make that particular contract, or that he subsequently ratified and adopted it as his own. Perhaps the guardian was supposed to be liable on the ground that he had received 200 dollars and five slaves belonging to the ward. But this would be in effect to take from the guardian, and apply to the satisfaction of the plaintiffs below, a considerable part of the principal of the ward's estate, though the guardian is not authorized to use the principal for his ward's support. Besides, the contract in this case, made by the first guardian, may have been an improvident one. In justice, the estate of the first guardian ought to be held solely responsible; for she received the whole fund appropriated by the will to the maintenance and education of the ward.

There was no counsel for the defendants in error.

STANARD, J. The evidence on which the instruction was moved utterly fails to shew any contract of the defendant, express or implied, prior or subsequent to the rendition of the services and the furnishing 423 the supplies *to the ward, on which the claim of the plaintiffs is founded. On the contrary, it shews that if there was any contract for those services and supplies, it was made by the former guardian, and that the services and supplies were rendered and furnished before the defendant became guardian. Unless the law devolved the responsibility arising

from the contract of a prior, on a subsequent guardian, the action, so far as it counts on a contract express or implied for those services and supplies, cannot be supported. That the law does not devolve such responsibility on the successor guardian, is, I think, free from all doubt. The action therefore, upon the evidence that was offered, could not be sustained on any of the counts of the declaration alleging an assumption of the defendant for those services and supplies. Had there been proof that the fund properly applicable to the support and education of the ward during the time that such support and education were supplied by the plaintiffs, had been uncollected by the former guardian, and had come to the hands of the defendant, or had been paid over by the administrator of the former guardian to the defendant, it might be urged that the plaintiffs were entitled to recover on the count for money had and received by the defendant to their use. Whether, if there had been such proof, it would in law have justified a recovery on that count, I give no opinion, nor have I formed one. There was no such proof, and the question does not arise. On the case made by the evidence, I entirely concur in the opinion of the other judges, that the court below erred in refusing to give the instruction moved by the defendant, and that the judgment must be reversed.

The judgment of the court of appeals was drawn by Baldwin, J., in the following terms:

The court is of opinion that Christopher Haskins was a competent witness on the trial before the jury, in the 424 *proceedings mentioned, and that the circuit court properly refused to exclude his testimony. But the court is further of opinion, that it appearing, from the bill of exceptions, to have been proved on said trial that the board, tuition, and other necessities furnished by the defendants in error to the ward Eliza Redd, were so furnished, not at the request of the plaintiff in error, her last guardian, but at the request of Elizabeth Redd, her former guardian, and that there was no evidence tending to prove an express promise on the part of the plaintiff in error to pay the defendants in error therefor, the said circuit court erred in refusing to instruct the jury, on the motion of the plaintiff in error, that the action against him by the defendants in error for said board, tuition and other necessities could not be maintained. The judgment is therefore reversed with costs, the verdict set aside, and the cause remanded for a new trial.

Page &c. v. Page.

October, 1843, Richmond.

(Absent CABELL, P.)

Nuncupative Will—Last Sickness—Commitment of Testimony to Writing—Construction of Statute—

*Nuncupative Will—Validity—Intention.—It is essen-

What sickness will be considered the last sickness of the deceased, and what will be considered a commitment to writing of the testimony or the substance thereof, within the meaning of the statute concerning nuncupative wills, in 1 R. C. 1819, p. 377, § 7, 8.

Same—Impeachment after Probate—Construction of Statute.—The statute in 1 R. C. 1819, p. 378, § 13, which allows a person interested to appear within seven years after probate of a will, and by bill in chancery to contest the validity of the will, applies only to written and not to nuncupative wills.

Same—Same—Case at Bar.—When a nuncupative will has been proved before a court of competent jurisdiction, after fourteen days from the death of the testator, and after the widow has 425 been summoned to contest the "same, as directed by the act in 1 R. C. 1819, p. 379, § 18, the sentence of the court admitting the same to probate is binding upon her, and cannot be impeached except by appeal therefrom, or by a bill in equity founded upon her having been prevented by fraud or accident from making her defence in the court of probate.

Same—Invalidity as to Realty—Case at Bar.—A nuncupative will is of no effect in law in relation to the testator's real estate, or the profits to accrue therefrom. But where, in the lifetime of the testator, a division was made between him and his two brothers of their father's real estate, which was acted upon by him in his lifetime by taking possession of the part allotted to him, and was also confirmed and ratified by him at the time of making his nuncupative will, the validity of such division was recognized in a court of equity.

Same—Construction of—Case at Bar.—A testator, by a nuncupative will, gave to his wife certain slaves and articles of personalty, "exclusive of the portions of his estate she would be entitled to as his widow under the law." His wife being pregnant, he said he wished his estate to be kept together and managed by his brothers for the benefit of his wife and child during her widowhood, and in

tial to the validity of a nuncupative will, that it should appear, that the deceased, at the time he spoke the alleged testamentary words, had a present intention to make his will, and spoke the words with such intention, and should distinctly indicate that intention, by calling upon persons present to take notice or bear testimony that such is his will, or by saying or doing something tantamount in substance, indicating plainly that the words spoken were designed to be testamentary. Winn v. Bob, 3 Leigh 140, 28 Am. Dec. 258. See Phoebe v. Bog-gess, 1 Gratt. 129, and note.

See Va. Code 1837, § 2516; W. Va. Code 1899, ch. 77, § 5, p. 706.

Same—Sufficiency of Testamentary Words.—Proof by one witness, that, on a certain day, in the time of the last sickness of the deceased, and at his habitation, he said it was his wish that a certain person should heir all his property; and, by a second witness, that on another day, during the same sickness, and at the same place, he heard the deceased speak the same words, and was told by him to take notice of what he said, is not sufficient to establish a nuncupative will, if the value of the personal property of the deceased exceed thirty dollars. Weeden v. Bartlett, 6 Munf. 123.

Same—Where Made—Habitation.—When a nuncupative will was not made at the habitation of the

the event of her marriage he wished them to manage the child's part of the estate. If the child should live, and then die under age without lawful issues, he wished his brothers to have the whole of his estate in equal portions, except the slaves and articles specifically given to his wife. The child died in ten days after his birth, leaving the testator's brothers, who were the next of kin of the testator and of the child. HELD, that by the true construction of the will, the testator intended that his wife should have in absolute ownership the slaves and other personal property specifically bequeathed to her, together with her legal rights in his estate as his widow, and nothing more: that the child inherited the real estate, subject to the widow's right of dower therein, and was entitled under the will (after payment of debts) to the slaves not specifically bequeathed, subject to the widow's life estate in one third thereof, and to distribution with the widow, in conformity to law, of the other personal estate not specifically bequeathed: and that, upon the death of the child, his interest in the real estate descended to his paternal uncles, and his interest in the slaves and other personal property passed to them under the executory bequest in their favour contained in the will.

Mann Page died seized of land in Han-over, and after his death a tract of land in King William, called Marshalls, was purchased and paid for out of money 426 which "came to the hands of his executor. He left three children, Robert Page, Charles C. Page and John F. Page, who were entitled to have these lands divided between them. In the latter part of 1823, these children (all of whom were then above 21 years of age) requested three gentlemen to make the division, suggesting that the Hanover land should be divided into two parts, and the King William land make the third part. A plat of the Han-

deceased, nor where he had resided for ten days next preceding, but was authenticated as the law requires, it was held that the will ought to be established, notwithstanding his having been very unwell when he left home, if, afterwards, he was taken more dangerously ill, and died at the place where the will was made. Marks v. Bryant, 4 Hen. & M. 91. See also, Nowlin v. Scott, 10 Gratt. 65.

Same—Meaning of "Habitation"—It was held in Nowlin v. Scott, 10 Gratt. 64, that the word "habitation" in the act of 1 Rev. Code, ch. 104, § 7, p. 377, in relation to nuncupative wills, means "dwelling house."

Same—"Last Sickness."—The principal case is cited in Reese v. Hawthorn, 10 Gratt. 563, 564.

Same—Same.—A nuncupative will to be valid must be made in the last sickness of the testator, when he is in such extremity that he has not the ability and opportunity to make a written will. Reese v. Hawthorn, 10 Gratt. 548. See Marks v. Bryant, 4 Hen. & M. 91.

Same—Omission of Part of Verbal Declaration—Effect.—Although in committing a nuncupative will to writing, within six days from the speaking of the testamentary words, a distinct and independent part thereof may be omitted, the residue of the will is not thereby vitiated. Marks v. Bryant, 4 Hen. & M. 91.

over land being laid before the gentlemen, they made the division, and directed that one part of the Hanover land, with the house on it, should receive 150 dollars from the child who should draw Marshalls, and the other part of the Hanover land, called Gilliams, should receive from Marshalls 450 dollars. The parties then proceeding to draw, Robert Page drew Gilliams, Charles C. Page drew the other part of the Hanover land having the house on it, and John F. Page drew Marshalls. With this result all were satisfied; and in the beginning of 1829, John F. Page took possession of Marshalls, and from that time made in his residence.

John F. Page was taken sick from home on the 17th of February 1833, when he was at Mansfield the residence of Thomas Atkinson in the county of Dinwiddie; and he died on the 4th of March 1833, without having returned to his habitation. In the time of his sickness, to wit, on the 24th of February 1833, he made a verbal disposition of his estate. And on the 28th of that month, the substance of what he said was committed to writing, as follows:

"We whose names are hereunto subscribed do certify that John F. Page of the county of King William, who is now extremely ill at the house of Thomas Atkinson in the county of Dinwiddie, called upon us on the 24th day of February 1833, and said, as he was too sick to have a will written and executed in the customary way, he wished, in the event of his death from the present illness, his property disposed of as

427 follows. *To his wife Catharine Page he gave his negro man Jemmy, woman Lucy, and a washerwoman to be hired by his brothers for the exclusive use of his wife, until one could be purchased by his brothers with convenience to his estate; which when purchased he also gave to his said wife. He said also, he gave to his wife his carriage and horses, and all his household and kitchen furniture; which negroes, carriage, horses and furniture he gave, and wished his wife to have, exclusive of the portions of his estate she would be entitled to as his widow under the law. The said John F. Page at the same time mentioned that his wife was pregnant; and that he wished his estate to be kept together and managed by his brothers, for the benefit of his wife and child, during his wife's widowhood, and in the event of his wife's marriage, they his said brothers to manage his child's part of the estate. The said John F. Page said at the same time, that he confirmed and ratified the division of his father's estate, both real and personal, among his brothers and himself, as it was made by the surveyor and gentlemen commissioners who divided it at their request. The said John F. Page also said, that if the child his wife was now pregnant with should live, and then die under age without lawful issue, he wished his brothers Robert and Charles Page to have the whole of his estate both real and personal, in equal portions, except the serv-

ants, carriage and horses, and furniture, specifically given to his wife as before mentioned. And then the said John F. Page said to one of the undersigned, he wished him to commit to writing what he had said concerning the disposition of the estate, and the same to be taken and published, in the event of his death, as his nuncupative will. Witness our hands, at Mansfield, this 28th day of February 1833.

Thomas Atkinson,
N. T. Page."

428 *On the 22d of April 1833, this writing was produced in the court of King William county, and ordered to be filed; and the widow of the decedent was directed to be summoned to the next court, to contest the will. The summons which issued was returned with an endorsement signed by the widow, stating that she acknowledged service of the summons, and did not intend to contest the will. On the 22d of July 1833, "the foregoing depositions of Thomas Atkinson and N. T. Page, purporting the nuncupative will" of the said John F. Page, were established by the court as his will, and ordered to be recorded. And administration with the will annexed was thereupon granted to Charles C. Page.

The posthumous child having died within ten days after its birth, a bill was filed by the widow in March 1835, in the circuit court of King William, insisting that the nuncupative will was not legally admitted to record, because the witnesses Atkinson and Page did not testify orally in court to the supposed testamentary words, or their import, nor were their depositions taken, either in or out of court, to establish the same, but they merely proved, as the nuncupative will, the paper filed in court as aforesaid.

In May 1835, on the motion of Charles C. Page as next of kin of the decedent, a summons was again awarded against the widow by the county court, to contest, if she pleased, the proof of the nuncupative will. This summons being returned at the June term, and appearing to have been executed upon her, Thomas Atkinson and N. T. Page were then sworn in court, and deposed, that upon the 24th of February 1833, at Mansfield, at the house of Thomas Atkinson in the county of Dinwiddie, John F. Page did call upon the said deponents, and say in substance as follows: "As he was too sick" &c. (stating, in the precise terms of the writing first admitted to probat, every thing therein contained; except

only, that instead of concluding in 429 the terms of "the writing," "And then the said John F. Page said to one of the undersigned, he wished him to commit to writing" &c. these depositions concluded with the statement, "And then the said John F. Page said to the said Thomas Atkinson," &c.) It also appeared to the court, by the oath of the said Thomas Atkinson and N. T. Page and of John C. Pollard, that the above testimony of Atkinson and N. T. Page, or the substance

thereof, was committed to writing within six days after the said words were spoken by the said John F. Page, to wit, on the 28th day of February in the year 1833, at Mansfield in the county of Dinwiddie aforesaid, which writing is in the words and figures following, to wit: "We whose names are hereunto subscribed" &c. (reciting it). The court, having heard the testimony of the said witnesses and of sundry others, was of opinion that the said words deposed to as aforesaid, and committed to writing as aforesaid, were used by the said John F. Page deceased in his last sickness; that at the time of speaking said words, he was of sound and disposing mind, and of capacity to make a will; that he was suddenly taken sick from home, at Mansfield, at the house of Thomas Atkinson in the county of Dinwiddie, and died there without returning to his own habitation in the county of King William, never having left Mansfield between the time he was taken sick and his death; that during his last illness, in extremity, and in contemplation of immediate death, he spoke the said words, and called on Thomas Atkinson and N. T. Page to take notice that such words were his will; and that after speaking the said words, he desired Thomas Atkinson to commit to writing what he had said concerning the disposition of his estate, to be published, in the event of his death, as his nuncupative will. Whereupon it was ordered that the said nuncupative words be established as the true last will of the said John F.

Page, and that the same be recorded.
430 *By the original bill in the suit in the circuit court, the first sentence of the court of probat was impeached by the widow, upon the ground that she had been prevented from making her defence in that court by fraud. And now, by an amended bill, she impeached the second sentence, upon the ground of her having been prevented from making her defence by accident. And the said bills alleged, that at the time of speaking the supposed testamentary words, the decedent was not of sound and disposing mind and memory; that he was not then (in contemplation of law) in his last sickness; and that the formalities of the law were not observed in reducing the will to writing, and in proving the same. It was insisted by the original bill, that real estate could not pass by a nuncupative will, and that the ratification by the nuncupative will of the division therein mentioned was invalid. The original and amended bills also submitted to the court the interpretation of the said will, in case the same should be established.

The next of kin of the decedent and of his child being Robert Page and Charles C. Page, they were made defendants, the former in his own right and as administrator de bonis non of Mann Page, and the latter in his own right and as administrator with the will annexed of John F. Page. They put in elaborate answers, denying the allegations whereby the will was impeached;

insisting that the division of their father's real estate, having been fairly made, acted upon by the said John F. Page in his lifetime, and sanctioned by him in his last moments, ought not to be disturbed; and submitting their views as to the proper interpretation of the will.

Depositions were taken in the cause, from which it appeared, that the decedent had an attack of pleurisy, and the symptoms, on the 23d of February, were those usually seen in a severe attack of that disease; but about 8 or 9 o'clock the next morning, his fever had abated, and the symptoms of the disease become mitigated.

431 *Charles Page went that morning (being Sunday) to church in Petersburg, which was about 5 miles from Mansfield. While attending church, he was sent for in consequence of a change in the disease for the worse, and reached Mansfield between 12 and 1 o'clock. The will was made about 1 o'clock, and the decedent was then perfectly in his senses. The physicians who had been sent for at the same time that Charles Page was sent for, did not reach Mansfield until between 4 and 5, and he was then much worse. He remarked to the physicians, that his friends had become very much alarmed and thought he would die, but he did not think he would. One of the physicians, however, deposed that he was then incapable of dictating a will, and the other said he thought it doubtful whether he would survive the night or not. But the next morning (Monday the 25th) the symptoms had improved, and he was perfectly in his senses; and he was in his senses at intervals every day between the 24th and the day of his death, being usually better in the morning and worse in the afternoon, when his fever rose.

Pending the suit, Robert Page and Charles C. Page both died. As to the former, the suit was allowed to abate; it was revived against the executor, widow and child of the latter.

The cause having been removed by consent to the circuit court of Hanover, came on first to be heard on the bills, answers, exhibits, and examination of witnesses, and certain accounts were then directed. Upon the coming in of the commissioner's report, the case was again heard, and a decree made the 12th of October 1838, whereby the noncupative will was established, and the division therein mentioned confirmed. And the court adjudged and declared, that according to the true construction of the will, the plaintiff was not only entitled to the specific legacy therein bequeathed to her, (all of which it was

admitted she had received, except
432 *the washerwoman directed to be purchased for her) but that the child of the testator being dead, she was entitled to the whole profits of the estate, real and personal, so along as she remained the widow of the testator, and from and after her marriage, to her legal rights in the estate as if he had died intestate, to which

end the estate was by the will to be kept together.

On the petition of the representatives of Charles C. Page, an appeal was allowed.

Daniel for appellants. The object of the testator was to leave the widow to her legal rights, with the addition of certain specific legacies mentioned in the beginning of the will. The clause directing the estate to be kept together and managed for the benefit of the wife and child during her widowhood, if construed to give an estate during widowhood to the wife, would be inconsistent with the executory limitation to the testator's brothers in the event of the child's death under age without lawful issue.

The court has allowed the widow, during her widowhood, the whole estate, real as well as personal. Even if that had been the intention of the testator, it could not be effected by a nuncupative will; for such a will can create no interest in lands, much less an estate of freehold therein, which would be imported by a gift of the profits during widowhood. 1 Tho. Co. Lit. 200.

Lyons for appellee. There was no valid will. A nuncupative will made in the commencement of a disease, of which the testator ultimately dies, but dies after a considerable time has elapsed, and after rallying from time to time, so as to be perfectly capable from time to time of making a regular will in writing, is not made in the last sickness contemplated by the statute. To render a nuncupative will valid on the ground of its being made in the testator's last sickness, it must be made in the sickness of which he dies, and there must

433 *afterwards be no such recovery (total or partial) as may leave him capable in mind and body of executing a will in writing. The statute contemplates cases of necessity, of inability to make any other than a nuncupative will, and ought not to be extended beyond cases of that character. *Prince v. Hazleton*, 20 Johns. 502. The cases of *Weeden v. Bartlett &c.*, 6 Munf. 123, and *Winn v. Bob & others*, 3 Leigh 140, though not precisely in point, may be referred to as confirmatory of the same principle. The testamentary words must also be uttered by the decedent in the prospect and contemplation of approaching death. The cases establish that the proximity of death, in point of fact, at the time of the testamentary words spoken is not sufficient, unless the testator was aware of and believed such proximity. And here the evidence does not shew such consciousness and expectation on the part of the testator, but the contrary. Then as to the two sentences of the court of probat. The first of these was plainly invalid. And the second was after six months from the time of speaking the testamentary words. Then the enquiry arises, whether the testimony, or the substance thereof, was committed to writing within six days after making the will. 1 R. C. 1819, p. 377, § 8. The words spoken were so committed to writing; but they

are only a part of the testimony required by the statute to be put in writing. The testator must be of sound mind. He must call on some person present to take notice that such is his will. And the words must be spoken in the time of the last sickness, and in contemplation of death. These matters are indispensable to be proved, and the statute requires that the proof of them, the testimony respecting them, should be reduced to writing, as well as the testamentary dispositions. But all this part of the testimony is omitted in the writing.

II. A nuncupative will, it is admitted, cannot control the profits of real estate, 434 any more than it can pass the land itself. But so far as the will could pass the estate of the testator, the decree adopted the true construction. What is there in this will to countenance the idea, that in the event of the child's death under age and without issue, the widow is to be stripped of all provision except the specific bequests? Yet that is the inevitable result of the argument which denies that the wife took an estate during widowhood in all the property which the will was competent to pass. For the limitation to the brothers, according to the terms of the will, must operate (in the contemplated contingency) upon all the testator's estate except the specific legacies to the widow; no more saving her share as distributee, than her supposed estate during widowhood. Such cannot be the meaning of the testator, because he has declared his intention to be not to give the widow less, but to give her more, than the law would allow in case of intestacy.

III. If the agreement between the three brothers for partition of the lands was not an agreement executed at the date of the nuncupative will, but merely executory, then the will could have no influence on it, since a nuncupative will cannot affect the title to lands; and the widow is entitled to her distributive share of the decedent's money invested in the tract called Marshall's. [Stanard, J. A nuncupative will may operate to convert money into land, because it may dispose of money.] However that may be, it cannot have the effect of substituting a dower interest of the widow in place of an absolute property in her distributable share.

Daniel in reply. According to the interpretation of the statute by this court, the will was made in the last sickness of the testator, and in contemplation of death. *Marks and wife v. Bryant*, 4 Hen. & Munf. 91. And it is plain that the meaning of the legislature was merely to require the testamentary words to be reduced to writing within the six days; not to require that the *testimony as to the decedent's sanity, his intelligent and voluntary action, and the other particulars proper to be proved in court, should also be put in writing. What would be the use of such a requirement? And if there be any use, why was not a similar require-

ment made in the case of written testaments?

But it is too late for the widow to contest the validity of the will. She renounced all purpose to contest the probat, failed to appear though duly summoned, and the probat was in truth at the joint instance of herself and the other parties. She also accepted and enjoyed the legacies given her by the will, and never thought of a contest about the will until after the death of the child. This combination of circumstances would preclude her from a contest now, even if the will had been proved in common form merely. But the will was proved in the form in which, under the statutes of Virginia from 1748 to the present time, nuncupative wills have always been proved. 5 Hen. Stat. at large p. 457, § 11; 1 R. C. 1819, p. 379, § 18. That proof is very different from what is allowed in the case of written wills. The statute respecting probat of written wills authorizes the court to take the proof immediately, requiring no citation of the next of kin: the statute respecting nuncupative wills does provide for a citation of the parties interested, and invalidates the probat unless that provision be complied with. There is no reason for applying to the latter the statute in 1 R. C. 1819, p. 378, § 13, allowing bills in chancery to contest the validity of wills. And this statute should therefore be restricted to cases in which the probat may be in law, and has been in fact, ex parte and without notice; cases, namely, of wills in writing. In England, when a testament of personalis is proved in solemn form after citation of the next of kin and distributees, they are in general precluded by such probat—"forever barred." 1 Wms. on Ex'ors 194. And

the probat here of a nuncupative
436 *will, being what is considered in England a probat in solemn form, a bill in chancery ought not to be allowed after such probat, unless upon some ground of fraud or accident alleged and proved by the complainant. Nor is it at all material as to the first probat, whether it was strictly formal and regular; it is binding nevertheless, being the definitive sentence of a court of competent jurisdiction, never reversed or appealed from.

II. He contended that the true construction of the will was such as he insisted upon in opening. And III. as to the tract called Marshalls, he said, if the division could now be impeached, no division among heirs, not carried out in the most formal manner by deeds of partition, could ever be valid and obligatory. Besides, he remarked, if the division could be treated as a nullity, the testator's estate must be responsible for the rents and profits of the land during all the time he held it.

BALDWIN, J., delivered the following as the opinion of the court:

The court is of opinion that the act of assembly authorizing wills admitted to probat to be contested by a bill in chancery at any time within seven years thereafter, ap-

plies only to written, and not to nuncupative wills; and that the nuncupative will in question having been admitted to probat by a court of competent jurisdiction, after the appellee had been regularly summoned by its process to appear and contest the same, if she thought proper so to do, the sentence of the court of probat was binding upon her, and could not be impeached, except by appeal therefrom, or by a bill in equity founded upon her having been prevented by fraud or accident from making her defence in the court of probat. And the court is further of opinion, not only that the appellee was not prevented by fraud or accident from contesting the

437 said will in the court of *probat, but moreover that it clearly appears from the evidence in this cause, that the same was made by the testator in his last sickness, when he was of sound disposing mind and memory, and with the solemnities required by law. The court is consequently of opinion that there is no error in the decree of the circuit court, so far as the same sustains the validity of the said nuncupative will, and the sufficiency of the probat thereof, whether regard be had to the first or the last sentence of the court of probat: and is also of opinion that there is no error therein in recognizing the validity of the division made between the testator and his two brothers of their father's real estate, and the allotment to the testator of the place called Marshalls, and his accountability for his due share of the balance of the purchase money thereof. But the court is of opinion that the said nuncupative will was of no effect in law in relation to the testator's real estate, or the profits to accrue therefrom; and that, by its true construction, the testator intended that his wife should have in absolute ownership the slaves and other personal property specifically bequeathed to her, together with her legal rights in his estate as his widow, and nothing more. And the court is further of opinion that the testator's posthumous child inherited his real estate, subject to the widow's right of dower therein, and was entitled under the will (after payment of debts) to the slaves not specifically bequeathed, subject to the widow's life estate in one third thereof, and to distribution with the widow, in conformity to law, of the other personal estate not specifically bequeathed: and that upon the death of said child, his interest in the real estate descended to his paternal uncles, Robert and Charles C. Page, and his interest in the slaves and other personal property passed to the said Robert and Charles C. Page, under the executory bequest in their favour contained in said will. The court is therefore of opinion that the

438 *said decree of the circuit court is erroneous, so far as the same is incompatible with the rights of the parties as above expressed, and so far as the same gives costs to the appellee, instead of the appellants: and in these respects it is considered by the court that the said decree

be reversed and annulled, and that the appellants recover against the appellee their costs by them expended in the prosecution of their appeal aforesaid here. And the cause is remanded to the said circuit court, for assignment to the appellee of her dower in the real estate, including Marshalls, after setting aside the order of abatement as to the defendant Robert Page, and reviving the suit against the representatives of his real estate; and for further proceedings in conformity with the views above declared, after a revival of the suit against the executor or administrator of the said Robert Page.

Weaver v. Vowles.

October, 1843, Richmond.

(Absent CABELL, P., and STANARD, J.)

Case Discussed.—The case of Seddon and others v. Tutop, 6 T. R. 607, cited, and the principle thereof discussed.

Former Recovery—Plea of—Case at Bar.—In assumption for work and labour done, care and diligence bestowed, and materials provided, the defendant, besides the general issue, pleaded a former action for not performing the same promises, in which the plaintiff recovered damages for the non-performance of the same: the plaintiff replied that the promises were not the same identical promises in respect whereof the judgment was recovered, and tendered an issue, which was joined. At the trial, the plaintiff having given evidence on the general issue, the defendant, to sustain his plea of former recovery, gave in evidence the record of the former suit, the declaration "in which contained two counts, one for work and labour, care and diligence, and materials, as well as for goods sold, money lent, money paid, and money received; and the other upon an account stated. The defendant also gave in evidence the account filed in that case, which contained credits and charges up to the 24th of October 1835, 'leaving out the building of a large barn, and work done on a new mill.' The verdict and judgment in that case being for \$630 53 cents, the plaintiff examined a witness, who proved that an account was settled with the defendant in October 1835, on which a balance of \$630 53 cents was struck; that the account filed in the former cause was a copy of the account so settled; and that the settlement did not include the plaintiff's demand for work done on the barn or the new mill, charged in the account in the second case, but that this demand remained for future adjustment. It was farther proved, that on the trial in the former cause, the account not being then filed which was afterwards filed in the second suit, all evidence in regard to that account was excluded, and the plaintiff rested his case on the count upon an account stated, and relied upon the settlement before mentioned, shewing the said balance of \$630 53 cents, and recovered upon that ground only. Thereupon the defendant moved the court to exclude from the jury all the evidence offered by the plaintiff in support of the items charged in the account filed in the second

case, on the ground that he was precluded from recovering the same in this action by the recovery in the former suit, and that the demand of the plaintiff for the said sum of \$630 53 cents recovered in the former suit, and for the items charged in the account filed in this case, was one entire demand, and could not be made the subject of two separate suits, and therefore the plaintiff was precluded by the recovery in the former suit from recovering in this suit. But the court overruled the motion, and a verdict was rendered for the sum found by the jury to be due upon the account filed in the second case. On a supersedeas to the judgment given on this verdict, the same was affirmed.

On the 9th of May 1837, Vowles sued out a writ of *capias ad respondendum* against Weaver, in the circuit superior court of Fauquier, in an action of trespass on the case. The declaration, which was filed the 3d of July 1837, set forth that Weaver, on &c. was indebted to the plaintiff in the sum of 2500 dollars, for work and labour, care and diligence, and divers materials and necessary *things in and about the said work, by the said plaintiff to and for the use of the said defendant, at his special instance and request, before that time done and performed, bestowed and provided, and being so indebted, in consideration thereof promised &c. The defendant pleaded non assumpsit and setoff, on which issues were made up. He also filed a special plea in writing, setting forth, that theretofore, to wit, on the 9th of May 1837, the plaintiff impleaded the defendant in the circuit superior court of Fauquier, in a plea of trespass on the case on promises, to the damage of the plaintiff 5000 dollars, for not performing the same identical promises and undertakings in the declaration mentioned, and such proceedings were thereupon had, that afterwards, on the same day and year aforesaid, the plaintiff, by the consideration and judgment of the said circuit court, recovered in that plea against the defendant 630 dollars 53 cents, with interest from the 24th of October 1835 till paid, for his damages which he had sustained on occasion of the not performing the same identical promises and undertakings in the said declaration mentioned, and 17 dollars 80 cents costs, whereof the said defendant was convicted, as by the record thereof still remaining in the said circuit court would appear, which said judgment yet remained in full force, nowise reversed, satisfied, or made void; and this the defendant was ready to verify by the said record. To this plea the plaintiff replied, that the several promises and undertakings in the declaration mentioned were not, nor was any or either of them, any of or any one of the same identical promises and undertakings, for and in respect whereof the said supposed judgment in the said plea mentioned was recovered, as the defendant had in his said plea alleged; and this the plaintiff prayed might be enquired of by the country. The defendant took issue on the replication.

*See monographic note on "Judgments" appended to Smith v. Charlton, 7 Gratt. 425.

441 *A trial being thereupon had, the jury found for the plaintiff the issues joined, and assessed his damages to 914 dollars 91 cents with interest from the 1st of April 1836 till paid. The defendant moved the court to set aside the verdict and grant him a new trial; but the court overruled the motion, and rendered judgment for the plaintiff for the damages and interest found by the jury, and the costs of the suit.

By a bill of exceptions filed by the defendant and made part of the record, it appeared that the following proceedings took place at the trial.

The plaintiff exhibited the accounts filed by him in the cause, and gave evidence to prove the items therein stated. One of these accounts, marked A, contained various items for work done and materials furnished by the plaintiff in erecting a barn for the defendant. The only date specified in the account was that prefixed to the first item, namely, October 1, 1832. The other account, marked B, was for work done and materials furnished by the plaintiff in erecting a new mill for the defendant; and in this account also, the only date specified was that prefixed to the first item, namely, October 24, 1835. The aggregate of the charges contained in these two accounts exceeded the amount of damages found by the jury.

The defendant, to sustain his plea of former recovery, gave in evidence a transcript of the record (including the writ of *capias ad respondendum*) in a former suit between the parties to this action. The writ was sued out on the 31st of December 1836. The declaration contained two counts; the first of which charged, that on &c. Weaver the defendant was indebted to Vowles the plaintiff in the sum of 5000 dollars, "as well for work and labour, care and diligence, and divers materials and necessary things in and about the said work, by the said plaintiff to and for the use of the said defendant, at his special instance

442 and request, *before that time done, performed, bestowed and provided," as for divers goods &c. sold and delivered, and divers sums of money lent &c. paid &c. and had and received &c. and being so indebted, the said defendant in consideration thereof promised &c. The second was a count in the common form upon an account stated. The cause was tried upon the plea of non assumpsit, and the jury found that the defendant did assume upon himself in manner and form as the plaintiff against him had complained, and they assessed the plaintiff's damages, "by occasion of the nonperformance of those assumptions," to 630 dollars &c. with interest &c. (as stated in the special plea).

The transcript so given in evidence by the defendant, though certified by the clerk of the circuit court as a complete copy of the record, did not contain any account shewing the items of the plaintiff's demand in that suit. The bill of exceptions, how-

transcript given in evidence by the defendant, stated that the said defendant also gave in evidence "the account filed in that case by the plaintiff, in these words: 1830, March 23." &c. This account consisted, first, of various items for goods furnished and cash paid by Weaver (the defendant) to Vowles (the plaintiff), commencing the 23d of March 1830 and terminating the 23d of October 1835, amounting in the aggregate to 914 dollars 60 cents; and secondly, of various credits to Vowles, commencing the 23d of March 1830 and terminating the 24th of October 1835, amounting in the aggregate to 1545 dollars 13 cents, and so exceeding the amount of Weaver's charges against Vowles by 630 dollars 53 cents, (the sum for which the verdict and judgment in the first action were rendered). These credits to Vowles, except the last item, were chiefly for goods furnished by him to Weaver. The last item was as follows: "1835, Octo.

24. By additional credits for mill-
443 wright work *and other charges up to this date, leaving out the building of the large barn, and work done on a new mill, not completed, which were not taken into this account, \$1345. 75."

The plaintiff examined a witness, who proved that he, during the period of that account, acted as the agent of the defendant, and kept his books. That he entered on the defendant's book an account between him and the plaintiff, which contained various items of debit and credit. That, in the month of October 1835, the plaintiff came to the house of the defendant to have a settlement of their accounts. That the aforesaid account entered on defendant's book was produced, and admitted to be correct. That the plaintiff then exhibited a statement of other charges against the defendant, for work done in repairing the merchant mill and saw mill of the defendant, and building a horse mill, and containing an item for the board of defendant's nephew, and possibly other items. That these bills were examined by the defendant, and the sum of 1345 dollars 75 cents being admitted to be due on account thereof, a credit for that sum was entered on the book, the debits were taken from the credits, and a balance of 630 dollars 53 cents struck, either on the book or on a separate piece of paper, as the balance due to the plaintiff by the defendant upon the settlement then made. That the said settlement did not include the plaintiff's demand for work done on the barn, or the new mill, charged in the accounts filed in this case. That the account filed in the former cause, and before referred to, is a true copy, taken from the defendant's books, of the account then settled. That it was agreed by the parties, that the said sum of 630 dollars 53 cents was due by the defendant to the plaintiff upon the settlement aforesaid. And that the plaintiff's demand for work on the barn and new mill remained for future adjustment between the parties.

444 *The plaintiff further proved, that when the former cause was called for

trial, he offered to file the accounts now sued on, and to embrace both demands in that suit; but the defendant's counsel objected to their being then filed unless the plaintiff would continue the case, which he refused to do, and all evidence in regard to those accounts was consequently excluded. That on the trial in the former case, in consequence of those accounts being thus excluded, no evidence was given upon the count for work and labour, but the plaintiff rested his case on the count upon an account stated, and relied upon the settlement before mentioned, shewing the said balance of 630 dollars 53 cents, and recovered upon that ground only.

And thereupon the defendant by his counsel moved the court to exclude from the jury all the evidence offered by the plaintiff in support of the items charged in the accounts filed in this case, on the ground that he was precluded from recovering the same in this action, by the recovery in the former suit; and that the demand of the plaintiff for the said sum of 630 dollars 53 cents, recovered in the former suit, and for the items charged in the accounts filed in this case, was one entire demand, and could not be made the subject of two separate suits, and therefore the plaintiff is precluded by the recovery in the former suit from recovering in this suit. But the court overruled the said motion, being of opinion that the demand for the said sum of 630 dollars 53 cents was so far separate and distinct as to form the ground of a separate action. To which decision of the court the defendant excepted.

On the petition of the defendant, a superseas was awarded to the judgment.

Stanard, for plaintiff in error. The principle by which the court must be regulated where a prior recovery for the same cause of action is pleaded, is this:
 445 *Where the declaration in the second suit is framed in such a manner as that the causes of action may be the same with those in the first, it is incumbent on the plaintiff to shew that they are not the same. Lord Bagot v. Williams, 3 Barn. & Cress. 235; 10 Eng. C. L. R. 62. The declaration in the first suit between these parties assigns the cause of action in the very same words as the declaration in the second; and the damages claimed in the first suit were sufficient to cover the amount of both recoveries. Prima facie therefore, according to the authority already cited, the cause of action in the second suit was embraced by the first. How does the plaintiff meet the onus probandi thus cast upon him by the law? He adduces parol evidence to shew that the first recovery was had, not upon the count for work and labour, but solely upon the count alleging an account stated. Such evidence directly contradicts the record of the first recovery, in which a general verdict is found for the nonperformance of the assumptions charged in the declaration. The evidence is therefore inadmissible. The party may, it is

true, offer parol evidence to shew that the work and labour for which the first recovery was had was not the same with, or did not include, the work and labour for which the recovery is sought in the second action; for such evidence does not contradict the record: but it is not competent to shew by parol, either that no evidence was submitted to the jury in the first suit in reference to the claim for work and labour, or that the jury did not pass upon that evidence. Field v. Gibbs &c., 1 Peters' C. C. R. 155; Reed v. Jackson, 1 East 355; Hess's ex'or v. Heeble, 6 Serg. & Rawle 57. In the case of Seddon v. Tutop, 6 T. R. 607, (which will probably be relied upon by the other side) it is to be inferred from the whole report, though it is not expressly stated, that the first verdict was found, in terms, upon

only one of the counts in the declaration, — the count, namely, upon the promissory note. This inference is confirmed by the remarks of Bayley, J., in Bagot v. Williams, 10 Eng. C. L. R. 64. Moreover, the first verdict in Seddon v. Tutop was not found on issue joined between the parties: it was merely an assessment of damages on a writ of enquiry, the defendant being in default. On both grounds, the case is distinguishable from the present.

II. But if the parol evidence here can properly be admitted, it does not prove that any cause of action in the second suit had not been legally passed upon in the first. For, where evidence offered to prove one of several demands is excluded by the court, and the plaintiff suffers a verdict to pass on the whole case, the judgment on such verdict is a bar to subsequent actions for that demand. Smith v. Whiting, 11 Mass. R. 445. The distinction is between those cases in which the demand is never submitted to a jury, but is abandoned at or before the trial, by striking out the count, or discontinuing the action upon the record as to such demand, so that no evidence is offered in relation to it; and those cases in which the claim is not abandoned at or before the trial, but the issue joined thereupon, together with the other issues in the cause, is submitted to a jury, and a general verdict is suffered to pass on the whole case. If a claim is submitted to a jury, and they disallow it, or allow less than the plaintiff is entitled to recover, or overlook part of his demands, a verdict and judgment thereon will furnish a conclusive bar to a second action for the same cause. Brockway v. Kenney, 2 Johns. R. 210; Irwin v. Knox, 10 Johns. R. 365; Platner v. Best, 11 Johns. R. 530; Hess's ex'or v. Heeble, before cited, 1 Wms. Saund. 207, note 2. In like manner, where a submission to arbitration embraces a particular demand as to which no evidence is offered before the arbitrator, that demand is nevertheless barred by an award in general terms on the matters submitted. Smith v. Johnson, 15 East 213; Dunn v. Murray, 9 Barn. & Cress. 780; 17 Eng. C. L. R. 498; Wheeler v. Van Houten, 12

Johns. R. 311. The evidence here does not shew that on the trial in the first action no attempt was made to adduce proof in support of the first count. Further, the evidence to support a declaration upon a stated account (supposing the subject to be work and labour done and materials furnished) would equally support a declaration for work and labour done and materials furnished. The acknowledgment by the defendant, of the justness of an account containing such items, would certainly prove that the work was executed for him, and the materials furnished to him, by the plaintiff.

III. Where the plaintiff's claim is entire and indivisible, he cannot be allowed to bring suit and recover upon a part, and afterwards recover in a separate action for the residue. *Jackson v. Colver*, 1 Wend. 487; *Guernsey v. Carver*, 8 Wend. 492; *Smith v. Jones*, 15 Johns. R. 229; *Farrington &c. v. Payne*, 15 Johns. R. 432; *Seddon v. Tutop*, 6 T. R. 607, and remarks of Lord Kenyon in that case; *Lord Bagot v. Williams*, 10 Eng. C. L. R. 62; *Markham v. Middleton*, 2 Str. 1259. But a claim upon an account for goods sold and delivered, all due, is indivisible. *Guernsey v. Carver* and *Markham v. Middleton*, ubi supra. The same principle must equally apply to a general account for work and labour done. In both cases, a judgment for part of the amount is a bar to any action for the remainder. Upon an analogous principle, where a plaintiff brings separate actions for demands which might have been embraced in a single suit, such actions will be consolidated at his costs. *Cecil v. Briggs*, 2 T. R. 639; *Hutson v. Lowry &c.*, 2 Va. Cas. 42; *Willard v. Sperry*, 16 Johns. R. 121. The whole demand of the plaintiff here, embraced in his two actions, was due at the time the first action was brought.

448 *Morson for defendant in error.

The pleadings and issue in this case cannot be distinguished from the pleadings and issue in *Seddon v. Tutop*. The replication here is the proper one, according to the authority of 3 Chitty's Pl. (7th american ed.) p. 1158.

The principle on which a second action is barred by the judgment in a former, is expressed in the maxim *nemo vexari debet bis pro eadem causa*. 1 Starkie's Evid. (american ed. of 1837) p. 214. To make the plea of judgment recovered a defence, the same fact must have been in issue. The test of identity is, whether the same evidence will support both actions. *Id.* p. 221, 2. Apply that test to the present case: Would the same evidence support the issues joined in the two actions? Under our statute, 1 Rev. Code, ch. 128; § 86, p. 510, the bill of particulars is the true and only exponent, in the action of indebitatus assumpsit, of the matters in issue between the parties. The plaintiff cannot put in issue, under a general count in that action, any matter of demand not set out plainly in his bill of particulars. The reason is,

that such a count gives the defendant no information whatever as to the precise nature of the matters demanded. Here the bill of particulars filed in the first action is wholly different from that filed in the second; and the second bill is for matters which, on the face of the first, were expressly stated to be excluded. Admitting for the present that we cannot go out of the record to ascertain whether the matters claimed in the two suits were or were not the same, how is it shewn that the bill of particulars in the first action was no part of the record? No case or dictum on that subject is to be found in our reports: and this must have been because it was never doubted that the account which the statute directs to be filed with the declaration, to supply that notice which the declaration failed to give, was thereby constituted part of the declaration and of the record.

449 If this be so, and the account *in the first suit was properly a part of the record, the omission of the clerk to certify it as such is immaterial. It is set out in the bill of exceptions taken at the trial of the second action, and is therein stated to be "the account filed in the first case by the plaintiff." Taking it as a part of the record, it appears by the record that no part of the demand recovered in the second action was claimed or put in issue in the first.

Supposing, however, that the bill of particulars is no part of the record, the question is as to the competency and effect of the parol evidence adduced by the plaintiff. Estoppels are odious in law, and must be strictly pleaded and strictly proved; they will never be favoured by presumption. 1 Chitt. Plead. 238. Opinion of Tucker, P., in *Craddock v. Turner's adm'x*, 6 Leigh 129, 130, 131. It may perhaps be questionable whether, in aid of estoppels, parol averments and proofs are admissible; but they certainly are to rebut them. 3 Phill. Evid. (Cowen & Hill's ed.) 834, 838; 8 Wend. Rep. 9, 22, 36; 10 Wend. Rep. 82; *The king v. Wheelock*, 5 Barn. & Cress. 511; 11 Eng. C. L. R. 291, 2; *The king v. Wick St. Lawrence*, 5 Barn. & Adolph. 526; 27 Eng. C. L. R. 120; *Cleaton v. Chambliss*, 6 Rand. 92. In fact it is conceded on the other side, that if our evidence does not contradict the record, it is admissible. Does it contradict the record? Let it be admitted that a claim for work and labour was in issue and passed upon in the first suit, and let all evidence be rejected which tends to disprove that fact: still, by the concession of the other side, we may shew that the work and labour so claimed and passed upon was not the same with that for which the present action is brought. And is not that precisely and distinctly shewn by the evidence on the part of the plaintiff?

If the case of *Seddon v. Tutop* be fairly considered, and not frittered away by metaphysical distinctions and refinements, it is absolutely conclusive against the plaintiff *in error. It does not appear, as suggested on the other side,

that there was a *nolle prosequi* in the first action in that case, as to the demand on the open account; and it does appear on the contrary, from lord Kenyon's remarks, that there was no withdrawal of any count in the first action. The authority of that case is fully recognized in every elementary writer, and in all the subsequent cases. Many of these are collected in 1 Starkie's Evid. (edi. of 1837) p. 223, note 1. Neither does Seddon v. Tutop introduce any new principle; the remarks of the judges shew that they were merely reaffirming a principle long before settled. That case is stronger than the present: because there both the demands might have been proved and recovered in the first action; whereas here, the first bill of particulars not comprising the matters demanded in the second suit, those matters could not have been proved or recovered in the first suit.

The general explanation of all the authorities cited on the other side is this: they refer either to cases in which the very demand in the second suit was in issue and passed upon in the first, or to cases in which the demand in the second suit was parcel of a demand, indivisible in its nature, which had been claimed in the first. To all such cases the principle is properly applicable, that a defendant shall not be vexed at the plaintiff's pleasure by repeated litigation for the same cause of action.

II. Not only were the claims upon which the two actions here were brought, distinct and separate in points of fact, but they were properly separable. One was a demand for an ascertained sum; the other was an open account, not at all adjusted. They arose upon different contracts, at different times, for different work and labour. A stated account (which was the ground of recovery in the first action here) is just as distinguishable from an open account
451 for work and materials * (the ground of claim in the second action), as the promissory note in the case of Seddon v. Tutop from the open account there.

III. As to the cases respecting the consolidation of actions, cited on the other side, it is sufficient to remark, that such consolidation is discretionary with the court, and the discretion, though exercised to prevent useless vexation and expense to the defendant, will never be employed to bar the plaintiff from his recovery of a just debt. There is no room for its application except where the plaintiff has several suits pending at the same time, for matters which might have been embraced in one. The case of *Hutson v. Lowry &c.* (a case of prohibition to a justice) has nothing to do with this. But the jurisdiction there exercised was also nothing more than a discretion, of the same kind with that exercised in consolidating actions.

Patton in reply. The question here is, whether the demand in the last suit was a matter in issue in the first,—a matter as to which the plaintiff might, if he had thought proper, have given evidence before the jury.

Whether evidence was or was not in fact given, is immaterial.

Mr. Morson has earnestly contended, in order to evade the force of the authorities sustaining this proposition, that the bill of particulars is to be regarded as a part of the record, and as the only exponent of the matters in issue in the first suit. He has also contended, that the matters demanded in the two suits were wholly distinct in their nature, and though capable of being united in one action, were not necessarily to be so united. Let us examine these propositions.

The idea that the bill of particulars is a part of the record, is certainly novel. In England, either a statute or long usage has established the practice of requiring from

the plaintiff a bill of particulars in 452 certain actions, *for the purpose of giving the defendant notice of the matters demanded by the plaintiff, so as to enable him to prepare for his defence. Our statute has merely established, in the action of *indebitatus assumpsit*, a similar rule. It is a rule of evidence,—of the competency and admissibility of evidence,—introduced for the benefit and protection of the defendant, and which he may waive at his pleasure. The declaration may be so particular as to dispense with any account: and where an account is necessary, it may be filed at any time before the trial, early enough to give notice to the defendant. That the account is no part of the declaration, is shewn by the cases of *Moore v. Mauro*, 4 Rand. 488, and *Fitch v. Leitch*, 11 Leigh 471. The effect of the statute is not, as contended, to limit the extent of the issue, —to confine it to the claims set forth in the account,—but merely to restrict the plaintiff in the admission of evidence. The stamp laws of England have precisely the same effect. Suppose a bill of exchange is excluded from the jury because unstamped: can it be said that there has been nothing in issue in the suit, because no bill of exchange has been produced, though one was declared on? Yet how is that case distinguishable from this? But if the account be a part of the declaration, the want of it in a proper case ought to be, and must necessarily be, ground of demurrer to the declaration. But who ever heard of a demurrer for that cause? [Morson. I have very little doubt that a demurrer would lie.] Again, suppose that an action of general *indebitatus assumpsit* goes to trial without any account filed (which is a very frequent case), and a verdict is found for the defendant: according to Mr. Morson's argument, the verdict and judgment would operate nothing, but the plaintiff might at his pleasure bring a new suit, on the ground that as there was no account filed in the first action, nothing had ever been in issue there. In *Hurst v. Watkins*, 1 Camp-

453 bell's Rep. 68, it was held *that the plaintiff was restricted to his bill of particulars, and if he failed to sustain that, he might be nonsuited: but that if the defendant chose to make another account of

the plaintiff evidence in the cause, the plaintiff might recover upon such other account, the declaration and issue being sufficiently general to embrace it. The same principle may be deduced from the case of *Bell v. Puller*, 2 Taunt. 285. These cases shew conclusively that the bill of particulars has no sort of effect to change or limit the issue, but merely to protect the defendant against being surprised by the introduction of evidence as to matters of which he had received no notice. In *Jackson v. Wood*, 8 Wend. 44, the bill of particulars is said by senator Seward to be no part of the record. The case of *Ross v. Milne* (to be reported in 12 Leigh) shews, that even after a trial on the merits, exceptions filed at the trial, and verdict and judgment for the plaintiff, if no cause of action is shewn in the declaration, the judgment will be reversed, and cannot be aided by the statute of jeofails. But if nothing is in issue where no bill of particulars is filed, there is no cause of action shewn by the plaintiff, and the judgment (on the authority of *Ross v. Milne*) must be reversed. This is the necessary consequence from the argument on the other side. [Morson. The statute of jeofails would aid the case after verdict, because, where no account is filed, there is merely a defective statement of the cause of action. In *Ross v. Milne*, the declaration shewed that the plaintiff had no cause of action at all.]

But there is no evidence whatever to shew that the bill of particulars in question was filed with the declaration in the first suit. It is not certified as a part of the record by the clerk of the court below, but on the contrary is excluded. And from the parol testimony it may be inferred that it never was introduced in the first suit until the trial, and was then introduced only
454 as evidence *to support the count upon an account stated, by connecting it with testimony to shew that the defendant acknowledged its correctness.

But it is argued, that because the bill of particulars professes to be only a partial statement of the plaintiff's demands,—because it expressly states that the plaintiff had other demands against the defendant for other work and materials,—therefore those other demands were not, and could not have been, included in the causes of action in the first suit. This is manifestly a non sequitur, even supposing that the bill of particulars was only a partial statement and notice of the plaintiff's demands. But that is not the true character of the bill of particulars. It is an account of a demand for certain items amounting to 630 dollars, besides and in addition to the demand for work done upon the barn and the new mill. And the bill of particulars was a sufficient notice of the nature and character of all those causes of action. *Moore v. Mauro* and *Fitch v. Leitch* (already cited) are full and direct authorities to that point. To these may be added the case of *Hatchett v. Marshall*, Peake's N. P. Cas. 172. Objections to a bill of particulars, that it is not

full and minute in its specifications, are received with very little favour. The case of *Milwood v. Walter*, 2 Taunt. 224, and other cases cited in *Tidd's Pract.* (new ed.) p 304, shew, that a mistake in the date of an item, and other variances between the bill of particulars and the evidence adduced by the plaintiff, if they have no effect to mislead the defendant, will not be permitted to operate the exclusion of the evidence. The question always is whether the bill of particulars be sufficient to answer the purpose of notifying the defendant on what account he is sued, and of enabling him to prepare his defence to the action.

If then the demand here asserted in the second suit was a demand embraced by the declaration and issue in the first, and the plaintiff might have adduced evidence *to sustain it under his bill of
455 particulars, the case of *Bagot v. Williams*, and the other cases cited for the plaintiff in error, establish that this second action cannot be maintained, whatever be the reason that the demand was not recovered in the former action,—whether the failure to adduce evidence, the rejection of evidence adduced, or the insufficiency of proof to establish the plaintiff's case. The only exception is where the plaintiff withdraws the demand from the consideration of the jury, by entering a *nolle prosequi* as to such demand, or striking out the count in which it is asserted: and that exception does not apply to this case.

In *Seddon v. Tutop*, the damages found by the first verdict were to an amount corresponding with the promissory note declared on in the first count. It would seem that the verdict there was not general, but restricted in terms to the demand asserted in that count, exclusively of the other. That the finding was in effect merely on the count for the promissory note, is at all events the understanding of the various judges who have subsequently noticed the case: see particularly *Bagot v. Williams* and *Hess's ex'or v. Heeble* (before referred to) and *Snider &c. v. Croy*, 2 Johns. Rep. 227. And in no other way is it possible to reconcile *Seddon v. Tutop* either with the subsequent cases in England, or the cases in this country, which in terms admit its authority. Further, the form of the issue in *Seddon v. Tutop* is relied upon both by *Erskine* *arguendo*, and by lord *Kenyon* in his judgment: the issue was, whether the plaintiff had or had not already recovered damages for the identical promises declared on in the second action; and upon the evidence it was clear that he had not. Here the issue is different, and perfectly coincides with the issue in *Bagot v. Williams*, *Hess's ex'or v. Heeble*, and other cases cited and relied on by *Mr. Stanard*.

We do not impugn the authority of *Seddon v. Tutop*, for we do not think it necessary: but it may be remarked,
456 *that it has certainly gone as far in encroaching upon the general principle that a defendant is not to be twice vexed for the same cause of action, as the courts

should ever go in any well regulated system of jurisprudence. The case may be sustained on the grounds upon which it is rested by the court which decided it, and it may be an authority in cases precisely similar; but the principle of the decision should not be extended to other cases, different in circumstances.

In this case the first verdict is general; it finds damages for the nonperformance of the assumptions in the declaration mentioned: and shall it be inferred from parol evidence, that the damages were not found for the nonperformance of all those assumptions, but only of some or one of them? *Brockway v. Kenney* distinctly decides that such evidence is not admissible for any such purpose.

In point of fact, as well as by intendment of law, the demand of the plaintiff in the second suit was in issue and passed upon in the first. Under the count upon the account stated, no bill of particulars was necessary (*Fitch v. Leitch*, 11 Leigh 471); and the bill of particulars filed specifies the items of demand asserted in the other count. Why should the plaintiff take the trouble to file an account of those items, if he did not sue for them or seek to recover them in that action? Moreover, the evidence in the record shews that the plaintiff did offer to prove those very items before the jury, but that his evidence was excluded. [Morson. It does not appear that any attempt was made to sustain that count before the jury: the statement is simply that no evidence was given in support of it.]

But we contend that the causes of action in the two suits here were the same, because we insist that the two counts in the first suit were themselves for one and the same cause of action, and not for 457 different causes. *For the test of identity as to this subject (laid down in the passage quoted from 1 Starkie on Evid. 222, 3, and the case there referred to of *Hitchen v. Campbell*, 2 Bl. R. 827,) is, whether the causes of action alleged in several counts or declarations would be sustained by the same evidence. Here, the same evidence which would sustain the second count in the first declaration would also have sustained the first count. Proof of a stated account for work and labour will sustain a declaration in indebitatus assumpsit for the performance of the work and labour; which is the character of the first count in the first action, and of the declaration upon which the present verdict and judgment have been recovered. The plaintiff might have recovered under the second count, for all that was due him at the time of the suit brought, by proving the defendant's acknowledgment of an account embracing all the items; as on the other hand he might have recovered all under the first count, either by the very same evidence, or by distinct evidence that the work had been done and the materials furnished at the defendant's request. The fact that an account was stated between

the parties embracing only a part of the plaintiff's demand, did not sever that part so as to make it a distinct and independent cause of action; the claim was still entire and indivisible, although the plaintiff might thereby be enabled to prove different items of it by different kinds of evidence,—to prove one portion by shewing that the defendant acknowledged his account for that portion, and the residue (or the whole, if the plaintiff thought proper) by shewing that he had performed the labour and furnished the materials for the defendant.

In addition to the cases already cited shewing that an entire demand cannot be severed, the case of *Morgan v. Plumbe*, 9 Wend. 287, may be referred to.

PER CURIAM. The judgment is affirmed.

458

*Muire &c. v. Smith.

November, 1848, Richmond.

(Absent CABELL, P.)

*Ferry**—Inquisition—Evidence—Construction of Statute.—Construction of the act in 2 R. C. 1819, p. 261, ch. 238, which provides for the impanelling of a jury to say whether, in their opinion, public convenience will result from the establishment of a proposed ferry, and for the return of this opinion to the county court, "who thereupon, as well as upon any other evidence that may be offered, shall have full power to establish such ferry." The finding of the jury in such a case is merely evidence, and the weight of it, under all the circumstances, a matter for the discretion of the court.

Same—Jurors—Preconceived Opinion—Quashing Inquisition.—Upon the return of the certificate of a jury, that, in their opinion, public convenience would result from the establishment of a proposed ferry, evidence is introduced, 1. Of one of the jurors, who proved, that before he was sworn, he had made up an opinion that the ferry would be a public convenience; that he thought it probable he might have expressed his opinion, though he did not recollect to have done so; that he had, before he was sworn, signed a petition for the said ferry; and that, at the time he was sworn, he was uninfluenced by the said opinion, and prepared to render an impartial verdict. 2. Of another juror, who proved the like facts with regard to himself, and also that he had expressed his opinion. 3. Of another juror, who proved the same facts with regard to himself, that the second had proved with regard to himself, and also that he had circulated a petition for the ferry. Upon this evidence the county court quashed the finding of the jury, and the circuit court reversed the judgment of the county court. *Held*, the judgment of the circuit court is right.

Case at Bar Distinguished.—This case distinguished by JUDGES BALDWIN and ALLEN from *Hunter v. Matthews*, to be reported in 12 Leigh, where the proceeding was under the act concerning mills, in 2 R. C. 1819, p. 226, ch. 235.

On the 14th of March 1837, an order was made by the court of King & Queen county,

*See monographic note on "Ferries" appended to *Patrick v. Ruffners*, 2 Rob. 300.

for the justices to be summoned to appear on the first day of the succeeding term, to act on an application of Lewis Smith for the *establishment of a ferry from his lands in King & Queen county to his lands in King William county. At May term 1837, Francis Row, Thacker Muire and William Newman moved the court for leave to enter themselves defendants to the application, which motion the court overruled, and the defendants excepted. Thereupon, "it appearing to the satisfaction of the court that the said Smith is the owner of the lands on both sides of the Mattapony river at the place proposed for the said ferry, and that public roads have been established through the same, and it also appearing to the court that the magistrates have been duly summoned, and that notice of this application has been given by advertisement set up at the door of the courthouse for two successive court days," the court made an order directing the sheriff to impanel a jury of twelve disinherited freeholders, to view the place proposed for the establishment of the ferry, and say whether, in their opinion, public convenience would result from its establishment. The opinion of the jury impanelled under this order not being certified, but on the contrary it appearing by the return of the sheriff that they could not agree, and it further appearing that one of the jurors impanelled was not a freeholder, the court, at July term 1837, quashed the said return of the sheriff, and directed him to impanel another jury. On the same day that this order was made, Row, Muire and Newman were permitted to enter themselves defendants. The jury impanelled under this order certified, that after being first sworn, they viewed the place proposed for the ferry, and on their oaths they believed that public convenience would result from the establishment of the ferry. This opinion being returned by the sheriff to the court, the case was continued from term to term until the 14th of November 1837, when Row, Muire and Newman moved the court to quash the proceedings, (among other reasons) because some of the jurors were *interested, and had made up and expressed an opinion upon the question of the convenience of the ferry, before they were sworn upon the jury. Thereupon three of the jurors were introduced as witnesses, and this question was propounded to them: Had you made up and expressed an opinion upon the question of the public convenience of the ferry proposed to be established by the applicant in this case, before you were sworn upon the said jury? The applicant objected to the question being answered, but the court overruled the objection, being of opinion that the evidence was admissible, and the same was admitted accordingly: to which opinion the applicant excepted. The court, on hearing the case, quashed the proceedings, and gave judgment in favour of the defendants against the applicant for their costs. To which judgment the applicant

also excepted. This last bill of exceptions set forth, that Row, Muire and Newman moved the court to quash the proceedings, 1st, because no public roads had been established through the lands of the applicant, from and to which the ferry was proposed to be established; 2dly, because no notice of the application had been given according to the requisitions of the statute; and 3dly, because some of the jurors had made up and expressed an opinion before they were sworn, and were interested. To sustain this third objection, the defendants introduced, 1. William Todd, one of the jurors, who proved, that before he was sworn, he had made up an opinion that the ferry would be a public convenience; that he thought it probable he might have expressed this opinion, though he did not recollect to have done so; that he had, before he was sworn, signed a petition for the said ferry; and that, at the time he was so sworn, he was uninfluenced by the said opinion, and prepared to render an impartial verdict. 2. William B. Todd, another of the said jurors, who proved the same facts with regard to himself that William Todd *proved with regard to himself, and also that he had expressed his opinion. And 3. Elias Watlington, another of the said jurors, who proved the same things with regard to himself that William Todd had proved with regard to himself, with the additional facts that he had expressed his opinion and had circulated a petition for the ferry. Upon this evidence the court sustained the motion of the defendants, and quashed the proceedings.

A supersedeas being awarded to this judgment, the circuit court reversed the same with costs, and sent back the cause to the county court, to be in the same plight and condition it was in on the 14th of November 1837, for further proceedings to be had therein.

On the petition of Muire and Newman (Row having died) a supersedeas was awarded to the judgment of the circuit court.

Daniel for defendant in error. The bill of exceptions to the opinion of the court overruling the motion of Row, Muire and Newman for leave to enter themselves defendants, not shewing any ground for the motion, or that these parties had any interest in the case, this court must intend that the judgment of the county court was right. Besides, these same parties were afterwards admitted to contest the application for the ferry, and actually succeeded in the county court. The last bill of exceptions sets forth three grounds for the motion to quash the proceedings; but as the evidence introduced relates only to the third, that alone need be noticed. It is, that some of the jurors who found the inquest had previously made up and expressed opinions respecting the public convenience of the proposed ferry. If those jurors had been examined on the voir dire in a case of life

and death, and had given the same testimony which they here gave as to their own impartiality, that testimony would have been sufficient to admit them on the jury.

462 "There being no counsel for the plaintiffs in error, Leigh, as *amicus curiæ*, suggested that the case of *Hunter v. Matthews*, decided not long since by this court and to be reported in 12 Leigh, involved a question as to the impartiality of jurors in a mill case, and the decision there might have an important bearing upon this case.

Daniel. There is a material difference between the statutes relating to the establishment of mills and of ferries. The functions of the jurors, and the effect of their finding, are very different in the two cases. On an application for leave to build a mill, the inquisition in favour of the applicant is conclusive until evidence is adduced to impugn it; and if the application be not contested, the court has no discretion to refuse leave to erect the mill and dam. But in regard to the application for leave to establish a ferry, the statute directs that the jury shall enquire whether the proposed ferry will be a convenience to the public; and if they find that it will, the court, upon their opinion to that effect certified under their hands, and upon such other evidence as may be offered, shall have full power to establish such ferry. The jury in this case find no verdict affecting any right of property in third persons; they assess no damages; their certificate is merely of their opinion on the question of convenience to the public, and that opinion may be aided and supported by other evidence to be examined at the discretion of the court. The opinion is conclusive under no circumstances. In a mill case, other evidence cannot be resorted to in aid of the inquest, but only to contradict it. Tate's Dig. 2d ed. p. 695, note k. and opinions there cited. The question, then, whether a juror who has concurred in the opinion that a proposed ferry will be a public convenience, is strictly disinterested and impartial, is of very inferior importance to a similar question in relation

463 "to a juror in a mill case, and the evidence of unfitness ought to be much stronger, and indeed irresistible, to require that the finding in the former case should be set aside on that ground.

BALDWIN, J. It cannot be doubted that a court under whose authority an inquest has been taken, with a view to the action of the court upon the subject of the enquiry, has the power to quash the inquisition for good cause shewn. Its authority to set aside the inquisition and to award a new writ is analogous to the supervision and control which it exercises in regard to the verdict of a jury upon a *venire facias* or a writ of enquiry. And as a motion for a new trial is addressed to the sound discretion of the court, it is equally so in relation to the motion to quash an inquisi-

tion. In either case, the court interposes where manifest injustice has been done by the decision of the jury; or without enquiry into the merits of that decision, where the jury or the successful party has been guilty of gross misconducts in the proceeding, affecting the purity of the administration of justice, or where the jury has been so constituted, without the default of the party complaining, as to render it improbable that a fair and impartial investigation has been had. The same general principles, therefore, must govern an application to set aside a verdict of a jury, whether that verdict has been rendered upon a trial in court, or upon an inquest in pais. And the force of an objection to the verdict, founded merely upon a defect in the constitution of the jury, must depend upon several considerations; the want of an opportunity to make the objection before the decision of the jury; the effect of that decision upon the determination of the cause; and the weight of the objection itself.

When a jury is impanelled in court, the parties have an opportunity to challenge either the array or the polls; and if they do not avail themselves of it, the

464 "court will not listen to objections to jurors after the rendition of their verdict, unless under very peculiar circumstances. But upon an inquest in the country, the right of challenge does not exist; and of course objections, whether to the array or the polls, cannot be made until after the return of the inquisition. On the other hand, a verdict rendered in court is conclusive upon the parties while it stands; whereas an inquisition made in the country may, under the peculiar law by which it is governed, be either conclusive, in the whole or in part, or merely evidence for the information of the court, and liable to be overcome or strengthened by other evidence. If an inquisition be conclusive on any material point, objections to the array or the polls, if sufficiently cogent, may be entertained upon a motion to quash; though not such as would induce the court to set aside a verdict upon a *venire facias*, because the proper subjects of previous challenge. It does not follow, however, that the court will quash an inquisition for every objection which would have been a cause of even principal challenge upon a *venire facias*; for an important distinction arises from the consideration, that a challenge, when well taken, has the effect of preventing a vice in the constitution of the jury, and though it should be improperly sustained, can be productive of but little inconvenience; whereas the quashing an inquisition is necessarily attended with delay and expense, besides the hazards of annulling a decision of the jury correct upon the merits. It would therefore be no sufficient ground for quashing an inquisition, however conclusive in its character, that one of the jurors was a seventh cousin of one of the parties, or his steward or attorney, or of the same corporation with him, or "a witness named in the deed;"

though these appear from the books to be causes of principal challenge, sufficient in themselves, and not submitted to the determination of triers, as is the case
465 with challenges that go only to *the favour. The objection ought, I think, to be such as to raise not merely a strong suspicion, but strong reason to believe the juror acted under an improper bias, or that unfairness had been practised in the constitution of the jury; either of which might be inferred where one of the jurors was the son or the brother of the successful party, or had a pecuniary interest in the result. The rule, it seems to me, may be safely asserted, that an inquisition will not be quashed for objections to jurors which would not be good cause of principal challenge upon a venire facias; but the converse of the proposition cannot, I think, be true, that whatever is good cause of principal challenge upon a venire facias is a fatal objection to an inquisition. A juror upon an inquest can no more be challenged after verdict than a juror upon a venire facias; and it surely cannot be true that the inquisition found may be challenged, because the party had not an opportunity to challenge the jurors who found it.

In the case before us, though the objections to some of the jurors might have furnished grounds of challenge, inasmuch as the evidence tends to shew decided expressions of opinion before they were sworn, in relation to the matter of enquiry; still I think the court, in the exercise of a sound discretion, ought to have overruled them upon the motion to quash the inquisition. It by no means follows that a juror was partial because he had expressed an opinion; for his belief may not have been the result of malice or prejudice, but of his own knowledge of the subject. Besides, the only evidence on this point is that of the very jurors themselves, introduced for the purpose of proving that they were not impartial at the time they were sworn. It is obvious that such evidence, if at all admissible, ought to be received with great caution and circumspection, by reason of the difficulty of contradicting it, and the encouragement which it holds out to
466 tampering with jurors *after the rendition of their verdict. Nor ought it to be at all garbled, as it would be in this case, by rejection (what might perhaps be disregarded upon an examination on the voir dire with a view to a challenge) the emphatic declarations of the witnesses, that they stood, when called to be sworn on the jury, uninfluenced by what had occurred, and prepared to render an impartial verdict.

If therefore the inquisition were conclusive in its effect, the evidence just noticed would, in my opinion, furnish no good reason for quashing it. But the whole ground of objection is removed when we look to the character of the inquisition, which is in no wise conclusive. The proceeding is under the act concerning ferries, 2 R. C. 261, by which the duty of

the jury is confined to the question whether public convenience will result from the establishment of the ferry applied for, and the merits of the application are to be decided by the court, upon the inquisition, and any other evidence which may be offered. The finding of the jury, therefore, in such a case is merely evidence, and the weight of it, under all the circumstances, a matter for the discretion of the court. There may be cases of corruption or unfairness in the constitution of the jury, calling upon the court to quash the inquisition as a decisive mark of its reprobation; but minor objections, pointing only to a want of qualification or a liability to prejudice on the part of one or more of the jurors, should be directed, not against the competency, but the credibility of their verdict.

Hunter v. Matthews is not an authority to rule this case. It was there held that an inquisition upon an ad quod damnum, on an application to erect a mill and dam, was properly quashed, on the ground that two of the jurors had been of the jury which had found a former inquisition upon the same matter of controversy. The proceeding there was had under the
467 act concerning *mills &c., 2 R. C.

225, by the provisions of which the inquisition is conclusive as to the value of the acre of land located for the abutment of the dam, and the damage to the proprietors above and below; and is also conclusive against the applicant, where it finds that the mansion house &c. of any proprietor will be overflowed, or the health of the neighbours annoyed. And the decision in Hunter v. Matthews was founded upon the conclusive effect of the inquisition.

My opinion is, that the county court erred in quashing the inquisition found by the jury, and also erred in quashing the other proceedings. The objection that notice of the application for the ferry was not given according to the requisition of the statute, and the further objection that no public road had been established through the lands of the applicant, from and to which the ferry was proposed to be established, are wholly unwarranted, if not contradicted, by the record, and would seem to be founded upon the erroneous idea that the evidence of those facts ought to have been spread upon the record, though the case was never heard before the court upon the question whether the ferry ought to be established, which was arrested by the successful motion to quash the proceedings.—The judgment of the circuit court reversing that of the county court seems to me perfectly correct.

ALLEN, J. In Hunter v. Matthews, two of the jurors had been of the jury which found an inquisition on a former writ of ad quod damnum in the same cause. This, according to the authorities, was a cause of principal challenge; and for that reason, and because the inquisition in a mill case was in some respects conclusive upon the rights of both parties, I was of opinion

that the inquisition there should be quashed. Neither of those reasons applies to the present case. The objection to the jurors did not constitute a cause of principal challenge: it concluded to the favour; in which case the court, in the exercise of a sound legal discretion, must determine upon the validity of the objection. Even where the juror has given a former verdict, lord Coke says, "that in this or other like cases he that taketh the challenge must shew the record, if he will have it take place as a principal challenge; otherwise he must conclude to the favour." From which it may be inferred that a cause of principal challenge, growing out of the act of the juror, depends not so much on the character of the objection as on the kind of proof. The fact of his having rendered a former verdict in the same cause, and the influence it would be likely to exert in a subsequent trial, could not be affected, whether proved by the record, or otherwise; yet in the latter case the challenge concludes to the favour, and is addressed to the discretion of the court. See, upon this subject, Co. Litt. 157 b., 3 Thomas's Co. Litt. 479, and 3 Black. Comm. 363. It is not said in either of these authorities that the expression of an opinion constitutes a cause of principal challenge; and from the instances put, and more especially from the remark of lord Coke cited above, it is clear that the objection concludes to the favour. The same doctrine is to be found in 21 Viner's Abr. 266, and 2 Rolle's Abr. 657.

Viewing the objection here as constituting a challenge concluding to the favour, I think the court should have overruled it, after the inquisition had been found. According to the uniform course of decision, the testimony of jurors going to impeach their own verdict, if admissible, should be received with great caution. If such testimony be resorted to, full weight should be given to the whole of it. Here the jurors declare that their opinions previously formed had no influence on their finding.

But there is another reason why, in this peculiar case, there can be no propriety in quashing the inquisition. *It concludes nothing. It is at best but the opinion of twelve men, given under oath, as to the question of public convenience. The court, upon that as well as the other evidence, establishes the ferry or rejects the application. In a mill case, the finding of the inquisition that the health of the neighbourhood will be annoyed is conclusive; and so in respect to the quantum of damages for the land condemned. In these respects it differs widely from an inquisition of the kind under consideration.

I think therefore that the county court erred in quashing the inquisition, and that the judgment of the circuit court reversing that of the county court should be affirmed.

The other judges concurring, judgment of circuit court reversing that of county court affirmed.

470

*Cocke v. Haxall's Ex'x.

November, 1843, Richmond.

(Absent CABELL, P., and STANARD,* J.)

Fraudulent Conveyances—Recordation of Deeds—Case at Bar.—It was the intention of the legislature, in the act of 1792 regulating conveyances, (1 vol. of old revised code, p. 167, § 2.4.) to require a deed of trust or mortgage of personal estate to be recorded in the general court, or in the court of the district, county or corporation in which the grantor resided. Therefore where a deed of trust of personalty, dated the 15th of July 1812, stated the grantor to be of Henrico county, and the trustee and cestui que trust to be of the town of Petersburg, and the deed was never recorded in Henrico but only in Petersburg, and there was no evidence to shew that either at the date of the deed or of its recordation in Petersburg, the grantor resided in that town, HELD, the deed so recorded is void as to the grantor's creditors.

By deed bearing date the 15th of July 1812, purporting to be between John Bell "late of the town of Petersburg but now of Henrico county" of the first part, George Keith Taylor of the said town of Petersburg of the second part, and William and Henry Haxall of the same town of the third part, it was recited that Bell was indebted to William and Henry Haxall the sum of 10,000 dollars, the payment of which he desired to secure, and be conveyed to Taylor, in trust for that purpose, certain articles of household and kitchen furniture and liquors mentioned in a schedule annexed to the deed. In the court of hustings of Petersburg on the first of March 1813, this deed was acknowledged by Bell, Taylor and William Haxall, and with the schedule annexed admitted to record.

In 1817, Benjamin Cocke, a creditor of William & John Bell & Co. brought an action in the superior court of 471 *Prince George county to recover his debt. In that action, judgment was obtained against John Bell on the 27th of April 1818, for 1634 dollars 72 cents with interest from the 1st of June 1815, and costs; and on the 3d June 1818 a writ of fieri facias was issued upon the judgment, and levied in the city of Richmond on property which William and Henry Haxall claimed to have been conveyed by the deed of trust aforesaid. Upon a bill by them in the court of chancery at Richmond, the sale was enjoined, and the property restored to the possession of Bell. Under an order of the court of chancery, William Haxall, the surviving partner of William and Henry Haxall, entered into bond on the 8th of November 1831, with Philip Haxall his surety, in the penalty of 4000 dollars, conditioned to pay to Cocke all such costs and damages as might be awarded him in consequence of the injunction, in case the same should be dissolved. This injunction was dis-

*He had been counsel for the plaintiff in error.

†See monographic note on "Fraudulent and Voluntary Conveyances" appended to Cochran v. Parla. 11 Gratt. 348.

solved on the 25th of June 1833. And thereupon Cocke brought an action upon the injunction bond, in the circuit court of Henrico, against Clara Haxall as executrix of Philip Haxall. Issues were joined upon the pleas of conditions performed and non damnificatus, and at the trial the facts appeared to be as herein before stated. It was admitted that before the dissolution of the injunction, John Bell had died insolvent.

In this state of the case, the plaintiff moved the court to exclude from the jury the deed aforesaid, upon the ground that at the time of its execution Bell the grantor resided in the county of Henrico, and the property conveyed by it was also in that county, and the deed had never been recorded in Henrico, and was therefore void as to the plaintiff. But the court overruled the motion, and permitted the deed to be given in evidence to the jury as a deed properly and duly recorded. To which opinion the plaintiff excepted.

472 *The plaintiff also moved the court to instruct the jury that the deed was void as to him, unless by the evidence it should appear to the satisfaction of the jury, that either at the date of the deed, or of its recordation in the hustings court of the town of Petersburg, the grantor resided in that town: but the court refused to give the instruction, and the plaintiff excepted to this opinion also. A second instruction was moved and overruled, the purport of which it is unnecessary to state.

A verdict being found for the defendant, judgment was rendered thereupon; and to that judgment a supersedeas was awarded.

The cause was argued by Stanard and Lyons for the plaintiff in error, and by C. and G. N. Johnson for the defendant in error. In the course of the argument, the counsel cited and commented upon the following statutes and decisions: Act of 1748, in 5 Hen. Stat. p. 409, § 4; Clayborn's ex'or v. Hill, 1 Wash. 177; Note to Moore's ex'or v. The Auditor, in 3 Hen. & Munf. 235; Act of 1785, in 1 vol. of Old Rev. Code, p. 15, 16, ch. 10, § 2; Act of 1792, in same volume p. 157, ch. 90, § 2, 4, and p. 158, § 8; Moore's ex'or v. The Auditor, 3 Hen. & Munf. 232; Hodgson v. Butts, 3 Cranch 140; Bond v. Mewburn and others, 1 Brock. 316; Act of 1814, Sess. Acts of 1813-14, p. 36, ch. 10, § 8; Act of 1819, 1 R. C. p. 364, ch. 99, § 11; Lane v. Mason, 5 Leigh 520.

ALLEN, J., delivered the following as the opinion of the court:

The court is of opinion, upon a consideration of the various acts of the legislature for regulating conveyances, and especially of the acts of 1705, ch. 21; 3 Hen. Stat. 318,—of 1710, ch. 13; 3 Id. 517,—of 1734, ch. 6; 4 Id.

397,—of 1748, ch. 1; 5 Id. 408, and of 473 1785, ch. *62; 12 Id. 154, that it was the intention of the legislature, in the act of 1792, to require a deed of trust or mortgage of personal estate to be recorded in the general court, or in the court of the district, county, city or corporation in which

the grantor resided. And it appearing from the recital in the deed in the bill of exceptions referred to, that the grantor John Bell resided in Henrico county, and the deed having been recorded in the corporation of Petersburg; such deed, so recorded, was void as against the creditors of said grantor. The court is therefore of opinion, that the court below erred in permitting said deed to go in evidence to the jury, and in refusing to give the first instruction asked for by the plaintiff. Therefore the judgment is reversed with costs, and the cause remanded, with instructions to exclude the said deed from going in evidence, if no other testimony should be adduced on the trial, and to give the first instruction as prayed for by the plaintiff, if the same should be again required.

474 *Wade's Heirs v. Greenwood & Wife.

November, 1843, Richmond.

[40 Am. Dec. 759.]

(Absent CABELL, P.)

Specific Performance*—Unrecorded Conveyance—Grantor's Creditors—Lost Deed—Costs.—In 1814 land was sold, possession thereof delivered, part of the purchase money paid, and a contract made to pay a further part when a lawful right should be conveyed. In 1820 a bill was filed by the vendor and his wife (who claimed to have inherited the land from her father) against the vendees and their assignee, asking specific execution of the contract. The bill also made defendant a non-resident, who, it was alleged, had formerly owned the land, and conveyed it to the father by a deed which was accidentally destroyed before it was placed on record. The assignee in his answer said, he had heard a report that the father mortgaged the land to secure a debt which was yet unpaid. He professed his readiness to pay the balance due from him to the vendees, upon receiving a title to the land, and a release of the mortgage, if there was one. The nonresident defendant, though proceeded against by publication, put in no answer. It was proved by a witness, that in 1794 the nonresident defendant conveyed the land to the father of the female complainant; that the deed was acknowledged before three witnesses, and delivered to one of them to have it recorded; and that it was accidentally burnt while in his possession. In 1830 a decree was made for specific execution. During all this time the vendees and their assignee, and the heirs of the latter, continued to hold possession of the land; none of them asked a rescission of the contract; and it did not appear that there was any such mortgage as was mentioned in the answer. Upon an appeal by the heirs of the assignee. **Held.** 1. That as the conveyance to the father, though never recorded, and afterwards destroyed, was effectual against the grantor to vest the legal title in the father, and the great lapse of time since that conveyance, in connexion with the uninterrupted possession of the father

*Specific Performance.—See monographic note on "Specific Performance" appended to *Hanna v. Wilson*, 3 Gratt. 248.

and those claiming under him, furnished a sufficient presumption against any claim on the part of the grantor's creditors, the decree for specific execution was, under the circumstances, proper. 2. That as there was no record of the said conveyance, a commissioner should be directed to execute another deed from the grantor to the appellants. 3. That as the ancestor of the appellants was not bound to take the title until

the existence and validity of the said conveyance *had been judicially ascertained, and as the burthen of establishing these facts devolved on the vendors, they should be decreed to pay the costs.

Same—Personal Decree against Heirs of Vendee—Rule.

—Where a suit is brought against a vendee for specific execution, and pending the suit he dies, and the same is revived against his heirs, they are not liable to a personal decree: the decree should merely be, that unless they pay the purchase money and interest within a period to be prescribed, the land shall be sold.

Sale of Land—Enforcement of Vendor's Lien—Time for Redemption.

—In a suit by a vendor against the vendee's heirs, to subject lands to sale by virtue of the vendor's lien for his purchase money, it is, in general, an improper exercise of discretion to decree an immediate sale without allowing any time for redemption, or to decree the sale to be made for cash. If circumstances exist which render it expedient to sell forthwith and for cash, such circumstances should be disclosed by the record. If there be a decree to sell forthwith and for ready money, in a case in which nothing appears to call for or justify a departure from the general rule, the decree will for this cause be reversed.

By deed dated the 18th of September 1777, James Dejarnett and wife conveyed to George Mitchell a tract of 400 acres of land in the counties of Halifax and Pittsylvania, being chiefly in the former. Dejarnett acknowledged the deed, and his wife was privily examined, in the court of Halifax county on the day of its date, and the same was thereupon admitted to record.

By a deed of the 19th of December 1786, in the names of Mitchell and his wife, the land was conveyed to John Welch. This deed was proved in the court of Halifax county, on the 21st of June 1787, by two witnesses as to Mitchell; but his wife did not appear to have been privily examined.

By a deed of the 25th of April 1788, in the names of Welch and his wife, the land was conveyed to Daniel Roberts. This deed was also proved in the court of Halifax county by two witnesses; but the wife of Welch did not appear to have been privily examined.

Daniel Roberts sold the land to Redmon Cody, who died leaving a daughter Nancy his only child and heir. She intermarried with Bartlett Greenwood.

476 *On the 28th of May 1814, articles were executed between Hardwick Shearing and Moses Shearing of the one

part, and Bartlett Greenwood of the other part, whereby the two former acknowledged that they had bought the land of Greenwood and received possession from him, and (in addition to what was stated in the articles to have been paid) were to pay Greenwood 100 dollars upon his making to them a lawful right to the land, and 300 dollars more the 25th of December 1816. Hardwick Shearing and Moses Shearing afterwards transferred their right to the land to Henry Wade.

In 1820, Greenwood and wife filed their bill in the superior court of chancery at Lynchburg, against Roberts, the purchasers from Greenwood, and Wade their assignee, setting forth, that the father of the female complainant died during her minority, seized of the land, and the sale by the plaintiffs was made before they had knowledge of the facts in regard to the title; that Roberts received full payment for the land, and executed to Redmon Cody a deed for the same in due form of law; that Cody was put in possession of the premises pursuant to the deed, and he and those claiming under him have held the possession 33 years uninterruptedly; that the deed executed by Roberts to Cody was delivered over by Cody to Haynes Morgan esquire, then a practising attorney in the county court of Pittsylvania, to offer to the said court for probat, and Morgan deposited the deed with his own papers in his office, which was consumed by fire in the year 1787, before the period for holding said court had arrived; that Roberts resides out of the commonwealth, and the Shearings have also gone out of the state, having previously sold their interest in the land to Wade, and put him in possession thereof. The bill prayed a conveyance of the title of Roberts, and that the land be decreed to be sold, and the complainants paid the 400 dollars remaining due, with interest thereupon.

477 *Wade, in his answer, admitted that he contracted with the Shearings at the price of 800 dollars, of which he had paid at different times 400 dollars, leaving the residue unpaid. He said, he had heard a report that Cody in his lifetime mortgaged the land to secure a debt to John M'Rae of Petersburg, and that the debt was yet unpaid. He professed his readiness to pay the balance due from him to the Shearings, upon receiving a title to the land, and a release of the mortgage, if there was a mortgage; but entertaining strong doubts as to the plaintiffs' title, he was not willing, he said, to part with his money until those doubts were removed.

Moses Shearing also answered, stating, that by an arrangement made by him with Hardwick Shearing, the latter had taken the benefit and burthen of the contract.

The cause was proceeded in by publication against Roberts and Hardwick Shearing, and the bill as to them was taken for confessed.

Chancellor Taylor referred the title of the plaintiffs to a commissioner, to be by him regularly deduced for 50 years. The com-

†Enforcement of Judgment Liens—Time For Redemption.—The principal case is cited in foot-note to Crawford v. Weller, 23 Gratt. 835.

missioner reported the evidence of James Dejernett, that he was in possession of the land by purchase as early as 1770, and then held the original patent for the same; and the evidence of James Montgomery, that after Dejernett sold the land, he (Montgomery) saw the original patent in the hands of Welch, who then owned the land. The deposition of Thomas Self was also taken the 15th of May 1822. He deposed, that about 28 years before, he rented the land from Redmon Cody, and he then understood from Daniel Roberts and said Cody, that he (Roberts) had sold the land to Cody; that at the time of the conversation of Roberts and Cody, or some short time before, the last payment was made by Cody to Roberts; that the deponent was called on by the parties to witness a deed from Roberts to Cody; that the deed was acknowledged in the presence of deponent and of Haynes Morgan and Reuben Comp-ton, and *all three witnessed the same; that Morgan undertook to have it recorded, and took it in possession for that purpose; that Morgan's house was burnt some time afterwards; and that the deponent had never been called on to prove the deed for the purpose of having it recorded.

The defendant Wade died pending the suit, and the same was revived against his heirs.

On the 19th of May 1830, the chancellor decreed, that upon mrs. Greenwood's uniting with her husband in the relinquishment of her right to the land by such good and sufficient deed to the heirs of Wade as counsel learned in the law should advise, and delivering the same to the said heirs or some one of them, if he or they would receive it, but if not, depositing it with the clerk of the court for their use, the heirs of Wade should pay unto the plaintiffs the sum of 400 dollars with interest thereon from the 25th of December 1814, and their costs by them about their suit expended. And the court further decreed, that in case default should be made in such payment upon the execution and delivery of the said deed as aforesaid, the defendants, or such of them as might have the possession of the land, should deliver the possession thereof to the marshal of the court, and that the marshal, after having advertised the time and place of sale for four weeks in some newspaper printed in the town of Lynchburg, at the front door of the court-houses of Halifax and Pittsylvania counties on some court day, and at some public place near the premises at least ten days before the sale, should proceed upon the premises to sell by way of public auction, to the highest bidder for ready money, the land aforesaid, or so much thereof as should be sufficient to pay off and discharge the said principal money, interest and costs, and the expenses attending the said sale, and should pay the proceeds thereof, after defraying the expenses attending the same, into one of the banks *at
479 Lynchburg to the credit of the suit,

subject to the future order of the court, and report his proceedings to the court. And liberty was reserved to the defendants Daniel Roberts and Hardwick Shearing, respectively, to shew cause against the decree at any time within seven years, upon their appearing and answering the bill.

A deed from Greenwood and wife was executed to the heirs of Wade, and the wife's privy examination and acknowledgment, as well as the husband's acknowledgment, duly certified by two justices of the peace, and the deed tendered to one of the heirs, and deposited with the clerk of the court, as directed by the decree.

An appeal was allowed from the decree, on the petition of Wade's heirs, who insisted that the plaintiffs had not made a lawful title agreeably to the contract, and under the circumstances ought not to have been permitted to sell the land, at the sacrifice which a doubtful title must occasion, for the balance of the purchase money, which, by the terms of the agreement, was not to be paid until after a good title was made: that at all events no sale should have been decreed, but upon terms of repaying to the heirs of Wade the amount paid by them to Shearing, and by Shearing to the plaintiffs, and rescinding the agreement, which could not be performed on the part of the plaintiffs: and that, before any sale could justly be asked, an enquiry should have been directed to ascertain whether the mortgage mentioned in the answer of Wade ever existed, or still remained.

Garland for appellants. This being a bill for specific execution, the court will not decree such execution if it would be inequitable to do so. Cabell, P., delivering opinion of court in Bryan v. Lofftus's adm'rs, 1 Rob. 16. Here there is reason to apprehend disturbance by Roberts or his heirs. Self has not proved any delivery of the deed by Roberts, or by his author-
480 ity; and if he had, *it is at least questionable whether a single witness would be sufficient to establish the fact, seeing that the deed could only be admitted to record upon proof by three witnesses. It must be considered a case of a clouded title, under which, if a sale be made, the land will be sacrificed; which a court of equity does not permit. Gay v. Hancock & others, 1 Rand. 72. Mere possibilities, it is true, constitute no objection to a specific execution; as where, from the length of time, it is impossible to discover in whom the legal title is. But when a considerable, a rational doubt exists, notwithstanding the court inclines to the opinion that a good title can be made, specific execution will not be decreed. Stapylton v. Scott, 16 Ves. 272. The court never decrees such execution where the title is involved in difficulties. 1 Fonbl. Eq. 190; Marlow v. Smith, 2 P. Wms. 198; White v. Foljambe, 11 Ves. 337. A purchaser will not be compelled to take a doubtful title. Roake v. Kidd, 5 Ves. 647; Lowes v. Lush, 14 Ves. 547; Franklin v. Lord Brownlow, 14 Ves. 550; Sloper v. Fish, 2 Ves. & Beames 145. Although the

court thinks the title good, yet if it be doubtful, specific execution will be denied. *Cooper v. Denne*, 1 Ves. jr. 565; *Jervoise v. Duke of Northumberland*, 1 Jac. & Walk. 549.

A party seeking specific performance should shew that he is not himself in default, and that he has taken all proper steps towards performance on his part. 2 Story's Equity, p. 81, § 771; 1 Fonbl. Eq. book 1, ch. 6, § 2; *Milward v. Earl Thanet*, 5 Ves. 720, note; *Moore v. Blake*, 1 Ball & Beatty 68, 9; *Pratt and others v. Carroll*, 8 Cranch 471; *Colson v. Thompson*, 2 Wheat. 336, 341; *Brashier v. Gratz and others*, 6 Wheat. 528. Here a conveyance should have been directed of the title of Roberts, or at least the plaintiffs should have been required to execute an indemnifying bond against any title outstanding in him or derived through him, and against the other defects alleged by the vendee.

481 *The decree is also erroneous in allowing interest on the purchase money from a date anterior to the execution of the conveyance by Greenwood and wife, and in allowing them their costs. It is moreover harsh in directing the land to be sold for ready money, upon four weeks notice. A reasonable time should have been allowed for paying the money, and the sale should have been upon a reasonable credit.

Patton and C. Johnson for the appellees. No objection is made in the pleadings to going on and completing the contract, if a good title can be made. Now Roberts had a title which would have enabled him to sustain his right to this land against all the world, before his conveyance to Cody. And after that conveyance, the execution of which is clearly proved, the title of Roberts was fully vested in Cody. Had Cody brought a writ of right to recover the land against Roberts, and adduced in that case the same evidence that is exhibited here, it would have been abundantly sufficient to entitle him to recover. After such a lapse of time without any creditor of Roberts or subsequent purchaser from him being heard of, it must be presumed that the title is unexceptionable. This principle of presumption equally applies to the objection that the wives of two of the parties who successively conveyed the land did not join in the conveyances.

The sufficiency of the title is to be ascertained at the time of the decree, not at the time of suit brought. *Hepburn v. Auld*, 5 Cranch 262. The cases of *Lyddal v. Weston*, 2 Atk. 19, *Sperling v. Trevor*, 7 Ves. 497, *Hillary v. Waller*, 12 Ves. 251, *Halsey v. Grant*, 13 Ves. 73, and *Horniblow v. Shirley*, Id. 81, shew the kind and degree of doubt or defect which will prevent specific execution, and what will be considered as sufficiently guarded against by the vendor's warranty. The cases

482 *of *Fleetwood v. Green*, 15 Ves. 594, *Margrave of Anspach v. Noel*, 1 Madd. C. R. 310, American ed. 172, *Bradshaw v. Bradshaw and others*, 2 Meriv. 492, and *Burnell v. Brown*, 1 Jac. & Walk. 173,

shew that where the party resisting specific execution is in possession of the land, there will be a stronger disposition on the part of the court to compel specific execution (notwithstanding small objections to the title), and to leave the party to his remedy on the general warranty in his deed. *Buckle v. Mitchell*, 18 Ves. 111, shews that remote and merely contingent objections to the title will not avail. Here the husband and wife have executed and tendered a deed conveying the land. And therefore the question suggested in *Howel v. George*, 1 Madd. C. R. 1, whether specific performance of the husband's contract for the sale of the wife's land can be decreed, so as to require him to procure her to join in the conveyance, need not be considered.

As the vendee was in possession of the land, he was properly required to pay interest on the purchase money. The contract expressly provided a particular day for the last payment; and where that is the nature of the contract, and the party has also had possession of the land, interest will go upon the purchase money from that day.

There is nothing in the record from which it can be inferred that the discretion of the chancery court was improperly exercised in decreeing a sale for cash upon four weeks notice. Under the circumstances of this case, and after the delay of payment which had already occurred through the vendee's default, it would have been improper to allow further delay, especially when the sum to be raised was so inconsiderable. Moreover the case of *Manns v. Flinn's adm'r*, 10 Leigh 93, shews that this is no ground for reversing the decree.

483 **ALLEN, J.*, delivered the following as the opinion of the court:

The court is of opinion, that it appears from the evidence that Daniel Roberts did convey the land in the bill and proceedings mentioned to Redmon Cody, the ancestor of the female appellee: that such conveyance, though never recorded, and afterwards lost or destroyed, was effectual as against the grantor to vest the legal title in said Cody: and that the great lapse of time since said conveyance, in connexion with the continued and uninterrupted possession of the land by Cody and those claiming under him, furnishes a sufficient presumption against any claim on the part of the creditors of said Daniel Roberts. The court is therefore of opinion, that as the appellants have continued to hold possession of the property, and have not asked for a rescission of the contract, it was proper, under the circumstances of the case, to decree a specific performance of the contract; and that in this there was no error in the decree. But the court is further of opinion, that the ancestor of the appellants was not bound to take the title of the appellees until the existence and validity of the said conveyance from Daniel Roberts had been judicially ascertained; that the burthen of establishing those facts devolved upon the

appellees; and therefore that they should have been decreed to pay the costs. The court is further of opinion, that as there is no record of the conveyance from Daniel Roberts, a commissioner should have been directed to execute a deed from him to the appellants. The court is further of opinion, that under the authority of *Tibbs &c. v. Matthews &c.* decided in this court on

the sixth day of May 1829, *it was
484 wrong to decree personally *against the appellants, who, as heirs of the vendee, were not liable to a personal decree. The decree should have been, that unless they paid the said debt and interest within a period to be prescribed, the land should be sold. And the court is further of opinion, that in a suit to subject lands in the hands of heirs to sale, for the equitable lien of the vendor for unpaid purchase money due from their ancestor, or for the debt of the ancestor, it is, in general, an improper exercise of discretion to decree an immediate sale without allowing any time for redemption, and to decree a sale for cash: and that if circumstances exist which render it expedient to sell forthwith and for cash, such circumstances should be disclosed by the record. In the case under consideration, nothing appears to call for or justify a departure from the general rule; and the court is therefore of opinion, that there was error in directing the marshal to take possession of the land, and to sell forthwith and for ready money. It is therefore decreed, that so much of the said decree as conflicts with this opinion be reversed, and that the appellants recover against the appellees their costs here expended; that the said decree be affirmed for the residue; and that the cause be remanded, with instructions to be finally proceeded in according to the principles above declared.

485 *Walkers v. Boaz and Others.

November, 1843, Richmond.

(Absent CABELL, P.)

Writ of Right—Pleading—Nonjoinder of Demandants Must Be Pleaded in Abatement—Cases Approved.—

Upon a writ of right by three demandants, it appears at the trial of the mise, that the tenement demanded descended to the demandants and their two infant brothers from their mother, and that those two infants successively died without issue, and were survived by their father as well as by the demandants: *Held*, 1. That upon the

*In *Tibbs &c. v. Matthews &c.* the court of appeals adjudged the decree to be erroneous in this, that it was "personal against the heirs, and not conditional (as it ought to have been) that unless they pay the money, the lands be sold" &c.—Note in Original Edition.

†Writ of Right—Pleading—Misjoinder of Demandant—Platter in Abatement.—In *Beil v. Snyder*, 10 Gratt. 365, it is said the nonjoinder of the omitted heir was clearly a matter in abatement, and was not therefore available on the mise joined; and the cases of *Green v. Lifer*, 8 Cranch 230, *Garrard v. Henry*, 6

death of the infant who first died, his share of the tenement descended to his four brothers, without regard to the father; and upon the death of the other infant, the share which he derived by descent from the mother passed in like manner to the three brothers, but the share which he derived by descent from his brother (1-4th of 1-5th) descended to his father. 2 That according to the principles established in *Garrard &c. v. Henry &c.*, 6 Rand. 110, and *Linton and others v. Bartly and others*, 9 Leigh 444, the fact of the father's having so become interested as tenant in common with the demandants (not having been pleaded in abatement) cannot prevent the demandants from recovering so much of the tenement as they shew title to, namely, all except that fourth of a fifth.

Same—Same—Nonsuit—When Proper to Set Aside.—A nonsuit in a writ of right having been suffered under a misapprehension on the part of the demandants and their counsel as to the legal effect of an instruction given at the trial, *Held*, the court, in the exercise of a sound discretion, should, on the motion of the demandants, have set aside the nonsuit; and this not having been done, the judgment overruling such motion was reversed.

Same—Same—Plea of Several Tenancy—When Pleaded.—Within what time the plea of several tenancy should be pleaded in a writ of right.

On the 13th of March 1824, Benjamin P. Walker, Samuel J. Walker and Isaac W. Walker, by John M. Walker their father and next friend, sued out of the circuit court of Buckingham county a writ of *pæcipe quod reddat* against Meshack Boaz, William Phelps and James Rogers, which writ was returnable to the rule day in April following, and was then returned ex-
486 ecuted *on Boaz, but not on the other tenants. At that rule day, the demandants filed their count demanding a tenement of 272 acres of land. A new writ having been issued against Phelps and Rogers, and returned executed upon them, at April term 1825 "came the parties, and by their consent" an order of survey was entered. At April term 1826, again "came the parties by their attorneys, and by their consent" a new order of survey was entered. Under the first order, a survey was made the 22d of April 1825; under the last, the 7th of September 1826.

At September term 1826, before the case had been called, the tenants tendered a plea, that Boaz was seized, as sole tenant in fee, of 228 acres part of the land demanded, *absque hoc* that the said Boaz had any thing in the said 228 acres; that Rogers was seized, as sole tenant in fee, of 24

Rand. 110, and *Walkers v. Boaz*, 2 Rob. 485, only prove the same general doctrine that on the mise joined matter in abatement cannot be taken advantage of by the tenant; but none of these cases touch the question arising in this case which holds that upon the mise joined every affirmative matter going to the right and title of the demandant, the want of which might have been pleaded in bar of the action, is necessarily put in issue and he is put to proof of the same.

Same—Same—Nonsuit.—See generally, monographic note on "Judgments" appended to *Smith v. Charlton*, 7 Gratt. 425.

acres other part thereof, with a like erroneous abaque hoc; and that Phelps was seized, as sole tenant in fee, of the balance, with a like abaque hoc. The plea was verified by affidavit. At the same time a like plea was tendered in another case of a writ of right by the same demandants against Meshack Boaz and Thomas Coleman. The reason assigned for not offering the pleas sooner was, that Boaz and his counsel did not know how much of his land (he holding one entire tract) was demanded in one suit, and how much in the other, until the last survey was returned. The court, however, rejected the pleas, being of opinion that they were offered at too late a period. And the tenants excepted.

After a demurrer to the count, which the court overruled, the mise was joined on the mere right.

At the trial, the demandants adduced evidence to prove that the land in controversy was granted to Jeremiah Whitney by patent dated June 22, 1780: that Jeremiah Whitney, the patentee, died in the year 1781: that his brother Josiah Whitney was his heir at law, to whom the said land thereupon descended: that Josiah Whitney sold and conveyed the land, by deed dated March 4, 1783, to Susanna Whitney, who died in 1785: that Susanna Whitney, by her will dated April 7, 1784, devised the land to her son George Christian, but he dying before the testatrix, the devise lapsed, and the land descended to John H. Christian her eldest son and heir at law: that John H. Christian died in 1801, and by his will devised the land to his wife Joice Christian: that Joice Christian died in 1808, intestate, and the land thereupon descended to her daughter and heir at law, Susanna the wife of John M. Walker and mother of the demandants: that Susanna Walker died in 1814, leaving her said husband and five children, namely, the three demandants, and John Walker and an infant child not named: that the infant unnamed child died shortly after his mother, and his fifth part descended to his four brothers, namely, the three demandants and their brother John: and that John died an infant, leaving his three brothers, the demandants, and his father John M. Walker him surviving. And thereupon the court instructed the jury, that upon the death of Susanna Walker, her interest in the land descended to her five children; that on the death of the infant unnamed child, his share (1-5th part) descended to his four brothers, namely, the three demandants and John Walker; that upon the death of John Walker, the share of the land which he derived by descent from his mother (1-5th part) descended to his brothers the three demandants, but the share which he derived by descent from his brother the unnamed infant 1-4th of 1-5th) descended to his father John M. Walker (who was not joined as a demandant in the writ of right), and he thereby became interested as tenant in common with the demandants. Whereupon the demandants, upon an understanding

(sanctioned by the court) that the opinion would be reconsidered by the court without prejudice from a nonsuit, if the court should see cause to change its opinion, did suffer a nonsuit. *Afterwards the demandants moved the court to set aside the nonsuit and to reinstate the cause, alleging that the said opinion was contrary to law, and that if otherwise, yet the demandants, notwithstanding the interest of their father aforesaid, might prosecute this action with effect; but the court, not changing its opinion aforesaid, refused to reinstate the cause and set aside the nonsuit; to which opinion the demandants excepted.

On the petition of the demandants, a supersedeas was awarded.

Leigh for plaintiffs in error. Though the opinion of the court below, so far as the same held the father of the demandants entitled to a fourth of a fifth of the land, was correct, the demandants were nevertheless entitled to recover in this action so much of the land as they shewed title to, namely, all except that fourth of a fifth. After the mise has been joined on the mere right, the objection does not lie at the trial, that a party has been omitted who is entitled to part of the land demanded; it does not lie so as to prevent those who are demandants from recovering that to which they are entitled. *Green v. Litter and others*, 8 Cranch 230; *Litter and others v. Green*, 2 Wheat. 306; *Garrard &c. v. Henry &c.*, 6 Rand. 110; *Linton and others v. Bartly and others*, 9 Leigh 444. The nonsuit ought to have been set aside. And for the error in refusing to do so, the judgment should be reversed and a new trial awarded.

The pleas of several tenancy were plainly demurrable, because the traverse (the abaque hoc) does not deny the joint seisin of the tenants in the parcel of which sole tenure is pleaded, but denies that the tenant whose sole tenure in such parcel is pleaded, holds any thing in that same parcel. But the chief objection to the pleas, and that which decisively shews that they were properly rejected, is, that they were tendered too late. The matter of the pleas was merely in abatement, and ought to have been pleaded at the appearance day.

*Johnson. The only ground upon which the pleas were rejected being that they were offered too late, that is the only question in respect to them which can be considered here. Now the record shews that the pleas were tendered at the first appearance of the tenants. They had not previously appeared in the cause for any purpose, unless such appearance is to be inferred from the entry that the parties came on a certain day, and thereupon the order of survey was made. The meaning of the rule which requires that matter of abatement shall be pleaded at the first appearance of the defendant, is not that he must plead it at the first day on which he might enter an appearance, but only that

he shall not, after appearing and pleading other matter, and thereby waiving the matter in abatement, be allowed to go back and avail himself of it. Here it is not pretended that the demandants could have been benefited in any way by an earlier tender of these pleas; and the tender of them was made as soon as the survey enabled the tenants to set forth the particular bounds and description of the parcels which they claimed and held in severalty.

The discretion of the court, to which the motion to set aside the nonsuit was addressed, was properly exercised under the circumstances. At common law, a nonsuit in a writ of right was a bar to a subsequent action for the same lands. But it is no longer so in Virginia since the act of February 11, 1824, Sess. Acts of 1823-4, p. 27, ch. 24, § 2. Here, too, the nonsuit was voluntarily and wantonly suffered: there was, according to the pretensions now advanced for the demandants themselves, no sort of necessity for suffering it. If the opinion pronounced by the court was injurious to them, they might have excepted, and appealed to this court for the correction of the error.

But suppose the judgment be now reversed, the nonsuit set aside, and the cause sent back for a new trial *on the mise, which is accordingly had, and a verdict and judgment rendered for the demandants: then such judgment might be reversed on a supersedeas by the tenants, because of the rejection of their pleas of several tenancy. Why then set aside the nonsuit and reinstate the cause, when these same pleas, or amended pleas presenting the same matter, must now be received, and the consequence will be the abatement of the suit because of the misjoinder of tenants having no community of interest?

Leigh in reply. The question whether this cause shall be reinstated, or the nonsuit left in force, is of more consequence to the demandants than seems to be supposed on the other side. If put to a new action, they may have to encounter the bar of the statute of limitations. Upon the motion to reinstate, the court below was called on to consider whether the justice of the case required that the motion should be granted; not merely whether the opinion it had expressed on the trial, in consequence of which the nonsuit was submitted to, should be adhered to as correct or changed as erroneous.

That the pleas of several tenancy were offered too late is unquestionable. *Garrard &c. v. Henry &c.*, 6 Rand. 110; 1 R. C. of 1819, ch. 128, § 34, p. 496. It is a novel suggestion, that the tenants were obliged to wait for the execution of the order of survey in the cause, before they could plead that the lands which they respectively claimed and held as their own were claimed and held in several rights.

ALLEN, J., delivered the following as the opinion of the court:

It seems to the court, that although the

law was correctly propounded by the court below in the instruction given to the jury, yet according to the principles established in *Garrard &c. v. Henry &c.*, 6 Rand.

491 124, and **Linton &c. v. Bartly &c.*, 9

Leigh 444, the objection was matter in abatement, and could not be taken upon the trial of the mise joined on the mere right. And as it appears that the nonsuit was suffered under a misapprehension on the part of the demandants and their counsel as to the legal effect of the instruction upon their right to recover, the court, in the exercise of a sound discretion, should, on the motion of the demandants, have set aside the nonsuit, instead of overruling the said motion. It is therefore considered that the judgment be reversed and annulled, and that the plaintiffs in error recover of the defendants in error their costs here expended. And it is further considered that the cause be remanded to the circuit court, with instructions to set aside the nonsuit, and to reinstate the case upon the docket for a trial to be had on the mise joined.

492 *Arrington v. Cheatham & Wife.

November, 1843, Richmond.

(Absent CABELL, P.)

Wills—Payment of Legacy—Personal Liability of Representative—Sureties.—A testator, by his will, after directing that in the first place all his just debts shall be paid, devises and bequeaths to his wife, during her life, his plantation, all his stock and furniture, and six slaves by name; and then, after various specific devises and legacies to his children, directs as follows: "I desire that my wife will, as soon as convenient after my decease, purchase and deliver to my granddaughter C. C. a negro girl of about £50 price, which I give to my said granddaughter and her heirs." The wife is also named executrix. She qualifies as such, giving a bond with sureties; and the whole personal estate, other than specific legacies, is exhausted in payment of the debts. The widow having accepted the property given her by the will, and taken possession of the whole of it, HELD, she is liable personally as legatee, not as executrix for the payment of the legacy to the granddaughter, and the sureties in her executorial bond are no-wise responsible for the same.

Guardian and Ward—Executor Guardian De Facto—Interest on Ward's Legacy.—For several years an infant legatee resides with and is maintained by her grandmother, who is chargeable with the payment of the legacy, the annual interest of which is less than the annual value of the maintenance: HELD, the grandmother shall not be charged with interest on the legacy during the period of such maintenance.

Appellate Court—Decree—Reversal.—A decree being rendered against the sureties of an executor, and the appellate court being of opinion that they are not liable, decree reversed and bill dismissed.

*See monographic note on "Guardian and Ward" appended to *Barnum v. Frost*, 17 Gratt. 398.

†Joint Judgments—Reversal.—At common law, a joint judgment erroneous as to some is erroneous

as to all of them, although only one had appealed. But though a sum (less than 100 dollars) was erroneously decreed against a succeeding administrator, as to whom the bill ought to have been dismissed, yet he not having appealed, no correction was made by the appellate court in this part of the decree, the appellant being in no wise interested therein.

Joseph Tweedy senior, late of Campbell county, died in the latter part of the year 1810, having duly made and published his last will and testament, whereby, after directing that in the first place all his
493 just debts *should be paid, he devised and bequeathed to his wife Fanny, during her natural life, the tract of land whereon he then lived, all his stock and turniture of every kind, and six slaves by name. He then made various specific devises and bequests to his children (seven in number), including the remainder in the land and slaves given to his wife for life. These devises and bequests to his wife and children comprised his whole estate, real and personal, except one old slave, valued in the appraisement at £20., and some produce and provisions valued at something less than £40. Then followed a clause in these words: "I desire that my wife will, as soon as convenient after my decease, purchase and deliver to my granddaughter Caroline Coleman a negro girl of about £50. price, which I give to my said granddaughter and her heirs." The testator concluded his will by appointing his wife executrix and his two sons Robert and John executors.

The will was proved in Campbell county court on the 9th of December 1810, and Fanny Tweedy the widow and John Tweedy qualified as executors, giving bond with Robert Tweedy (who renounced the executorship), Archer Williamson and Adler Arrington, as their sureties.

Caroline Coleman the granddaughter having, about the year 1819, intermarried with Matthew Cheatham, the said Cheatham and wife, in 1821, filed their bill in the superior court of chancery holden at Lynchburg, against Fanny Tweedy and John Tweedy executors of Joseph Tweedy, and the aforesaid sureties in their executorial bond, setting forth the will of the testator, and praying satisfaction of the legacy thereby given to the female plaintiff.

Fanny Tweedy the executrix answered, that at the time of the testator's death, his estate was very much involved in debt, and not being very productive, it had required
494 all this respondent's exertions to discharge the *debts, which she had at length with much difficulty accom-

plished. That it had never been convenient for her, since the testator's death, to purchase a slave for the female plaintiff at the price mentioned in the will. That very shortly after the testator's death, the father of the female plaintiff died, leaving her mother and herself, with five other infant, children, in very straitened circumstances; whereupon the respondent took the female plaintiff, then only 6 or 7 years old, to live with her, and thenceforward until her marriage (a period of about ten years) had boarded, clothed and educated her, besides furnishing her, at the time of her marriage, with some articles of personal property. For these supplies, and the maintenance and education of the female plaintiff, the respondent claimed a reasonable compensation, and prayed an account to ascertain the same, and a decree accordingly.

Pending the cause, Fanny Tweedy died, and her estate was committed by the county court of Campbell to Thomas Dixon, sheriff of the said county, for administration. John Tweedy the executor having removed out of the commonwealth, administration de bonis non with the will annexed of Joseph Tweedy the testator was granted to John Roper.

An amended bill was afterwards filed by the plaintiffs, making defendants the said administrator of Fanny Tweedy, the said administrator de bonis non of Joseph Tweedy the testator, all the children of the testator (devisees and legatees in his will), John Tweedy as executor, and the sureties aforesaid in the executorial bond; praying a decree for the legacy of £50. with interest from a reasonable time after the testator's death, or for a slave such as the will described, with reasonable hires from the time when she ought to have been purchased according to the true intent of the said will.

Roper the administrator de bonis non of Joseph Tweedy the testator, Elizabeth

Coleman one of the legatees, Robert
495 *Tweedy another legatee, who was also a surety in the bond given by the executors, and Adler Arrington another surety in the said bond, severally put in answers, submitting to the court the question whether, upon a just construction of the will, the legacy to the plaintiff Caroline was chargeable upon the testator's estate generally, or only upon the portion thereof devised and bequeathed to the widow. Roper in his answer also stated, that the widow took possession of all the property, real and personal, given her by the will, and remained so possessed until her death. The estate, he said, which had come to his hands as administrator de bonis non, amounted only to 45 or 50 dollars in value.

The other defendants, though regularly proceeded against, failed to answer.

In the progress of the cause, accounts were directed, 1. of the administration of Joseph Tweedy's estate by Fanny Tweedy and John Tweedy his executors; 2. of the administration of the same estate by John

and must be reversed as to all. Vance Shoe Co. v. Haught, 41 W. Va. 282, 23 S. E. Rep. 556, citing the principal case; Jones v. Raine, 4 Rand. 396; Vandiver v. Roberts, 4 W. Va. 493; Lyman v. Thompson, 11 W. Va. 427; Lenows v. Lenow, 8 Gratt. 349; Purcell v. McCleary, 10 Gratt. 246; Gray v. Stuart, 33 Gratt. 358.

See monographic note on "Judgments" appended to Smith v. Charlton, 7 Gratt. 425.

Roper the administrator de bonis non; and 3. of the annual value of the life estate of Fanny Tweedy under the will of the said testator. These accounts were taken accordingly. By the first it appeared, that the executors of Joseph Tweedy had paid all the debts due from the estate, amounting to £346. 11. and delivered all the specific legacies given by the will: that, exclusive of specific legacies, the assets which came to their hands to be administered (including hires, during the years 1812, 1813, 1814 and 1815, of three of the slaves bequeathed to the widow for life) amounted only to £347. 11.: and that, allowing a commission of five per cent. to the executors, there was a balance due to them from the estate, on the 27th of March 1817, of £43. 18. Secondly, the account of Roper's administration on the estate of Joseph Tweedy shewed a balance due from him to the estate, on the 15th of February 1834, of 9 dollars 49 cents. Thirdly, it appeared that the 496 annual value of the property devised and bequeathed to Fanny Tweedy for life by the will of Joseph Tweedy, was about 170 dollars.

By depositions taken and filed in the cause, it appeared that Caroline Coleman resided at least eight years with her grandmother Mrs. Tweedy, who sent her to school for two or three years of that period. In the opinion of the witnesses, the schooling was worth 25 dollars, and the board worth 160 dollars, or 20 dollars per annum. It further appeared, that when Caroline was married, Mrs. Tweedy supplied her with several articles of furniture and a small stock of hogs, estimated to be worth 86 dollars.

The cause having been regularly transferred to the circuit superior court of Campbell county, came on to be heard in that court on the 1st of October 1834; when the court, expressing the opinion that the legacy of £50. to the female plaintiff should have been paid out of the profits of the life estate of Fanny Tweedy, the widow and one of the personal representatives of Joseph Tweedy deceased, and that she as executrix and her sureties were bound to pay the same, decreed that John Roper, administrator as aforesaid, pay the plaintiffs 9 dollars 49 cents, the amount appearing by the commissioner's report to be in his hands, with interest from the 15th of February 1834; and that the same John Roper, administrator as aforesaid, out of the estate in his hands if any he had to be administered, and Robert Tweedy, Archer Williamson and Adler Arrington, the sureties of Fanny Tweedy in her executorial bond, pay the plaintiffs £50. or 166 dollars 66 cents, with interest from the 31st of December 1811 until paid (subject to a credit of 9 dollars 49 cents, above decreed against the said John Roper administrator as aforesaid), and the costs of this suit: the court being of opinion that the other executor John Tweedy was in no wise bound for the debt, interest and costs aforesaid.

497 *On the petition of Adler Arring-

ton, one of the sureties, an appeal was allowed him from the decree.

The cause was argued by C. and G. N. Johnson for the appellant, and by Garland and Grattan for the appellees, upon the following objections taken by the appellant's counsel to the decree:

1. That Mrs. Tweedy was required to pay the legacy of £50. not as executrix, but as legatee, and her sureties were in no manner responsible for it.

2. That if the executors were chargeable with the payment of this legacy, it was a joint charge upon them both, for which both were bound in exoneration of their sureties.

3. That an account of Mrs. Tweedy's estate ought to have been taken.

4. That credit should have been allowed Mrs. Tweedy for the board, clothing and education of the plaintiff Caroline, and for the advancement made to her upon her marriage.

STANARD, J. If the testamentary provision for the appellee Caroline, contained in the will of Joseph Tweedy, were a pecuniary legacy for which the legatee might assert a claim on his executors, and they in their executorial characters might be held responsible after the surrender of the legacy to the widow, on whom the provision for the said Caroline is charged, no recovery could be had on such claim, because it clearly appears that the personal estate of the testator, exclusive of debts and specific legacies, supplied no fund to pay it. If it be but a mere charge on the legatee, the widow, on whom the duty of making the provision is imposed by the will (and such, I think, is its true character), that legatee, by the acceptance of the legacy, which by just intendment is to be regarded as the consideration for the duty, incurred a responsibility to make the provision,

498 *which charged her personally as legatee, and not executorially in respect to assets for which, as executrix, she might be liable. The title of the female appellee to the provision became complete, when the legatee, on whom the duty of making it was imposed, got the legacy in consideration of which it was imposed. The title to the provision was consummate at the moment that the subject on which it might be charged became vested in the legatee as such; and at the same time all executorial responsibility therefor terminated, and the personal responsibility of the legatee alone remained.

In either, or any just view of the case, the sureties for the performance of the executorial bond were not responsible for the failure to make the provision, of the legatee on whom the duty of making it was imposed, and who had received as legatee the subject bequeathed to her, in consideration of which she was required by the will to fulfil that duty. After Mrs. Tweedy had received the legacy bequeathed to her, she alone was responsible to the female appellee.

Mrs. Tweedy being alone responsible to the female appellee, the decree ought to have been against her representative only, and the bill ought to have been dismissed as to the other parties. But the representative of Joseph Tweedy, against whom a decree for the small sum of 9 dollars 49 cents was rendered, not having appealed, and the appellant being in no wise interested in that part of the decree, I think that part of it is not before this court for correction.

As the female appellee was supplied with board &c. by Mrs. Tweedy until her marriage in 1819, the representative of Mrs. Tweedy ought not to be held responsible for interest on the £50. during that time.

PER CURIAM. This court is of opinion that the decree, so far as the appellant is directly or indirectly interested therein, that is, so much thereof as subjects 499 the *sureties in the executorial bond to responsibility, be reversed and annulled, and that the appellees pay to the appellant the costs expended in the prosecution of his appeal. And this court proceeding to render such decree as the court below ought to have rendered, instead of that hereby reversed, doth adjudge, order and decree that Thomas Dixon sheriff of Campbell, to whom was committed the estate of Fanny Tweedy, out of the assets of his intestate in his hands to be administered, if so much thereof he hath, pay to the appellees the sum of 166 dollars 66 cents with interest thereon from the 1st of January 1819 till paid (subject to a credit of 9 dollars 49 cents as of the 15th of February 1834), and their costs expended in the prosecution of their suit in the superior court; that the bill of the appellees, as to the defendants Robert Tweedy, Archer Williamson and Adler Arrington, be dismissed; and that the appellees pay to those defendants the costs by them in their defence in the superior court expended.

500

*Talley v. Tyree.

November, 1848, Richmond.

(Absent CABELL, P.)

Appellate Jurisdiction—Injunction—Motion to Dissolve—Overruled.*—An appeal lies to the court of appeals from an order of a circuit court overruling a motion to dissolve an injunction which was improvidently granted. *Accord.* Lomax v. Picot, 2 Rand. 247.

***Appellate Jurisdiction—Dissolutions of Injunctions.**

—On this question the principal case is cited in *Baltimore & O. R. Co. v. City of Wheeling*, 18 Gratt. 58, and *foot-note*. See also, citing the principal case on this subject, *Kahn v. Kerngood*, 80 Va. 314; *Norfolk, etc., R. Co. v. Old Dominion Baggage Co.*, 97 Va. 90, 33 S. E. Rep. 386; *Gallaher v. Moundsville*, 34 W. Va. 737, 12 S. E. Rep. 861. See monographic note on "Injunctions" appended to *Clayton v. Anthony*, 15 Gratt. 518.

Mills and Milldams—When Owner Cannot Be Injoined from Rebuilding Dam—Case at Bar.—Two verdicts were rendered in favour of a party whose land was overflowed, against the owner of a mill for keeping his dam too high. The dam was then swept away: and the plaintiff at law thereafter exhibited a bill of injunction against the mill owner, which alleged that he had not begun, within the time prescribed by law, to rebuild the dam, also contained a suggestion in general terms, that irreparable mischief would result to the plaintiff from rebuilding the same. It did not appear that there was ever any order of court granting leave to build the mill and dam; it did appear, however, that the mill and dam had existed more than 50 years. **Held**, that the verdicts for keeping the dam too high shew that the mill owner had at least a prescriptive right to keep the dam at some height; that these verdicts did not warrant an injunction to restrain him from rebuilding the dam, in the absence of any allegation in the bill that he was about to build it, or had threatened to build it, beyond the authorized height; and that if it was competent for a court of equity to interpose at all to enforce a forfeiture of the mill owner's right because of his failure to rebuild the dam within the time prescribed by law, it ought not to be done by way of injunction, without an allegation in the bill of some distinct and sufficient ground of irreparable mischief.

In August 1836, Joseph Tyree exhibited a bill to the judge of the circuit court of Hanover, setting forth, that he is the owner of a tract of land in Hanover county on the south side of Mattadyquin creek, and Dydball Talley is the owner of a tract on the north side of said creek; that across the creek, for many years, Talley had had a dam, and a mill connected therewith; that whether the same was authorized by law or not, the complainant had never been able clearly to ascertain, but so far as 501 *he had investigated the subject, he was satisfied, and therefore charged, that legal and proper permission had never been obtained to erect said dam and mill; that it is certain, however, the same has been, within less than 20 years, raised above any height at which in previous years it had stood, and by consequence had greatly flooded and injured the complainant's land; that for this injury the complainant instituted an action at law, and by a fair trial obtained a verdict and judgment; that the said Talley still continuing to hold the water in his pond higher than he should under any circumstances have done, the complainant, for this continued injury, instituted another suit at law against the said Talley, and obtained another verdict and judgment; that sometime about the 10th of September 1834, a considerable part of the dam of the said mill was swept off by a very heavy flood, by which all the water, or very nearly all, was drawn off from the pond, and the lands above the dam were uncovered, and have since so remained;

+**Mills and Milldams.**—See monographic note on "Mills and Milldams" appended to *Calhoun v. Palmer*, 8 Gratt. 88.

that the said Talley had not since begun to "rebuild or repair" the said mill, although the same had been unfit for public use nearly two years; but that he now threatened to rebuild the dam forthwith, and by doing so he would again flood and greatly injure the land of the complainant, lying both above and below the said dam. And the complainant alleged, that if the said Talley should be permitted to proceed thus arbitrarily and illegally, he (the complainant) would be subjected to the most serious and irreparable injury; an injury for which he could obtain no adequate legal relief. An injunction was therefore prayed, to restrain the said Talley from proceeding to rebuild or repair the said mill or dam.

The injunction was awarded.

Talley answered, that the mill and dam (or rather the privilege thereof) have existed in use and unquestioned, certainly for 50 years, and he believed for a

502 *much longer time. He admitted that he had not found, among the records of Hanover county court, the original proceedings by which his said mill was established; but it was, he said, one of the oldest in the country, and could be proved to have had existence at a period the records of which were very imperfect, and it was not improbable that it was built at a time when it was lawful, and frequently the practice, to build mills and dams without application to any court for authority to do so. The complainant's speaking of the water having been, within less than twenty years, raised above its proper height, betrayed, the respondent argued, the complainant's own knowledge of the fact which he pretended to question, that the said mill and dam had an undoubted legal existence, from the length of time they had continued. The respondent did not deny that the complainant had recovered two verdicts against him in actions brought to recover damages for injury done to his lands. In these suits, he said, he laboured under the disadvantage of having no record to shew the height to which he was entitled to hold the water in his pond, and he believed that in consequence of this the jurors referred to his supposed illegal acts, consequences resulting from the relative situation of the creek and of the complainant's land. For, he said, he believed he could shew that as much injury would result to the land from a flood in the creek, when his dam is down and the water let off, as when the dam is standing. After each verdict, he said, he held the water in his pond at a lower height. Yet the complainant had instituted a third suit to recover damages for injury to his land in the intervening period between the last verdict and the month of September 1834, when the dam was carried away; and had avowed his purpose to contest the respondent's right to have his mill and dam on the site where they had stood so long, on any

503 terms whatever. The only ground, the respondent argued, upon *which the complainant could come into

equity, was for the prevention of irreparable injury. What, he asked, is the "irreparable injury" in the present case? The plaintiff complains that his land will be covered when the dam is raised too high. Then, said the respondent, the injury can only arise from raising the dam to an illegal height. "How can the complainant anticipate that this will be done, and that injury will ensue? Will it not be time enough to bring his action when the injury actually occurs? And has he shewn in any manner that such action will not compensate the injury?" The respondent denied emphatically the allegation in the bill that he did not begin to rebuild and repair his dam within one year from the 7th of September 1834, when it was carried away; and proceeded to state what he had done towards such rebuilding and repair, and when he did it.

Depositions read in the actions at law were produced by the defendant to shew the antiquity of the mill. According to these depositions, it was erected before 1768.

The defendant moved to dissolve the injunction, but the court overruled the motion.

From this order an appeal was allowed.

Daniel for appellant. The appeal was properly allowed in this case, to settle the principles of the cause, and save expense and delay. 1 R. C. 1819, ch. 66, § 57, p. 208; *Seas. Acts 1830-31*, ch. 11, § 31; *Suppl. to Rev. Code*, p. 149. The case of *Lomax v. Picot*, 2 Rand. 247, is a decision in point.

The charge of irreparable injury to the appellee from the erection of the dam is in general terms, and it is not shewn how such injury is to result. The jurisdiction of equity to interfere in such cases by injunction is of modern origin, and 504 very cautiously exercised. **Coulson v. White*, 3 Atk. 21; *Hanson v. Gardiner*, 7 Ves. 307; *Stevens v. Beekman and others*, 1 Johns. Ch. Rep. 318; 2 *Story's Eq.* 207, § 928; *Earl of Ripon and others v. Hobart and others*, 3 Mylne & Keene 169; 8 *Cond. Eng. Ch. Rep.* 331. The principle of this last case is directly applicable to the present. In *Crenshaw v. The Slate River Company*, 6 Rand. 245, the court adverts to the peculiar nature and public utility of mill property, and the hardship which may be inflicted on the mill owner by the interference of the court of chancery.

Lyons for appellee. It may well be questioned whether an appeal from an order refusing to dissolve an injunction is sustainable. Great delay, without any corresponding benefit, must be the consequence of allowing appeals in such cases, since they are not now privileged in respect to the time of the hearing.

This is a case of nuisance, in which there have been repeated trials at law, and repeated verdicts for the plaintiff. In such a case, equity has unquestionable jurisdic-

tion to interfere by injunction, as it would have, indeed, if the case were one of simple trespass. *Eden on Injunctions* 259-275; 1 Chitty's Gen. Pract. 722, 4; *Field v. Beaumont*, 1 Swanst. 208; *Gardner v. Village of Newburgh*, 2 Johns. Ch. Rep. 164; *Corning and others v. Lowerre*, 6 Id. 439; *Beveridge v. Lacey*, 3 Rand. 63. The plaintiff had no adequate remedy but in equity. If he had waited until the dam was rebuilt, a prosecution for a public nuisance could not be sustained. *Webb v. The Commonwealth*, 2 Leigh 721. And the plaintiff might also have been held to have waived his right to equitable relief, by his delay in applying to the court. As to actions at law, the history of this case is enough to shew that they would not afford any sufficient or effectual redress.

505 *Daniel in reply. While the act of April 16, 1831, (Sess. Acts 1830-31, ch. 11, § 32; Suppl. to Rev. Code p. 149,) has taken away the right to priority of hearing in cases such as this, it has left the right of appeal as it was under the former law.

The defendant had an unquestionable right to have his dam at some height, and it does not follow, because it has been heretofore too high, that he intended to rebuild it to an illegal height. [Lyons. The verdicts ascertain that the former height of the dam was illegal: but they do not determine that the defendant had a right to raise the dam. He may have had no right at all to have a dam at the place.] The verdicts are not in the record. They were not found, however, because a dam was unlawfully in existence, but because the height of it was too great. The bill itself concedes that the defendant had a right to have a dam of some height. And the plaintiff does not shew that the rebuilding the same would produce injury to him. There is then no ground disclosed by the bill for equitable interference; and though a demurrer might have been filed for that cause, yet it was unnecessary. The want of equity in the bill is a proper consideration on a motion to dissolve the injunction.

BALDWIN, J., delivered the following as the opinion of the court:

The court is of opinion, that the verdicts recovered by the appellee against the appellant for keeping his dam, in the proceedings mentioned, too high, serve to shew that he had at least a prescriptive right to keep the same at some height; and therefore that if it was competent for a court of equity to interpose at all, to enforce the alleged forfeiture of such right, by reason of the appellant's alleged failure to reconstruct his dam (after it had been swept away) within the time prescribed by law, it ought not to have been done by

506 *way of injunction, without an allegation in the bill of some distinct and sufficient ground of irreparable mischief, instead of a general and indefinite suggestion of such mischief. And the court is further of opinion, that the said verdicts against the appellant for keeping

his dam beyond the authorized height did not warrant an injunction to restrain him from reconstructing it at all, or even from reconstructing it beyond the authorized height, in the absence of any allegation in the bill that he was about to reconstruct, or had threatened to reconstruct it, beyond such authorized height. The court is therefore of opinion, that the circuit court erred in refusing to dissolve the injunction which had been granted to the appellee, inasmuch as the same was improvidently granted. It is therefore considered that the order of the said circuit court overruling the appellant's motion to dissolve said injunction be reversed and annulled, and that the appellant recover against the appellee his costs by him expended in the prosecution of his appeal here. And this court proceeding to make such order as the said circuit court ought to have made, it is further considered that the said injunction be dissolved. Which is ordered to be certified to the said circuit court.

507 *Macaulay's Ex'or v. Dismal Swamp Land Company and Others.

December, 1848. Richmond.

(Absent CABELL, P., and STANARD, *J.)

Dower—Selsin Subject to Deed of Trust—Recovery of Rents and Profits.—Where a husband makes a deed of trust conveying land with power to the trustees to sell the same for payment of debts, and they allow the husband to remain in possession during his life, and make no sale under the

*He had been counsel for the company.

+Dower—Laid Off by Metes and Bounds.—In *Tracey v. Shumate*, 22 W. Va. 498, the court, in speaking of the right of the widow to have her dower laid off by metes and bounds, said: "But the court of appeals of Virginia has long since settled this question in *Macaulay v. Dismal Swamp Co.*, 2 Rob. 507, in which the court held, that when a husband makes a deed of trust conveying land to a trustee to secure debts, and the husband remains in possession till his death, no sale by the trustee being made in his lifetime, the husband is to be considered as having died seized of the land subject to the deed of trust, so that the widow, if she did not join in the deed of trust, is entitled to dower in like manner, as if the deed had not been made; and therefore of course she has a right to have her dower assigned her in kind and by metes and bounds." See monographic note on "Dower" appended to *Davis v. Davis*, 5 Gratt. 587.

Waste—How Applied in This Country.—The law of waste, in its application here, must be varied and accommodated to the circumstances of our new and unsettled country. *Findlay v. Smith*, 6 Munf. 184, 8 Am. Dec. 733. The principal case is cited for this proposition in *McDodrill v. Pardee*, etc., Co., 9 W. Va. 579, 21 S. E. Rep. 883; *Bond v. Godsey*, 30 Va. 568, 39 S. E. Rep. 316.

Same—Life Tenant—Right to Open Mines.—The principal case is cited in *Bond v. Godsey*, 30 Va. 568, 39 S. E. Rep. 216; *Koen v. Bartlett*, 41 W. Va. 550, 23 S. E. Rep. 665. See *Williamson v. Jones*, 43 W. Va. 503, 27 S. E. Rep. 411; *Crouch v. Puryear*, 1 Rand. 258.

deed until after his death, the husband is to be considered as having died seized of the land subject to the deed of trust, so that his widow, if she did not join in the deed, and is entitled to dower in the land, may recover rents and profits from the husband's death in like manner as if the deed had not been made. In case the widow die before recovering such rents and profits, the same may be recovered to the period of her death by her administrator.

Same—Woodland Incapable of Cultivation.—A husband dies seized of land incapable of cultivation, and no otherwise productive or valuable than by working the timber and making sale thereof when converted into shingles. It appears that previous to as well as after the husband's death, the timber was worked, and large profits derived from the sale of shingles. Parties coming into possession after the husband's death, under a deed of trust made by him in his lifetime, admit his widow's right as doweress to one third of the timber worked, and for several years pay her one third of the proceeds of the same. Payment is afterwards stopped. **Held**, those in possession of the land after the husband's death shall account to the widow or her administrator for one third of the profits received by them during her life, subject to credit for the payments made by them to the widow.

Same—Laches—Account of Profits.—Under a deed of trust of land made by a husband, the trustees after his death sell the land, and the purchaser conveys it away to others. A bill is afterwards filed by the widow against the trustees, the purchaser's executor, and those in possession, claiming dower in the land, and an account of profits; pending which suit the widow dies. The bill upon its face shews a delay, without excuse, of more than 20 years in calling the trustees and the purchaser's executor to an account. The surviving trustee swears positively that he has paid over to the widow every dollar for which he and his cotrustee were accountable, and exhibits vouchers in proof of his allegation. The widow, by her own shewing in the bill, prosecuted to recovery a suit against the executor of the purchaser, for her share of the profits received by him; and the only pretext for a further demand, and that without a shadow of proof, is that she did not recover enough. **Held**, the plaintiff is entitled to no account as regards the trustees and the purchaser's executor, and the bill was properly dismissed as to them.

By two patents bearing date the 29th of November 1796, the commonwealth granted unto Alexander Macaulay and Isaac Sexton and their heirs, jointly, two parcels of land lying in Norfolk county, one of them containing 300 acres, the other containing 7700 acres. These two parcels of land, which adjoined each other, constituting an entire tract of 8000 acres, were situate within the bounds of the Dismal swamp. By a deed dated the 15th of November 1797, Alexander Macaulay conveyed to Thomas Griffin and Thomas Nelson (among other property) one moiety of the said tract of 8000 acres, upon trust to sell the same as soon as they conveniently could, and out of the proceeds pay to certain creditors of Macaulay designated in the deed, in

the order therein specified, the amount of the debts due them respectively, and pay the residue of such proceeds, if any, to the use of any other creditors of Macaulay. Elizabeth Macaulay, the wife of Alexander Macaulay, did not unite with him in this conveyance. The grantor died in July 1798.

In November 1829, Elizabeth Macaulay filed a bill in the superior court of chancery for the Williamsburg district, setting forth, that her husband the said Alexander Macaulay died seized in fee simple of an undivided moiety of the said tract of 8000 acres, and that she now holds the right of dower in the same. That previous to and since the death of Alexander Macaulay, the timber on the said land, for which the

509 same was principally *if not solely valuable, was worked, and large profits derived from the sale of shingles &c. That after the death of Alexander Macaulay, the trustees in the deed aforesaid, or Thomas Griffin the survivor of them, took possession of the land, and for many years caused the same to be worked, receiving during the time large sums from the proceeds thereof. That at a subsequent period John Jameson became possessed of the said land, and for many years worked the same, and received large sums from the proceeds thereof. That the Dismal Swamp land company thereafter got possession of the said land, and for more than twenty years past have worked the same, and received considerable sums from the proceeds thereof. That during the time the land was held and worked by the said trustees, the complainant received a portion of the proceeds in right of her dower; and that about the year 1817, she recovered by suit against the executor of Jameson the third part of 2000 dollars, with interest, as her portion of the proceeds for the year 1803, one of the years during which the land was held and worked by the said Jameson. That since the land has been in the possession of the Dismal Swamp land company, the complainant has at two different times received portions of the proceeds in part of her dower. That for these two payments, which were the only payments made to her by the said company on account of her dower right, indemnifying bonds with sureties were required and given, one of them bearing date the 9th of November 1816, the other the 10th of July 1817, both of which were expressed in similar terms. (A copy of the first bond, the original whereof was afterwards filed with the answer of the company, was exhibited with the bill.) That from Griffin as surviving trustee, from the estate of Jameson, and from the Dismal Swamp land company, (which said parties have each, by their partial payments to the complainant, fully admitted her right to a third part of 510 all *the net proceeds of the said land) there are still considerable sums due and unpaid to her in right of her dower. That at the time of her said recovery from Jameson's executor on account of the year 1803, she was advised that Jameson's estate

was only responsible to her for the third of the proceeds of that particular year; but she is now otherwise advised. That the last of the payments made to her by the Dismal Swamp land company was made on the 10th of July 1817; since which time the said company, although they have repeatedly admitted her right to a third of the proceeds of the said land, and have been often called upon and pressed to pay the amount still due to her, have failed and yet refuse to pay the same. Griffin the surviving trustee, John M'Neale executor of Jameson, and the president and managers of the Dismal Swamp land company, were made defendants, and the prayer of the bill was, that accounts might be taken of the proceeds of the land for the time that the same was held by the said trustees, by Jameson, and by the land company, respectively, and for general relief.

The president and managers of the Dismal Swamp land company answered, that they had no knowledge of so much of the plaintiff's case as respected the other defendants, and they considered that the same ought not to be blended with the demand against these respondents. That, upon the plaintiff's own shewing, it could not be true that her husband died seized of an undivided moiety of the land in question, his seisin having been defeated by his conveyance to the trustees Griffin and Nelson. That these respondents, in the year —, became the purchasers of an undivided moiety of the said land at the price of 4000 dollars. That the land was not arable, but swamp land; its chief value consisted of the juniper timber thereon, and the profits arose from felling the timber and working it up into shingles.

511 That on the 9th of November *1816, these respondents paid the plaintiff 985 dollars 83 cents, taking from her a refunding bond (which they exhibited). That on the 9th of July 1817, they paid her another sum of 460 dollars. That in 1818, as appears from the records of the company, an order was made to pay her the further sum of 183 dollars 33 cents; and on the 15th of November 1825, upon her statement that she had never received the last mentioned sum, an order was made by the company for its payment, and it was paid accordingly. The respondents charged, that the sums thus paid were not due to the complainant, but far exceeded her just claim as tenant in dower, if she had any such claim at all. The payments were made on an assumption that, as widow, she was entitled to one third of the net proceeds received from the land. But that assumption was manifestly erroneous; for, as tenant for life, she was not entitled to the timber, by the felling and sale of which alone the profits arose, but the same belonged to the respondents; and even if she had a title to share in the profits accruing from the timber, it was certainly not that of a proprietor in fee of one third, but only to an equivalent for her life estate therein, which could not be more than one ninth

part, or at the utmost one seventh. The respondents therefore now claimed, on an adjustment of the accounts, to recover back with interest so much of the sums paid the complainant as exceeded her due proportion. It would be seen, they said, "that by this erroneous mode of adjustment the complainant received in these payments 1629 dollars 16 cents, considerably more than one third of the fee simple cost, 4000 dollars, although it be true, and is so admitted by the bill, that the land was no otherwise productive or valuable than by working the timber, and making sale thereof when converted into shingles." The respondents further stated, that in the year 1820 they had disclaimed all 512 future operations upon the *former plan, and informed the complainant that she might have her dower assigned and laid off in the land; which, however, she had never done.

The refunding bond, exhibited with the answer, was executed by Elizabeth Macaulay and two sureties. By the condition,—after reciting that the said Elizabeth, as the widow of Alexander Macaulay, was entitled in right of her dower to one third part of the proceeds of timber from a moiety of 8000 acres of land in the Dismal swamp, of which said moiety the said Alexander Macaulay died seized, and of which the Dismal Swamp land company was now possessed; that the said company had that day paid her, in part of her dower thirds of the said proceeds, the sum of 985 dollars 83 cents; and that a suit was then pending in the federal court for the district of Virginia, in the name of J. Mordecai and others, against the devisee of Isaac Sexton and others, in which the plaintiffs claimed title to the said tract of land,—it was provided, that if the said suit should be determined in favour of the plaintiffs, and the said company should be compelled by law to refund the amount of proceeds received by them on account of the sales of timber from the said land, Elizabeth Macaulay should in that case repay them the said 985 dollars 83 cents, with interest.

Griffin the surviving trustee answered, that by an agreement between Alexander Macaulay and the creditors specified in the trust deed, Macaulay was permitted to retain possession of the trust property until his death, which happened in July 1798. That from his death until December 1801, when the Dismal Swamp land was sold under the trust deed, the trustees received the profits of the same, amounting in the whole to 4020 dollars, of which they paid to Mrs. Macaulay, in right of her dower, one third part or 1340 dollars, as would appear by her two receipts, (which were exhibited with the answer, one of 513 them bearing date the *27th of February, the other the 25th of November, 1801). That at the sale, in December 1801, of Macaulay's undivided moiety of the land, John Jameson, one of the creditors named in the deed, became the pur-

chaser thereof; since which period, nothing had ever been received by the trustees, or either of them, as profits of the said land, and they had never interfered with the same. And the respondent positively asserted that there was not one cent now due and unpaid to the complainant by the trustees, as the whole of her dower money was regularly paid to her by them as long as they received any dividends.

To the answers of the Dismal Swamp land company and Griffin, the plaintiff replied generally.

In February 1830, Elizabeth Macaulay the plaintiff died; and in July following, the suit was revived in the name of Robert Anderson her executor.

The cause having been transferred to the circuit superior court of law and chancery for James City county and the city of Williamsburg, Anderson the executor filed an amended bill in that court, in July 1833, setting forth, that the intermarriage of Alexander and Elizabeth Macaulay took place in 1781: that during the coverture the said Alexander was seized of an estate of inheritance in an undivided moiety of the aforesaid tract of 8000 acres: that Isaac Sexton died before the said Alexander, and by his will devised his undivided moiety of the said land to his son Edwin Sexton, who held the same for many years: that Edwin Sexton having, in February 1823, taken the oath of an insolvent debtor, and surrendered his interest in the said land, the said interest was thereupon sold, and Richard H. Drummond and Harrison Allmand became the purchasers thereof, that is to say, the former became the purchaser of three fifths, and the latter of the remaining two fifths: that Allmand subsequently sold and conveyed his undivided two fifths to Joseph

T. Allyn: that the said Edwin Sexton, 514 *Drummond, Allmand and Allyn had respectively derived large profits from the said land, by cutting the timber, getting out shingles, &c.: and that the said Elizabeth Macaulay never did receive the full amount of her dower interest in the said land, although repeated demands were made therefor before her death. The prayer was, that the defendants to the original bill might be made defendants to this amended bill, and required to answer the same; that the administratrix of Nelson the deceased trustee, the administrator of Edwin Sexton deceased, and Drummond, Allmand and Allyn, might be made defendants to both bills, and required to answer the same; that accounts might be taken of all the proceeds and profits derived from the land by the said Edwin Sexton, Drummond, Allmand and Allyn, respectively, and by the trustees Griffin and Nelson jointly, or the said Nelson separately; and that the complainant might have a decree for one full third of the net profits of an undivided moiety of said 8000 acres of land, as the interest to which his testatrix was entitled, and general relief.

Griffin the surviving trustee put in an answer to the amended bill, in substance

the same with his answer to the original bill.

M'Neale the executor of Jameson put in an answer to both the bills, in which (not admitting but wholly denying the matters charged against him) he alleged and insisted, that when the said bills were respectively exhibited, he was, as he had ever since been, a resident of Culpeper county, without the jurisdiction as well of the superior court of chancery of Williamsburg, as of the circuit superior court of James City: that the matters charged in the said bills against this respondent and against the other defendants are wholly distinct and separate in interest, and not of common and joint interest between this respondent and the other defendants, so as to give and draw to the said courts jurisdiction over this respondent, together with the other defendants, as 515 *to the matters alleged in the said bills: and therefore that the said courts had no right, power or authority to entertain jurisdiction of the cause against this respondent. He also relied upon the lapse of time, and the act for the limitation of actions and suits, in bar of the demand asserted against him by the said bills.

To the foregoing answers of Griffin and Jameson's executor, the plaintiff replied generally.

Nelson's administratrix, Edwin Sexton's administrator, Drummond, Allmand and Allyn failed to answer, and the bills were taken for confessed as to them.

The cause coming on to be heard the 30th of October 1835, the circuit court decreed that the bills be dismissed with costs.

From that decree Anderson the executor of Elizabeth Macaulay appealed to this court.

Daniel for appellant. This case is distinguishable from *Tod v. Baylor*, 4 Leigh 498, and *Thomas v. Gammel & wife*, 6 Leigh 9, upon the supposed authority of which the circuit court seems to have proceeded in dismissing the bill. Those were cases of absolute alienation by the husband of all right legal and equitable. Here there was merely a trust deed, a charge for the payment of debts, executed after the marriage and after the wife's title to dower had accrued: and the husband died seized of the equity of redemption. Mortgages are considered, both at law and in equity, as mere chattel interests, mere securities for money, the mortgagee acquiring a new estate by entry upon the breach of the condition. 1 *Powell on Mortgages* (Boston ed. of 1828) p. 112, note E, *Runyan v. Mersereau*, 11 Johns. R. 534; *Doe v. Pott*, Dougl. 720, 21. Where a wife joins her husband in a mortgage, but not in a subsequent release, she is entitled to dower in the equity of redemption, and to an 516 account of rents and profits *from his death. *Swaine v. Perine*, 5 Johns. Ch. R. 482; *Hale v. James*, 6 Johns. Ch. R. 258. Again, though where the right is merely equitable, equity follows the law,

yet where the court exercises its own peculiar jurisdiction (as where the widow comes into equity to get a term out of her way), the relief is larger: profits will be given from the time the title accrued. *Dormer v. Fortescue*, 3 Atk. 130, 31. In *Curtis v. Curtis*, 2 Bro. C. C. 620, profits were decreed to the representative of the widow from the time of the husband's death, and against the representative of the heir, though it was admitted that damages would not have been recoverable at law. The statute giving dower in trust estates has innovated largely on the technical principle of seisin on the husband, and shews the spirit of our legislature on the subject.

II. Where dower is demanded against the alienee of the husband and refused, damages are given from the time of such refusal. *Park on Dower* p. 302. Here the widow's right has been acknowledged by all who have held the estate since her husband's death. They were receivers or bailiffs, liable to account, and actually accounting.

III. It nowhere appears that those persons had any other title than possession. Their title is merely affirmed in the answers, but not proved.

IV. The widow is entitled to one third of the profits of the timber cut from the land. The only mode in which the estate could be enjoyed was by making a profit of the timber. In *Crouch v. Puryear &c.*, 1 Rand. 258, it was held that a dowress may take coal to any extent from a mine already opened, or sink new shafts in the same vein of coal, or penetrate through a seam already opened and take coal from a new seam that lies underneath. The principle of that case is directly applicable to this.

517 *Cooke and Patton for appellee Griffin. The court below was right in dismissing this bill as against Griffin. I. Because the suit was brought against him nearly 27 years after his alleged receivership had terminated. If this be in substance a suit for money had and received, the court of equity, which proceeds by analogy to the limitation at law, will hold it barred by the lapse of five years. *Hovenden v. Lord Annesley*, 2 Sch. & Lef. 631. And whether the statute applies or not, the claim is at all events objectionable as stale. *Carr's adm'r &c. v. Chapman's legatees*, 5 Leigh 164, and authorities there cited. It is true that neither the lapse of time nor the statute of limitations is relied upon in Griffin's answer. But where a bill asserts a claim which on its face appears to be stale, and such that equity on its known principles will not entertain it, the bill is demurrable unless it assigns a sufficient reason for the delay to sue. *Story's Eq. Pl.* 389, § 503. And though the defendant answer without relying upon that objection, the court may nevertheless dismiss the bill upon that ground. *Story's Eq. Pl.* 352, § 447.

II. Because the bill is multifarious;

Story's Eq. Pl. 407, § 530. This is a fatal defect, and the defence need not be set up in the pleadings in any way. *Id.* p. 224, § 271.

III. Because the plaintiff, by a suit commenced in November 1829, seeks to recover of Griffin profits received by him from 1798 to 1802; whereas by the case of *Tod v. Baylor*, 4 Leigh 498, it is settled that a widow cannot recover of her husband's alienee any profits except from the time when her subpoena was sued out.

IV. Because the bill having called upon Griffin to render a full and true account of all the profits which had been received by himself and his cotrustee, he did render a full account upon oath. Such account is *prima facie* evidence. *Cavendish v. 518 Fleming*, 3 Munf. 198. It is neither falsified, nor does the amended bill, filed after Griffin's answer, call in question any of its statements. Upon the account so rendered it appears that the plaintiff had no just claim whatever against Griffin.

Harrison for M'Neale executor of Jameson. The plaintiff here has brought, in the court of chancery, a joint action of trespass for several trespasses alleged to have been committed at several times by several tortfeasors. There is no connexion in interest shewn between the defendants. Jameson's executor pleads the misjoinder, pleads to the jurisdiction of the court as to him, and also relies upon the lapse of time and the statute of limitations. Upon all these grounds the bill was properly dismissed as to him. His answer further denies and puts in issue all the allegations of the bill against him, and there is no proof to sustain them.

Standard for the Dismal Swamp land company. At common law, in no real action, possessory or *droiturel*, were damages given against the tenant for the mesne profits of the land recovered. When therefore dower was detained against the widow, and she was obliged to bring a writ of dower, she was by the common law entitled to the profits of her third part of the lands from the time only when she recovered judgment; for the tenant was permitted to retain the profits of the estate intermediate the recovery against him in possessory actions, and his entry into possession, to enable him to perform the feudal services. 1 *Roper on Husband and Wife* p. 437. This was changed by the statute of Merton, which we have enacted in terms, 1 R. C. of 1819, p. 403, ch. 107, § 4. But by that statute a widow "shall recover damages only when her husband dies seized, that is, seized of the freehold and inheritance." *Co. Litt.* 32 b. And the case of *Bromley v. Littleton*, *Yelv.* 112, decides, that a mere finding that the husband died 519 *seized (not expressing that he died seized of the freehold and inheritance) is insufficient to entitle the widow to judgment for dower. Here the husband at the time of his death had no seisin of the freehold or inheritance in the land in question; no title, in fact, legal or equita-

ble, but only (at most) a bare possession. The legal title was in the trustees to whom he had conveyed the land; the equitable title in the cestuis que trust, the creditors provided for by the deed. Macaulay himself had nothing but a resulting trust in the surplus proceeds of the land after satisfying the objects of the conveyance. There is no sufficient evidence, as against the Dismal Swamp land company, that he was even in possession of the land at the time of his death. The statement of the trustee Griffin on that subject is no evidence against his codefendants.

Our statute making widows dowable of their husband's trust estates can have no influence on the case. The bill does not claim dower in the equity of redemption or resulting trust (if any such there were) of the husband, but asserts generally a right to dower in the land.

II. The case of *Tod v. Baylor*, 4 Leigh 498, does not decide that the widow there was entitled against the husband's alienee to rents and profits from the time of instituting her suit. Three of the judges concurred in the opinion that she was entitled to rents and profits only from the date of the decree. And as the decree does not give profits from the institution of the suit, although it directs the account to be taken from that period, it is not inconsistent with the opinion of those judges. This construction of that case is confirmed by the subsequent case of *Thomas v. Gammel & wife*, 6 Leigh 9.

The proposition in *Park on Dower* p. 302, 3, that even where the husband does not die seized, the wife may become entitled to damages against his alienee

520 *from the time of demand and refusal of her dower, is not supported by the authorities there cited. And Park himself lays down the proposition doubtfully. On the other hand, though the husband die seized, the widow may lose the right to damages from his death, by laches in demanding her dower. *Co. Litt.* 32 b.; *Delver v. Hunter*, *Bunb.* 57.

It is suggested, however, that the rights of the widow have been recognized by the grantees under her husband, and that such recognition is equivalent to the institution of a suit for dower, which was thereby rendered unnecessary. But it appears that in 1820 the land company refused to make any further payments to the widow, and informed her that she might proceed to have her dower in the land assigned, if she thought proper. The payments previously made by the company can only be considered as made under a mistaken impression of their rights, and cannot bind them after the mistake has been discovered. The widow has received what she had no title to, and her representative ought to consider himself fortunate that he is not compelled to refund. She had no estate in the land previous to assignment of dower, but a mere right of action (1 *Lomax's Digest* p. 92,) and therefore there is no pretence for supposing that the defendants held the land as

the joint property of the widow and themselves, accountable to her for a share of the rents and profits.

III. Unless the defendants were tenants of the freehold, the suit for dower cannot be maintained against them. The plaintiff, claiming as dowress, must admit that they have an estate in the land of which she may be endowed. A writ of dower, certainly, could not be maintained against any except a tenant of the freehold; and equity follows the law, where the dowress, instead of suing at law, resorts to the court of chancery. The suggestion that these parties have no title to the land, but are mere tortfeasors, having only a wrongful possession, is made for the first time in this court.

521 *IV. The foregoing views are presented on the supposition that the defendants have received rents and profits to which the widow as tenant in dower might possibly have a claim. We contend, however, that the profits received by the defendants were derived from a subject in which the widow as tenant in dower had no sort of interest. They were derived from the severance and sale of the timber on the land, which constituted the whole value. Where timber growing on land is severed therefrom, whether accidentally or by design, the party entitled to the first estate of inheritance in the land is entitled to the timber, and may maintain trover for it; and no other person has any right to the same. 2 *Wms. Saund.* 47b., note (f); *Farrant v. Thompson*, 5 *Barn. & Ald.* 826; 7 *Eng. C. L. Rep.* 272. Both at common law and by the statute (1 *R. C.* of 1819, p. 462, ch. 117, § 1,) the dowress in possession is chargeable for waste; and it is the settled doctrine in England that it is waste in a tenant for life to cut timber growing on the land. And though what is waste in England is not in all cases waste in this country, and the dowress may cut away timber for the purpose of clearing and improving land which would otherwise be valueless or nearly so,—for the purpose of enjoying the land in the only mode in which it can be enjoyed, that is, by cultivation (*Findlay v. Smith & Co.*, 6 *Munf.* 148, opinion of Roane, J.)—yet she cannot here, any more than in England, do that which tends to the disherison of the heir, or the destruction or lasting damage of the inheritance. Here the timber constituted the whole value of the land; and to allow the widow to cut and sell the timber in such a case, would be allowing her to impair, or rather to destroy, the inheritance itself. In 7 *Bac. Abr.* 261, it is laid down that a tenant for life of land which is altogether in woods, is still not entitled to cut the timber, though no profit could be de-

522 rived *from it in any other mode.

The case of *Crouch v. Puryear & Co.*, 1 *Rand.* 258, which decides that a dowress may work an old mine, decides also that she has no right to open a new one. Her rights in that respect are the same in England and in this country. In this case the

question is different; namely, how far the undoubted law of England as to waste in cutting timber has been modified among us. In New York, a rule applicable to the circumstances of the country has been adopted, and the tenant is allowed to clear a portion of the land for cultivation. *Jackson v. Brownson*, 7 Johns. R. 227. This (which is also the rule adopted in this state, as appears by the case of *Findlay v. Smith &c.*) is the utmost extent to which the modification of the english law has been carried. In Massachusetts, it has been held that a widow is not dowerable of wild lands at all. *Conner v. Shepherd*, 15 Mass. R. 164. Here the land was wholly unfit for cultivation; and the only profit was to be made by cutting down and selling the timber. If to sever the timber from such land for such a purpose be waste, it should seem that the widow was not entitled to be endowed of the land at all: for it is laid down by *Bracton* (as cited in *Park on Dower* p. 115,) that a woman cannot claim a thing in dower, unless she may use and enjoy the thing of which she is dowerable sine vasto, exilio et destructione.

In *Pigot v. Bullock*, 1 Ves. jun. 479, it was decided that until the estate of tenant for life comes into possession, he has no right to an account of underwood wrongfully cut by a preceding tenant. Here the dowress had no estate at all in the land when the timber was cut, and therefore would have been entitled to no account of the profits derived from that source, even though the cutting had been wrongful. But the parties against whom the account is claimed were entitled to the inheritance of the land, and were guilty of no wrong in cutting the timber.

523 *V. It is submitted that the objection for multifariousness in the bill is sufficiently taken by the answer of the Dismal Swamp land company. But if no such objection had been made, the authorities cited by the counsel for Griffin establish that the bill might nevertheless have been dismissed for that cause at the hearing.

R. G. Scott, in reply, insisted upon the following points: 1. That the doctrine of waste, as it exists in England, is not applicable to the woodlands of this country; that a widow is dowerable of such lands, though she can no otherwise derive profits from them but by the severance and sale of the timber; and that the measure of her right is one third of the net annual profits, as in the case of an open mine. On this subject, he examined and commented upon the cases of *Findlay v. Smith &c.* and *Crouch v. Puryear &c.* (before cited) and *Stoughton v. Leigh*, 1 Taunt. 402.—2. That *Macaulay*, having made no absolute alienation of the land, but a mere incumbrance thereof for the payment of debts, was to be considered as dying seized, and his widow as entitled to profits from the time of her husband's death; according to the cases of *Swaine v. Perine* (before cited) and *Banks*

v. Sutton, 2 P. Wms. 700,—3. That even supposing here was an absolute alienation by the husband during the coverture, the widow would be entitled to damages from the time of her demand of dower. *Park on Dower* p. 302, 2 Wms. Saund. 44d, note 4; and in this case such demand was both made and acceded to very early after the death of the husband. 4. That if this case stood only upon the same grounds as *Tod v. Baylor* and *Thomas v. Gammel & wife*, *mrs. Macaulay* would at least be entitled to profits from the date of the subpoena. 5. That her right to profits (from whatever period commencing) was not lost by her death pending the suit, but passed to her personal representative; *Curtis v. Curtis*, 2 Bro. C. C. 620,—6. That in

524 *this case all questions as to the widow's right to be endowed, as to her proper share of the profits, or as to the period from which the account should be taken, were entirely precluded by the acts and admissions of the defendants themselves; and in that respect the case was different from all those which had been cited for the appellees. 7. To shew that the objection of multifariousness in the bill, rather of misjoinder of defendants, taken by Griffin and the executor of Jameson, has no application to such a case as this, he cited and relied upon *Story's Eq. Pl.* p. 229, 230, and notes there. At all events, he contended, the objection could only have been made available by demurrer. *Id.* p. 203, § 237, note 2. As to the alleged staleness of the claim, Griffin was not entitled to make that objection, since he had neither pleaded the statute of limitations nor demurred to the bill; *Id.* p. 389, § 503, note 4. And the objection, though made by Jameson's executor in his answer, was sufficiently obviated by the circumstances of excuse stated in the bill. In respect to the plea of Jameson's executor to the jurisdiction of the court, upon the alleged ground of his residence out of the former district and present circuit, it was sufficient to remark that the fact was put in issue by the plaintiff's replication, and no proof of it had been adduced.

BALDWIN, J. The law gives dower to the widow, as a source of income for the maintenance of herself and family. It is a provision founded in justice and humanity, and highly favoured both at law and in equity. Her essential right is to the profits of one third of her husband's real estate of inheritance, whereof he was seized at any time during the coverture; and she is entitled for that purpose to the several possession of one third of the subject, if susceptible of a division by metes and bounds. If the subject be not so partible, still she is admitted to her due participation of the profits; *and the mode of enjoyment is adapted to the nature of the case. The nature of the property is wholly immaterial, as regards the right to dower, provided it be, or savour of, the reality; and this is equally true in regard

to the nature of its products. Thus a widow is dowable of lands, whether arable, meadow, or woodland; of manors, houses, mills and factories; of rents, whether rent-charge, rentseck, or rents-service; of dove-cotes and warrens; of fairs, markets, ferries and fisheries; of common certain, gross or appendant; of advowsons, gross or appendant; of tithes; of shares in road or navigation companies, &c.

But the widow's enjoyment is, by reason of her limited estate, confined to the use and products of the property; and she may not despoil or waste it, to the disherison of the heir; she is to enjoy, but not abuse it; to take the profits, but not convert or break in upon the capital. Like other tenants for life, the restriction upon her exercise of ownership is to be found in the law of waste. What shall be considered waste is to be determined, in general, by the mode, not the extent, of enjoyment to which the tenant succeeds. The tenant is not at liberty to convert arable land into meadow, or meadow into arable land; nor a mill into a dwelling house or brewery; though not only the immediate profits, but the permanent value of the property, be thereby enhanced. The removal of the soil and minerals, and the opening of new mines, are also prohibited. But if mines have been opened or worked by one having authority as the owner of the fee, the dowress may continue to work them, and that without stint; and moreover sink new shafts for the purpose, into the same mine, vein, bed or body of the mineral so devoted to the yielding of profit.

Waste in woods is to a great extent, though not exclusively, governed by the general rule already mentioned. In the

country from which we derive our
526 laws, *timber is of such importance that it enters largely into the value of the subject, and its preservation is deemed essential to the protection of the inheritance. The tenant is therefore prohibited from cutting it at all. To this there are some exceptions, arising out of the duty and wants of the tenant; to whom certain estovers are allowed, for the reparation of the buildings and enclosures, the construction of agricultural implements, and for the supply of fuel. These involve a question as to the extent of the tenant's enjoyment; and that depends, more or less, upon the exigencies of the occasion, the abundance or scarcity of the material, and the local usages of the county or vicinage.

In regard to mines, the english doctrine (for which see *Stoughton v. Leigh*, 1 Taunt. 402,) is not unsuitable to the condition of our country, and has been recognized in *Crouch v. Puryear &c.*, 1 Rand. 258, and *Coates v. Cheever*, 1 Cowen 460. As to waste in woods, though the principle which prevents timber from being cut, to the detriment of the inheritance, is the same in both countries, yet the application here of the rigid rule that prevails in England would defeat its own purpose. Instead of the scarcity existing there, we have

often a superabundance here, and the clearing of lands, to a greater or less extent according to circumstances, may enhance instead of diminishing the value of the property. With us, therefore, the restraint upon the power of the tenant for life ought, in this respect, to have reference not to the mode but to the extent of enjoyment. In England, the tenant may cut and sell the coppice and undergrowth, and even young timber trees under a certain age, at seasonable times, 1 Lomax's Dig. 52; *Pigot v. Bullock*, 1 Ves. jun. 479; and the reason assigned is, that no advantage can arise to a tenant for life from woods of that kind, but by the sale of them: and what shall be considered timber trees there depends in some measure upon local usages, arising out of the peculiar *growths of various tracts of country. Here it is enough that the tenant does no wanton mischief, and leaves a sufficient supply of timber for the wants of him in remainder or reversion.

That the law of waste, in its application here, must be varied and accommodated to the circumstances of our new and comparatively unsettled country, was recognized by all the judges who noticed that topic, in *Findlay v. Smith &c.*, 6 Munf. 134. And chancellor Kent, in his Commentaries, vol. 4, p. 76, says, that the american doctrine on the subject of waste is somewhat varied from the english law, and is more enlarged and better accommodated to the condition of a new and growing country. The proposition is well sustained by adjudged cases. In *Jackson v. Brownson*, 7 Johns. R. 227, it was held that the tenant may clear part of wild and uncultivated land for the purpose of cultivation, but must leave wood and timber sufficient for the permanent use of the farm; and that it is a question of fact for a jury, what extent of wood may be cut down in such cases without exposing the party to the charge of waste. In North Carolina, it has been held not to be waste to clear tillable land for the necessary support of the tenant's family, though the timber be destroyed in clearing. *Parkins v. Cox*, 2 Hayw. 339. And in Pennsylvania, in the case of *Hastings v. Crunkleton*, 3 Yeates 261, the court said, it was an outrage upon common sense to apply the english law of waste to a widow's use of uncleared dower land in this country; and held that she may clear, if she do not exceed the relative proportion of cleared land, considering the tract as a whole.

In the case before us, the widow's claim was to dower in a large tract of swamp land, incapable of cultivation, and stated in the answer of the principal defendants (the Dismal Swamp land company) to be "no otherwise productive or valuable than by working the timber, and
528 *making sale thereof when converted into shingles." If a tenant for life cannot have the use of it for that purpose, it is to such tenant utterly worthless, and a mere burthen. If a dowress may not enjoy it in the only mode of which it is susceptible.

ble, she may be left to starve, though her husband's whole capital has been invested in it with a view to annual profits. It is said, that if it cannot be enjoyed but by cutting down and selling the timber, that being waste, it serves to shew that she cannot be endowed at all. But this is founded upon the idea that she is not at liberty to cut down the timber except for the purpose of tillage; a proposition which, to my mind, cannot be maintained. She may, as I conceive, in such a case as this, cut down the timber ad libitum, and make all the profit of it she can, provided she does not thereby prevent the reversioner from making the like profit. By our law of waste in woods, the restraint upon the tenant has reference not to the mode but the extent of enjoyment. If enough be left for the successor to the inheritance, he has no cause of complaint; and what will be enough is a question of fact, to be determined upon all the circumstances of the case. In cases like this, the extent of the tract, the quantity of timber, the period of reproduction, the demands of the market, the expenses of the employment, are all elements of the enquiry; and if these should lead in such cases to a just and convenient rule of uniform application, I presume it will be this, that the tenant's use of the timber shall be so restricted as to leave to the successive tenants and owners an equally extensive use of it, at least.

There are other facts in this cause which give additional force to the widow's claim of dower. Her right was not only admitted, but the substantial enjoyment of it allowed, for several years, by the defendants now in possession. In the years 1816 and 1817, the

Dismal Swamp land company made 529 payments to her on account *of her interest in the profits, and took from her bonds conditioned for refunding the moneys in case an adverse title should be established as paramount to that of her husband; in which bonds her right as doweress to one third of the timber worked by the company is distinctly stated: and in 1825 an order was made by the company for a further payment to her on the same account, which payment had been previously directed by a former order in the year 1818. Her right had also been recognized by the trustees in the deed of trust from her husband (under which all the defendants claimed), and payments made to her by the trustees of one third of the dividends of proceeds, in February and November 1801.

Whether these circumstances were equivalent to an actual assignment of dower, I deem it unnecessary to enquire. They surely amount to such a recognition of the widow's right, as to dispense with all evidence on her part, and throw the whole burthen of proof on the other side. The bill charges, not only that the husband was and died seized of his undivided moiety of the land, but that, previous to as well as since his death, the timber was worked, and large profits derived from the sale of

shingles &c. This allegation is not denied by the answer of the Dismal Swamp land company, and under the circumstances above mentioned must be taken as true as respects those defendants, at least until disproved.

The case is thus presented of a doweress succeeding to a mode of enjoyment of the property adopted by the husband himself; and is not unlike the case of an open mine, which unquestionably may be worked by her to any extent. It is, in truth, a mine upon the surface; not of minerals, incapable of renewal, but of vegetable matter, in a constant course of spontaneous reproduction. The right of a doweress to work such timber has been recognized in North 530 Carolina; for in *Ballentine v. *Poyner*, 2 Hayw. 110, it was admitted that the tenant in dower may use timber for making staves and shingles, when that is the ordinary use, and the only use, to be made of such lands.

The widow having died pending this suit, her right to dower is only important as it affects the claim of her executor to mesne profits till the period of her death. Though at law the damages for mesne profits are lost by the death of either plaintiff or defendant in dower before judgment therefor, it is well settled to be otherwise in equity, from the consideration that the profits of a third part of her husband's real estate are her only subsistence from his death. 1 Roper on Husband and Wife p. 452.

But the plaintiff's claim to mesne profits is resisted, upon the authority of *Thomas v. Gammel & wife*, 6 Leigh 9, and *Tod v. Baylor*, 4 Leigh 498. In the former, it was held that mesne profits cannot be recovered at law by the widow against the alienee of her husband, because the statute of Merton, adopted into our code, gives damages only where the husband dies seized; and in the latter, that they cannot be recovered in equity, which conforms to the law in this respect. These cases give the rule where the husband in his lifetime has conveyed the land to a purchaser; but they have no application to incumbrances by mortgage or deed of trust, which are only securities for the payment of money, and still leave the grantor owner of the estate. Where the husband sells and conveys the estate by an absolute deed, though during the coverture, there is nothing left in him; and therefore, though the wife who has not united is entitled to dower, because he was at one time seized during the coverture, yet she cannot recover damages or mesne profits against the alienee, because her right to these is founded upon the statute of Merton, which requires the husband to have died seized. But where the land is mortgaged

by the husband after marriage, he is 531 *to be regarded as seized until foreclosure; and even where the wife has united in the mortgage, she is entitled not only to dower in the equity of redemption, but to an account of the mesne profits from the death of her husband. He is to be con-

sidered as having died seized of the equity of redemption, or of the real estate subject to the mortgage; and in such case the settled course is to compute the rents and profits from the husband's death. *Swaine v. Perine*, 5 Johns. Ch. R. 482; *Hale v. James*, 6 Id. 258.

The case of the incumbrance in question cannot be distinguished from a mortgage, or ordinary deed of trust, to secure the payment of money. It contains, indeed, no clause of redemption, and provides that the trustees, so soon as they conveniently can, shall sell the property conveyed, and out of the proceeds pay the debts specifically mentioned as intended to be secured, and pay the residue, if any, to the use of any other creditors of the grantor. Still, however, an equity of redemption was inherent in the very nature of the instrument, and none of the cestuis que trust could have been entitled to more of the proceeds than enough to satisfy their demands.

In this case, there is nothing to prevent an account of the mesne profits from the time of the husband's death, as respects the defendants originally accountable, against whom the claim has been asserted in due time. For reasons already suggested, the husband must be regarded as having been seized during the coverture and at the time of his death. In equity, the account of mesne profits is usually given from the time of the husband's death, the widow being *prima facie* entitled from the time her right to endowment accrued; and some reason must be shewn by the defendant to limit the account. 1 *Roper on Husband and Wife* p. 453; *Oliver v. Richardson*, 9 Ves. 222. The statute of limitations is no bar, either at law or in equity. *Ibid.* The mesne profits
532 *are assessed upon the defendants respectively, according to the time of their respective enjoyment of the land. *Hazen v. Thurbur*, 4 Johns. Ch. R. 604.

There is no reason why the defendants in possession, the Dismal Swamp land company, should not account for one third of the whole of the clear profits received by them from their undivided moiety of the 8000 acres, subject to credits for the payments made by them to the widow; nor why that account should not be brought down to the period of the widow's death. It is too late to enquire (if that was ever proper) whether the timber was worked to such extent, that the widow's share of it would exceed what she would have been entitled to if her dower had been assigned to her by metes and bounds. The course of conduct pursued by the principal defendants has been such as in itself to preclude any enquiry of that sort, as respects them. After having recognized her right to one third of the profits for a number of years, and making her payments from time to time on that basis, they were not justifiable in refusing to continue that mode of adjustment, at least until dower was formally assigned. It is true they say in their answer, that in the year 1820 they disclaimed

all future operations on the former plan, and informed the widow that she might have her dower assigned and laid off in the land. But of this there is no proof; and if there were, it was their duty, at least after what had occurred, to assign the dower specifically, and, as that could not be done without partition with their tenant in common, to procure such partition.

As regards the trustees, and the executor of Jameson, I think the plaintiff is entitled to no account, and that the bill was properly dismissed as to them. The bill upon its face shews a delay, without excuse, of more than twenty years in calling them to an account. The surviving trustee swears positively that he paid over to the widow every dollar for which he and his co-
533 trustee *were accountable, and exhibits vouchers in proof of his allegation. The widow, by her own shewing in her bill, prosecuted to recovery a suit against the executor of Jameson, for her share of the profits received by him; and the only pretext for a further demand, and that without a shadow of proof, is that she did not recover enough.

It may be doubted whether it was proper to make the representatives of Sexton the copatentee and tenant in common with the husband, and those claiming under them, parties in this suit, by the amended bill, filed after the widow's death; inasmuch as no assignment of dower could then be sought, and if the plaintiff can have any claim against them, it must grow altogether out of a settlement of accounts between them and the Dismal Swamp land company. But as they have never answered, and the bill has been taken for confessed against them, and it is possible that in the progress of the account to be directed the propriety of convening them may be made to appear, I think it was premature to dismiss the bill in regard to those defendants.

My opinion is, that the decree of the circuit court is erroneous in dismissing the plaintiff's bill, except as against the trustees and Jameson's executor; and that it ought to be reversed, and an account directed of the plaintiff's one third of the mesne profits received by the Dismal Swamp land company prior to the widow's death, and of the payments made to her by them; with a view to a decree for any balance which may be found due to the plaintiff.

ALLEN, J., concurred in the opinion delivered by judge Baldwin.

BROOKE, J. The company having acknowledged the right of the widow to one third of the profits of the land in which she
534 claims dower, by paying her from time to *time her portion of those profits, it is now too late for them to question that right. The objection that the subject is such that she cannot claim dower has nothing in it. The timber on the land being the only subject of profit, the destruction of her portion of it cannot make her liable to the charge of committing waste, as in other cases at the common

law, in which timber belongs to the reversioner, with the exception of housebote, firebote, &c. Had the company refused to pay her one third of the profits, the suit would have been brought at an earlier period, when her dower in the land would have been assigned her. As to the time from which she was entitled to one third of the profits, this case is not like that of *Tod v. Baylor*. In that case the husband did not die seized of the land, and the court thought the widow was only entitled to profits from the issuing of the subpoena, with the exception of the president, who thought that she was only entitled to profits from the date of the decree. In the case before us, the deed of trust executed by the husband was an incumbrance only, and he died seized of the land. The widow was therefore entitled to profits from the death of her husband to the time of her own death, according to the statute of Merton, adopted in our act concerning dower. I therefore concur in the decree that has been agreed on by the court.

The decree of the court of appeals was entered in the following terms:

This court is of opinion that the decree of the circuit superior court is erroneous, except so far as the same dismisses the bill of the appellant against the trustees of Alexander Macaulay, and the executor of John Jameson: therefore it is decreed and ordered, that the said decree, so far as the same is above declared to be erroneous, be reversed and annulled, and that the residue thereof be affirmed, and also that the
535 appellees the *Dismal Swamp land company do pay unto the appellant his costs by him expended in the prosecution of his appeal aforesaid here, and further that the appellant, out of the estate of his testatrix in his hands to be administered, do pay unto the appellees the representatives of John Jameson, Thomas Griffin and Thomas Nelson their costs by them about their defence in this behalf expended. And it is ordered that the cause be remanded to the said circuit superior court, with instructions to direct an account of the appellant's testatrix's one third of the mesne profits received by the Dismal Swamp land company prior to her death, and of the payments made to her by them, with a view to a decree for any balance which may be found due to the appellant.

536

*Ward v. Motter.

December, 1848, Richmond.

(Absent CABELL, P., and BROOKE, J.)

Joint Contract—Discharge of One—Effect.—Where two or more are jointly bound by contract, the legal remedy must be pursued against all. And if, by act of the claimant in such joint contract, one or more of the parties jointly bound be discharged, so that all cannot be subjected to a joint judgment, none are liable on the joint contract. Per STANARD, J.

Partnership—Bond Given by Active Partner—Right to Bring Action on Simple Contract against Dormant Partner.—Mercantile business being carried on in a single name, the merchant in whose name the business is conducted buys goods, and executes a specialty for the price thereof. The party who sells the goods and takes the specialty is ignorant at the time that the merchant has a dormant partner. Discovering this fact after the death of the merchant who gave the specialty, he then brings an action of assumpsit for the price of the goods against the dormant partner. HELD, the creditor has no legal remedy on the simple contract, the same being extinguished by the specialty: dissentiente BALDWIN, J.

This was an action of assumpsit for goods sold and delivered, brought in the circuit court of Fauquier county by John Motter against Berkeley Ward, as surviving partner of Robert Fisher and Berkeley Ward, who were copartners under the name of Robert Fisher. The defendant pleaded the general issue. At the trial a special verdict was returned, whereby it was found, that the defendant and Fisher entered into a copartnership to carry on the saddling business, and the same was carried on in the name of Robert Fisher; that while the said business was so carried on, Motter sold and delivered to Fisher the articles in the declaration mentioned, for and on account of himself and Ward, to be used in and about their said joint business of saddling; that at the time the same were so sold and delivered, Fisher executed and delivered to Motter a sealed obligation,
537 in the name of Robert Fisher, for the payment of the price *thereof on demand; and that the time of the execution and delivery of the said sealed obligation, as well as the time of the sale and delivery of the goods, Motter was ignorant that Ward was concerned with Fisher as a partner in the business.

Upon the facts so found by the verdict, the circuit court was of opinion that the law was for the plaintiff, and rendered judgment in his favour. On the petition of Ward, a supersedeas was awarded.

G. N. Johnson for plaintiff in error. The obligation under seal extinguished the simple contract, and assumpsit did not lie on it. Starkie on Evid. part IV. vol. 2, p.

***Partnership—Judgment against One or More Partners—Effect as to Those Omitted.**—In *McArthur v. Chase*, 18 Gratt. 701, it is said: "In all cases where the creditor takes a judgment against one or more of the members of a general partnership, omitting others, he loses thereby all recourse at law against the latter, even though they be dormant partners, and unknown at the time to the creditor. The joint contract is held to be merged in the judgment as to the members against whom it is obtained; and being so merged, is equally barred as to the others, since no joint suit can be maintained upon it. Collyer on Part. 650, and cases cited in notes: *Ward v. Motter*, 2 Rob. 536." See also, citing the principal case, *Brown v. Johnson*, 13 Gratt. 651.

See monographic note on "Partnership."

128, and note j.* 1 Chitty's Pl. 119;† Sheehy v. Mandeville &c., 6 Cranch 253; 2 Tuck. Comm. 137, 8. And though the debt by simple contract be the debt of two, and the bond be given by only one of the debtors, the simple contract is nevertheless merged in the specialty, especially where the bond is given at the time of the contract. Pudsey's case, cited 2 Leon. 110. Nor is the case different because the debt is a partnership debt. Tom v. Goodrich and others, 2 Johns. R. 213, is a case of a bond given by one of several partners for a debt of all, in which it was yet held that the simple contract debt was thereby extinguished. The other partners not having delegated the authority to bind by deed, the taking the deed of one is evidence of intention to look to him alone. Story on Partn. 211-220, especially § 134, 138, 139, 140, also p. 239, § 155. A party dealing with a partner knows that no matter how many partners there are, and whether they be dormant or known, the contract of one is the contract of all, if evidenced by bill or note. Not so when he takes a bond. He

takes that, knowing it cannot be the 538 bond of the others,* at least that they cannot be bound at law. The cases in this court of Sale v. Dishman's ex'ors, 3 Leigh 548; Galt's ex'ors v. Calland's ex'or, 7 Leigh 594; M'Cullough & al. v. Sommerville, 8 Leigh 437, and Weaver v. Tapscott, 9 Leigh 424, shew that one ground which will entitle the creditor to come into equity against the representatives of other partners is, that the debt is extinguished at law by a higher security being given.

Morson and Leigh for defendant in error. The decision of the circuit court rests upon the rule that a dormant partner may be held liable when discovered. Watson on Partn. 42; Gow 176, 7; Smith's Merc. Law 21, 22; Hoare v. Dawes, 1 Dougl. 371; Robinson v. Wilkinson, 3 Price 547; 1 Eng. Excheq. Rep. 422. In this last case it is laid down by baron Richards as "clear law, that a dormant partner cannot discharge himself from liability to pay the debts of a creditor through the medium of his ostensible partner, by any acts of his during the concealment of the unknown partner." Sheehy v. Mandeville &c., 6 Cranch 253, is also in point. It was there held that a judgment recovered against the ostensible partner on his note did not merge the original simple contract of that partner and his dormant partner. A fortiori the specialty of one cannot operate as a merger. In Leslie v. Wilson, 3 Brod. & Bingh. 171; 7 Eng. Com. Law Rep. 395, the specialty was by one of the parties liable on the original contract, and it was received at the time of the transaction; but there, as here, the creditor was ignorant of the joint liability, and that joint liabil-

ity was held not to be extinguished. Reasoning by analogy brings us to the same result. An unknown principal may be made liable when discovered. Story on Agency p. 453, 4, § 446; Smith's Merc. Law 65, 6; Wilson &c. v. Hart, 7 Taunt. 295; 2 Eng. Com. Law Rep. 112; Nelson v. Powell, 3 Dougl. 410; 26 Eng. Com. Law Rep. 168; Thomson v. Davenport 539 and others, 9 *Barn. & Cress. 78; 17 Eng. Com. Law Rep. 335. The principle is the same here; each member of the firm being an agent for his principal, the firm. Smith's Merchant, Law 19; Story on Agency p. 42, § 39, p. 113, § 124, p. 116, § 126, note.

But even had it been known at the time of the transaction that ward was a partner, there was no merger. The merger only takes place when all the parties bound in the debt of lower dignity become bound in the debt of higher dignity. 3 Bac. Abr. Extinguishment, D. p. 548 of Lond. ed. of 1832; Sheehy v. Mandeville &c., 6 Cranch 253. The bond of one may be taken as satisfaction for the prior debt of several, but it must be proved to have been so agreed, otherwise it is cumulative, and not an extinguishment. Smith's Merc. Law 22; Story on Agency p. 151, § 161; Twopenny &c. v. Young, 3 Barn. & Cress. 208; 10 Eng. Com. Law Rep. 54; Day &c. v. Leal &c., 14 Johns. R. 404; White v. Cuyler, 6 T. R. 176. In Taylor's adm'r v. The Bank of Alexandria, 5 Leigh 477, the doctrine is announced, that there is no extinguishment unless it be proved that the bond was accepted as a satisfaction. A similar proposition is laid down in The United States v. Lyman, 1 Mason 482. The remedy on the bond was there considered collateral and cumulative. And the decision is directly in opposition to that in Tom v. Goodrich and others; Enders &c. v. Brune, 4 Rand. 438, is also opposed to that case. Kyles v. Roberts's ex'or and others, 6 Leigh 495, and the other decisions of this court cited on the other side, shewing that there is no extinguishment in equity, are authorities in our favour. As the rule is established in equity, and there is no reason for a different rule at law, it should be considered as equally governing there. In holding that there is no extinguishment, the cases go upon the ground that no extinguishment was intended. And a court of law, in regard to the intention, must upon the same facts come to the

540 *same conclusion. A release cannot be given by an act which was not intended to release. It is no answer to say, that if we are right on the ground we take, equity would not have had jurisdiction in those cases. That is not so. In Sale v. Dishman's ex'ors there was no remedy at law because the suit was against the representative of a deceased partner. So also in Galt's ex'ors v. Calland's ex'or; and besides, in that case there was a trust fund which it was sought to reach. M'Cullough & others v. Sommerville falls within the same predicament. And Weaver v.

*The edition referred to is the American edition of 1826.—Note in Original Edition.

†The edition referred to is the American edition of 1837, (7th American from 6th London).—Note in Original Edition.

Tapscott is a case in which a surety went into equity on the principle of substitution. There is nothing then in those cases leading to the conclusion that the specialty takes away the remedy at law.

G. N. Johnson in reply. When goods are sold, and at the time of sale the bond of a third person is delivered, it must, upon these facts alone, be taken that the obligor is the only person liable. This is the doctrine of Pudsey's case, recognized in Hooper's case, 2 Leon. 110. The case is the same, if on a sale to two partners the bond of one be given in payment. Nor does it make any difference whether the existence of the partnership was known to the vendor or not. The cases in which a creditor, finding out partners that had been unknown to him, may proceed against them, are all cases of simple contract, in which there was no specialty. Such was Robinson v. Wilkinson. The opinion of baron Richards was not intended to bear upon a case circumstanced like this. He alludes to such securities as merchants are in the habit of taking; to bills of exchange and notes, not to bonds. Judge Marshall's opinion in Sheehy v. Mandeville &c. has been the subject of animadversion in other cases. Gow on Partn. 194; Robertson v. Smith & others, 18 Johns. R. 459.

It by no means follows, however, that 541 because a judgment would *not extinguish, a bond will not. In the case of the judgment, there is no act having for its object the extinguishment. In the case of a bond, there is an active agency to extinguish, when the creditor takes it. And he is not obliged to take it unless he pleases. Drake v. Mitchell and others, 3 East. 258, proceeds on the ground that the security was not of a higher nature: if it had been, the judgment, it may be inferred, would have been otherwise. The proposition in 3 Bac. Abr. 548, is, that where a stranger gives the bond, it is not a satisfaction unless accepted as such. It does not go the length of holding that there is no extinguishment where one of the parties gives the bond. In Willings &c. v. Consequa, 1 Peters' C. C. R. 306, judge Washington adverts to the rule in respect to a bond given by a stranger, and holds that it does not apply to the case of a bond given by one of two or more joint contractors. This case is cited with approbation in Penny v. Martin, 4 Johns. Ch. Rep. 569. In Robertson v. Smith &c., 18 Johns. R. 478, Spencer, C. J., in delivering the opinion of the court, cites Wilkes v. Jackson, 2 Hen. & Munf. 355, 361, in which it was decided that a judgment for damages in a separate action against one of several joint trespassers is a bar to an action against the rest. He remarks, however, that there is a wide difference between a judgment against one of several tortfeasors, and against one of several joint debtors. "In the latter case," he says, "whatever extinguishes or merges the debt as to one, merges it as to all." Now clearly the

simple contract is extinguished as to the one who gives the specialty. Then suppose, after the specialty is given by one, an action be brought against the other upon the joint simple contract, could such an action be maintained? Here, to be sure, the action is against a surviving partner; but the question is the same as if, immediately after the bond was given, the action had been brought against the dormant partner in the lifetime of the other. A 542 *bond by one is as much an extinguishment as to both, as a release to one. And the party taking the bond must be presumed to know that if there be a dormant partner, the bond will extinguish the claim against him. Leslie v. Wilson, cited on the other side, is fully reported in 6 J. B. Moore 415. The counsel who argued that case took care to distinguish it from a case of a contract. If the original liability there had only been of one party, and he had given a bond, still the action might have been maintained. Taylor's adm'r v. The Bank of Alexandria, 5 Leigh 477, is not a case of a bond given by one of two jointly bound, but the case of a bond given by a guarantee, who was only collaterally bound, and the bond therefore could only extinguish that collateral liability, leaving the original contract of the principal in force. The United States v. Lyman, 1 Mason 482, perhaps shakes the decision in Tom v. Goodrich and others, so far as the latter considers a debt to the United States for duties to be extinguished by the bond for such duties. But there is nothing in it which at all shakes the decision in Tom v. Goodrich and others as an authority upon the general principle applicable to this case. It is a principle which has been repeatedly acted on. Clement v. Brush, 3 Johns. Cas. 180. The extinguishment results from a fixed rule of law, and is not a question merely of intent. Chitty on Contracts p. 6; Toussaint v. Martinant, 2 T. R. 100. The decision of this court in Galt's ex'ors v. Calland's ex'or, 7 Leigh 594, and the opinion of Parker, J., in Weaver v. Tapscott, 9 Leigh 424, proceed manifestly upon the ground that no redress could be had at law. All the authorities are sought to be gotten over by the doctrine in relation to dormant partners, and the opinion of baron Richards. But the answer is, that a dormant partner is never to be charged any further than if he had been present and had participated in the transaction; and that the dictum of 543 baron Richards is in a *case which did not call for it, and was, besides, never meant to be applied to such cases as this.

BALDWIN, J. The liability of a dormant partner depends not upon the terms, or the form, or the dignity of the contract between the creditor and the ostensible partner, but upon the relation which the dormant partner bears to the subject of and the parties to the contract. The creditor, ignorant of the existence of the dormant

partner, has of course no transaction whatever with him, but deals exclusively with the ostensible partner, looks to his credit and responsibility alone, and never speculates upon the mere possibility of a dormant partner who may thereafter be accidentally discovered. The law subjects the dormant partner upon considerations of justice and policy. It is just that he who participates in the benefits should also be responsible of the engagements of the concern; and it would lead to much inconvenience and fraud, if the demands of creditors, growing out of the partnership business, should be affected by the secrecy of the connexion between the partners. This liability of the dormant partner, by operation of law, cannot be frustrated by any arrangements between the creditor and the ostensible partner; for such, in the nature of things, cannot be the intent of the creditor; and though it may be and usually is the intention of the ostensible as well as the dormant partner, that very intention it is the object of the law to overrule and defeat. It follows that all such arrangements, of whatever nature, whether by the separate security of the ostensible partner, or otherwise, are merely collateral to that joint undertaking which the law forces upon the members of the firm; an undertaking based upon the consideration which has enured to the benefit of the partnership, and governed by a rule broader than the stipulations of contracts, "*qui sentit commodum sentire debet et onus.*"

544 *The remedy, however, against the dormant partner must conform to his joint responsibility, and he cannot be sued alone, unless the objection be waived by his failure to plead it in abatement. The creditor may bring his action against the dormant and ostensible partners upon their joint implied promise, raised by the law out of the joint consideration; as where goods are sold or money advanced to the partnership, though without the creditor's knowledge of its existence at the time of his thus dealing with the ostensible partner. Or, where there is an express contract, the terms of which embrace the dormant partner, though unintentionally, as if there be several ostensible partners and also a dormant partner, and a security be given by the partnership, for example a promissory note payable by A. B. & co. or A. B., C. D. & co. the creditor may join the dormant partner in an action thereupon, inasmuch as he falls within the description of the firm. But if the terms of the security do not embrace the dormant partner, as if it be made payable by A. B. or by A. B. and C. D. the ostensible partner or partners, the dormant partner cannot be joined in an action thereupon.

The liability of the dormant partner, moreover, is not absolute, but dependant upon the election of the creditor; and that election must be made in due time, and by a proper course of proceeding. In *Hoare v. Dawes*, 1 Doug. 371, it was said by lord Mansfield, that a dormant partner is liable

when discovered. But I do not understand him to mean whenever discovered, or whatever may have been the proceedings against the ostensible partner; but only that though the dealing has been with the ostensible partner alone, yet the dormant partner may be subjected, if discovered. The creditor must however take care that he do not, by proceeding upon the joint contract, implied or express, against the ostensible partner alone, thereby lose his remedy against the dormant partner. If

he brings his action upon the 545 *implied promise, that being joint, he must not omit the dormant partner; for if he proceeds to judgment against the ostensible partner alone, he cannot afterwards maintain an action against the dormant partner, who may meet a separate suit by a plea in abatement, and a joint suit by shewing that the promise is no longer joint, it having been disavowed by the proceeding against his codefendant, as to whom transit in rem judicatum. So if the creditor brings his action upon a joint express promise, as in the case above supposed of a note payable by A. B. & co. or A. B., C. D. & co. the like result will follow from a separate judgment against the ostensible partners: another action cannot be subsequently maintained upon such joint promise. And in neither case will the objection in the subsequent action be answered by saying, that at the time of the separate judgment the dormant partner had not been discovered; for whether that has been the fault or the misfortune of the creditor, the recovery already had against the ostensible partner or partners presents an insurmountable obstacle; inasmuch as the law does not tolerate a second judgment against the same person upon the same cause of action. But where the express promise excludes the dormant partner, as in the case of a note given by the ostensible partner alone, a recovery thereupon against the latter presents no difficulty in the way of a subsequent action against him and the dormant partner, upon their joint implied promise; for a judgment upon a collateral security is no bar to a suit upon the original cause of action. *Drake v. Mitchell*, 3 East 251.

The case before us is unembarrassed by any separate proceedings on the part of the creditor against the ostensible partner. It is simply the case, as presented by the special verdict, of a sale of goods to the ostensible partner for the use and benefit of the partnership business, and a separate security taken from the ostensible partner therefor, without any knowledge at 546 the *time on the part of the creditor that the dormant partner was a member of the concern. No recovery has been had nor action brought upon the separate security of the ostensible partner, who has died; but the creditor, on discovering the dormant partner, has brought this action against him as the surviving member of the firm, upon the joint promise implied by law.

If the separate security given in this case by the ostensible partner were by simple contract, it is quite clear that the dormant partner would not be thereby exonerated. It is well settled that one simple contract, for the same consideration, does not extinguish another. If therefore a promissory note or bill of exchange be given for goods sold or money loaned, it does not bar the creditor's right of action founded upon the consideration; unless, from the negotiable character of the instrument, and the creditor's conduct or laches in relation thereto, the debtor is, in contemplation of law, subjected to the hazard of loss. *Chitty on Bills* p. 433. And if such note or bill be a separate security, it is immaterial, as to the effect of the instrument merely, whether it be given for a joint or a separate debt. It may be evidence that the debt was in its origin separate, or that the debt originally joint has been converted by a subsequent agreement into a separate debt; but if the fact be otherwise, if the debt was originally joint and has not been so converted into a separate debt, the separate security is merely collateral to the joint responsibility. Where there are several ostensible partners of a firm, it is often a question of difficult solution, whether the debt demanded be the debt of the partnership, or the separate debt of one of its members; and the difficulty arises out of the circumstance that a partnership is usually limited in its objects, and therefore the members of the firm individually have their separate interests and business transactions. The question in such cases turns, for the most part, upon the enquiry whether the credit

547 *was given substantially to the partnership, or to the individual. Each of the partners, from the nature of the social connexion, is the agent of the partnership, with authority to bind the members collectively in all matters within the scope of the partnership business, though not beyond it. Within this limit, each partner may pledge the credit of the firm, and his acts will be obligatory upon all, though the subject of the contract, as goods purchased or money borrowed, be applied by him to his individual purposes. On the other hand, he may pledge his individual credit exclusively; and if he does so, the other members will not be responsible, though the subject be applied by him to partnership purposes. And in the former case, it matters not whether, in point of form, the contract be made or a security given in his own name, or in that of the firm. *Williams v. Donaghe's ex'or*, 1 Rand. 304. These distinctions have but little application to the case of a dormant partner. The ostensible partner is the sole representative of the firm, and its business is conducted in his individual name. A credit to him in the partnership business is a credit to the firm; and the true criterion is whether his dealing enures to the concern or to the individual. On the one hand, he cannot pledge the firm for

his individual purposes, without disclosing the partnership and professing to deal for its use; and on the other, he cannot avoid pledging the firm in his dealings for partnership purposes, without the like disclosure, and an express stipulation for his exclusive liability.

This view of the joint liability of a dormant partner, notwithstanding a simple contract security given by the ostensible partner, is well sustained by a *thority*.

Judge Story, in his *Law of Partnership*, p. 215, § 138, says: "In the case of a dormant and secret partner, the credit is manifestly given only to the ostensible partner. Still, however, it is not treated as an exclusive credit: for the law in all 548 cases of this sort founds *its decision upon the ground that the creditor has had a choice or election of his debtor, which cannot be where the partner is dormant and unknown. The credit therefore is not deemed exclusive, but is binding upon all for whom the partner acts, if done in their business and for their benefit, as is the case in cases of agency for an unknown principal." And in another passage of the same work, the learned author, treating of the proof of debts in bankruptcy, says: "In cases of dormant partnerships, it is a general rule that the creditors who have dealt with the ostensible partner, not knowing that there is any dormant partner, have a right to treat their debts as joint debts or as separate debts, and have an election to prove the same against the joint estate, or against the separate estate of the ostensible partner."

Robinson v. Wilkinson, 3 Price 538; 1 Eng. Excheq. R. 417, was an action of assumpsit for goods sold and delivered, and the question was whether a concealed part-owner of a ship was liable for stores furnished the ship and master. The master drew bills for the demand on the ship's agents in London. Afterwards Cay, the ostensible owner, obtained indulgence from the plaintiff, by agreeing to accept bills, in lieu of the former, at three, four and six months, which the plaintiff drew on him, but which were dishonoured by Cay, who proved insolvent, and to prevent his bankruptcy agreed to pay a composition of thirteen shillings in the pound, which was secured by the acceptance of his friend Wilson of a bill drawn by Cay at eight months. This bill, which was negotiated by the plaintiff, was also dishonoured, both drawer and acceptor having become bankrupt before the bill was due. At the period of these several transactions, the plaintiff considered Cay as the sole owner of the ship, and did not know that the defendant was a part-owner. Immediately upon discovering this fact, the plaintiff made 549 a demand upon *the defendant, and he refusing, the action was brought, and the plaintiff recovered. The plaintiff's counsel relied upon the ground that the defendant was a dormant partner, as distinguishing the case from all those which go to determine that the acceptance by a

creditor of one of several partners as his debtor works a discharge of the rest. Richards, baron, in his opinion, said: "The question is, whether this defendant is discharged by any thing that has taken place. Whatever effect any or all of these transactions might have had if Wilkinson had been known to be a partner of Cay, is entirely put out of this case, because the plaintiff certainly dealt entirely with Cay, and knew nothing of Wilkinson, who was nevertheless clearly *prima facie* liable. It is clear law that a dormant partner cannot discharge himself from liability to pay the debts of a creditor through the medium of his ostensible partner, by any acts of his during the concealment of the unknown partner. If it were otherwise, and this action be not maintainable, a door is widely opened to defraud creditors by means of dormant partnerships." The views of the other judges were substantially the same; for, without relying upon the unproductiveness of the bills independently, they all regarded the defendant's unknown interest in the concern as a controlling circumstance in the cause.

In *Schermerhorn v. Loines*, 7 Johns. R. 311, where a person supplied stores to a ship, of which there were several owners, on the order of one of them who acted as ship's husband, and took his note in payment, and gave a receipt in full, it was held to be no discharge of the other owners, especially as it did not appear that the plaintiff knew at the time that there were other owners.

In *Reynolds v. Cleveland*, 4 Cow. 282, it was held that the partners were all liable for articles furnished for the benefit of the partnership, though the vendor did not know of the existence of the partnership, and supposed *himself dealing with an individual partner, to whom he gave credit by charging him alone in his books, and though a special contract was signed by the vendor and that individual; inasmuch as the vendor had not taken him for his debtor knowing that there were other partners.

It will thus be seen that if the separate security in this case can exonerate the dormant partner, it must be by force of the scroll attached to the instrument by way of seal, which gives to it the dignity of a specialty. It is upon this ground that the counsel for the plaintiff in error has very properly placed the cause; and what I have said in regard to the effect of a separate security by simple contract, has been with a view to its due consideration. In that connexion, it is evident that the defence is purely technical, there being no principles of justice or policy which are not equally applicable to the separate security of the ostensible partner, whether it be by specialty or simple contract.

It is argued in the first place, on the part of the plaintiff in error, that he is not chargeable upon a simple contract, because none such has ever existed, the specialty being, in the very nature of the transac-

tion, the whole contract on the subject, and the sole evidence of the debt. But this is to confound the contract itself, to wit, the reciprocal agreement of the parties for the sale of the goods at a given price or value, with the security given by one of them for its performance on his part. The contract has been executed on the part of the seller, and it may be has been extinguished on the part of the purchaser; but its very extinguishment supposes its previous existence, and whether for a month or a moment is immaterial. The authority relied upon by the counsel for the plaintiff in error, 2 Leonard 110. Hooper's case, and Pudsey's case there stated, is one of extinguishment. The purport of it, as correctly expressed in 3 Bac. Abr. Extinguishment, D. 551 is, that "if a *stranger give bond for a simple contract debt due by another, this does not extinguish the simple contract debt; but if, upon making the contract, a stranger gives bond for it, or being present promises to give bond for it, and after does so, the debt by simple contract is extinguished, the obligation being made upon or pursuant to the contract." And the only question in this cause is, whether the obligation given by the ostensible partner for the price of the goods, has extinguished the implied joint contract of him and the dormant partner, created by law.

In the cases from Leonard, the bond was executed for a sole simple contract debt; and the doctrine is unquestionable, that the simple contract is thereby extinguished, whether the obligation be given by the debtor, or by a stranger who, by agreement of the parties, (though not otherwise) is substituted for the original debtor. The doctrine is founded in good reason; for the higher security furnishes a better remedy, and must have been intended as a substitute for the former remedy, and the debtor ought not to be harassed by a double action.

In the present case, the ostensible simple contract debt was the sole debt of the ostensible partner; and that was doubtless extinguished by the single bill given by him therefor. But the law, without the knowledge of the creditor, gave him (at his election so soon as discovered) a secret simple contract debt, upon the same consideration, due from the ostensible and dormant partners jointly; and the question is, whether that joint debt was extinguished by the separate obligation of the ostensible partner.

Where the partners of a firm are ostensible, I regard it as perfectly well settled that if a creditor accept the separate bond of one for a simple contract debt of the firm, the joint legal remedy is thereby destroyed: and in that sense the simple contract may be considered as 552 *extinguished. The cases of *Clement v. Brush*, 3 Johns. Cas. 180, and *Tom v. Goodrich &c.*, 2 Johns. R. 213, cited for the plaintiff in error, prove nothing more than this; for they were both cases of os-

tensible partnership. This rule is sometimes illustrated by the analogy of a release by an obligee to one of several joint obligors, which operates as a release to all. But there is this distinction between the two cases: in the latter the entire debt is expressly relinquished, and therefore the operation of the release is the same, whether the obligation be joint only, or joint and several; whereas in the former, the debt being joint only, a several action cannot be maintained, and the joint remedy is gone by accepting the higher security from one of the joint debtors. The simple contract debt, however, in justice and good conscience is still due from both, though, being without a legal remedy, it is no longer recognized as existing at law. But it is not extinguished in equity, which allows or gives a remedy notwithstanding, and indeed for the very reason, that there is none at law. And this I take to be the principle of the cases cited in which this court, notwithstanding the execution of a bond by one of the partners for a partnership debt, gave relief in equity against the other partners; *Sale v. Dishman's ex'ors*, 3 Leigh 548; *Galt's ex'ors v. Calland's ex'or*, 7 Leigh 594; *Weaver v. Tapscott*, 9 Leigh 424. All of these, however, it will be found upon examination were cases of ostensible partnership.

In the case of ostensible partners, if the simple contract, instead of being joint only, (as it is at law, though not in equity, *Story on Partn.* p. 514, § 362,) were several, the separate bond of one of them would not extinguish the several remedy against the other. The simple contract would stand upon the same footing as a joint and several promissory note; and there it is clear that the several action would still remain against him who did not unite in the obligation, upon the same principle
553 *which governs the case of a joint and several bond, where a higher security is taken from one of the obligors, by acceptance or recovery of judgment against him only. *Higgin's case*, 6 Co. Rep. 45. It was there resolved, that "where two are bound jointly and severally, and the obligee has judgment against one of them, yet he may sue the other; for against him the nature of the bond is not changed, for notwithstanding the judgment he may still plead that it is not his deed." Now, in the case of a dormant partnership, the implied simple contract is not only joint, but several also as regards the ostensible partner; and it differs essentially from the case of an ostensible partnership in this, that in the latter the obligation is taken for the joint debt, which it extinguishes at law, but in the former it is taken for the separate debt only, extinguishing that, but leaving the remedy unimpaired upon the joint promise. It is true that the implied contract, after a several judgment upon it against the ostensible partner, can no longer be treated as joint. But this is equally true in regard to a joint and several bond, or a joint and several promissory

note; and the reason, equally applicable to all, is to be found not so much in the nature of the debt as in the nature of the remedy, which may be prosecuted to a judgment either jointly or severally, but cannot be so prosecuted both jointly and severally. 1 Wms. Saund. 291 f.; *Downey v. The Farmers and Mechanics Bank*, 13 Serg. & Rawle 288; *Williams &c. v. M'Fall &c.*, 2 Serg. & Rawle 280; 1 Ves. & Beam. 65.

I consider the case of *Leslie v. Wilson*, 7 Eng. Com. Law Rep. 395, an authority in point. There, goods conveyed by a ship having been spoiled in consequence of the negligence and unskilfulness of the captain, the freighter sued the owners, one of whom was the captain, for damages in an action on the case, and it was held that the action lay, though the captain had entered into a charter party under seal with
554 the freighter, by *which he engaged to convey the goods to their destination; it not appearing on the charter party that the captain was part-owner, nor that the freighter knew him to be such when the charter party was executed. All the owners were joined, and the case did not turn upon the vexed question whether the action was founded in tort or in contract, as presented whenever there is an omission of one or more of the joint contractors, it being a good objection in the latter, but not in the former. It seems however that the defendants' counsel, treating it, in another aspect, as founded in contract, contended that the implied contract on the part of the owners for the safe carriage of the goods was merged in the charter party under seal executed by one of them. But the court, after deciding that the execution of a charter party by the captain of a ship does not prevent the liability of the owners, waived as unnecessary the consideration of the doubtful proposition that the action was founded in contract, but upon that hypothesis overruled the objection of the part-ownership of the captain, on the ground that it was secret at the time he executed the charter party. The case therefore cannot be distinguished in principle from the one before us.

The able argument in this case has sought aid, on both sides, from authorities shewing the effect of a separate judgment against an ostensible partner, upon the right of action against his dormant partner; and these are worthy of consideration, inasmuch as they tend in some degree to elucidate, and rather more, it seems to me, to obscure, the principles belonging to the present subject.

In *Sheehy v. Mandeville &c.*, 6 Cranch 253, the plaintiff Sheehy sold merchandise to Jameson, and took his sole promissory note therefor, on which he brought his action of debt and recovered judgment. Afterwards discovering that Mandeville was a dormant partner of Jameson at the time
555 *action of assumpsit against them both jointly. If the last action had been tried upon the general issue on an in-

debitatus aassumpsit or quantum valebant for goods sold and delivered, and the separate note of the defendant Jameson had been relied upon as a bar, there can be no doubt that the plaintiff would have been entitled to a verdict. But the case was embarrassed by the nature of the pleadings. The declaration contained three counts: the first was founded upon the promissory note; the second was an indebitatus aassumpsit for goods sold and delivered; and the third a quantum valebant for the same goods. The first count could not have been maintained, if it had set forth the case correctly; for it is clear that the note or bill of one partner, drawn by him individually, cannot be declared on as the note or bill of him and his copartner, though given to secure a debt for which the firm is liable, *Chitty on Bills* p. 433; *Siffkin v. Walker &c.*, 2 Campb. 308; *Emly v. Lye*, 15 East 7; *Ripley v. Kingsbury*, 1 Day 150, note; unless under peculiar circumstances, when the individual name has been recognized by the partners as the name of the firm. *Collyer on Partn.* 227. And if the fact had appeared on the face of the declaration that the note was made by the defendant Jameson alone, that count would have been demurrable. But it did not so appear: on the contrary, it was averred that the note was made by both defendants under the name, firm and style of Robert B. Jameson, by which the defendants became liable, and being so liable, by that name and firm undertook &c. The defendant Mandeville appeared and filed two pleas. The first was to the whole declaration, and pleaded in bar the note of Jameson and the judgment thereupon, averring that the note was given by Jameson, and received by the plaintiff, in discharge of the plaintiff's bill for goods, wares and merchandise sold to Jameson, which were averred to be the same mentioned in the declaration. This plea was, on demurrer, *held bad as to the first count, because it did not deny the joint assumption laid in that count; but was sustained as to the two other counts, on the ground that though a note, without a special contract to that effect, would not of itself discharge the original cause of action, yet that by special agreement it may be received in payment, and such agreement was admitted by the demurrer. The second plea was to the first count only, and pleaded in bar to the joint action the separate judgment, upon the separate note of Jameson, in the former action brought against him alone, which note was averred to be the same mentioned in the declaration. And this plea was held bad on demurrer, on the ground that the original declaration not having been on a joint but a sole contract, the judgment did not bar the subsequent action on the joint contract. The court therefore gave judgment for the plaintiff on the first count of the declaration. Thus chief justice Marshall, who delivered the opinion of the court, made his way, through the perplexity of the pleadings, to the

merits of the cause, but by a route necessarily circuitous and technical. The separate judgment on the separate note of the ostensible partner was held not to bar the joint action against him and the dormant partner. But that action ought to have been founded on the implied promise alone: and the plaintiff embarrassed his cause, by declaring, in the first count of his declaration, upon the separate note, which he was obliged to treat as a joint note, and by demurring to the defendant's first plea, instead of taking issue upon it, and thereby putting the defendant to the proof of the special agreement therein alleged.

In *Willings & Francis v. Consequa*, 1 Peters' C. C. R. 303, Kuhn was introduced as a witness on the part of the plaintiffs, and objected to by the defendant as incompetent by reason of his interest. It appeared that Kuhn and another, as the agents of Willings & Francis, gave *a note to Consequa for merchandise purchased, in which Kuhn was interested. Consequa brought a suit against Willings & Francis on the note, stating it to be given by the procurement of their agents, Kuhn and another. It was agreed that whatever damages might be recovered in the suit of Willings & Francis against Consequa, in which the witness was offered, should be set off against the note. The ground of objection was that Kuhn, as a dormant partner of Willings & Francis, might be sued as such by Consequa at law, notwithstanding a recovery against Willings & Francis on the note, provided the note should not be discharged by a recovery of damages from Consequa, and Willings & Francis should be unable to pay it; and if not at law, he might be sued in equity; and therefore that he was interested in increasing the damages. Washington, J., overruled the objection to the competency of the witness, deciding that his interest was too remote, it depending upon several contingencies, and proceeded to remark: "If these contingencies should all happen, and Consequa should bring an action against Kuhn separately, he may be defeated by a plea of abatement; and the judgment in this action for or against Consequa would be a bar to any suit that he might bring against Willings & Francis and the witness. The judgment would as completely extinguish the original debt as if Willings & Francis had given a bond for it, which it would clearly have done, the rule that a bond given by a stranger is no extinguishment of the simple contract of the real debtor not applying to a case where it is given by one of two or more joint contractors." He then went on strongly to intimate, that after such a judgment of Consequa against Willings & Francis on the note, he could obtain no relief against Kuhn in equity; because of his wilfully proceeding to judgment against them alone. It will be seen that the judge's opinion of the effect of a separate judgment against Willings & Francis is upon *the supposition that Kuhn, having

been discovered to be a dormant partner, might be united with them in an action upon the note; and upon that supposition it is clearly correct, as much so as if, after such discovery, Consequa had taken their separate obligation for the debt. But the authorities already cited on that point establish that Kuhn could not be sued upon the note, not being a party thereto; and of course it could not be the case of a separate judgment against part only of several joint contractors, in an action upon the joint contract. The effect of the judgment upon a subsequent joint action on the implied contract was not considered at all; and in truth the whole of what was said by the judge, after deciding that the interest of the witness was too remote to render him incompetent, was mere matter of superfluous argument.

Penny v. Martin, 4 Johns. Ch. R. 566, is an authority upon the question of relief in equity after a several judgment on the joint implied contract. The judgment was rendered in an action of assumpsit against two partners for goods sold, and the bill filed against them and three others as dormant partners since discovered. The bill was dismissed on demurrer, for want of jurisdiction; the chancellor, without deciding whether the plaintiffs had lost their remedy at law, being of opinion that their ignorance, at the time of the judgment, of the fact alleged to have been since discovered, was not a sufficient ground for transferring to that court jurisdiction of a matter properly, if not exclusively, cognizable at law; no accident, mistake or fraud being shewn.

Ward v. Johnson &c., 13 Mass. Rep. 148, is an authority upon the effect of a several judgment on the express joint contract, upon a subsequent action against all the partners on the same contract. An action of assumpsit was brought and judgment rendered against one of two partners alone, on a promissory note given by him in the name of the firm. A subsequent action of assumpsit was brought against the two partners on the same note, and they pleaded the former recovery, which was held to be a bar. The court said, that by the judgment in the first action the contract was merged, and the form of action changed, a higher security for the debt being substituted, in like manner as a bond for a debt due upon simple contract operates as an extinguishment; and that there was no instance of two judgments for the same cause of action.

Robertson v. Smith &c., 18 Johns. R. 459, was an action of assumpsit against the defendants on a promissory note made by Soulden, Smith & co. The plaintiff had previously recovered judgment on the note against Peter Sken Smith and William Soulden, the ostensible partners, under the firm of Soulden, Smith & co. In his declaration in the first suit, he averred them to be partners in trade, and that the note was made by them in their partnership name and firm. Not having obtained satisfaction of the judgment, and supposing that Peter

Smith and Abraham Van Santvoord were also partners under the same firm, he brought suit against the four defendants. And it was held that the former judgment against two of the defendants on the note was a bar to the subsequent action against the four defendants for the same cause of action. This was the case of a separate judgment against the ostensible partners upon an express contract, the terms of which embraced the dormant partners, and a subsequent action against all upon the same joint contract. The reasoning and authorities adduced by Spencer, C. J., who delivered the opinion of the court, are entirely satisfactory to shew that the former recovery was a bar to the subsequent action. But he seems to have misapprehended the case of *Sheehy v. Mandeville &c.* in expressing his disapproval of the opinion delivered by chief justice Marshall. The separate judgment in that case was not, as he supposes, upon a joint, but a separate contract. Both declarations, "it is true, were upon the same note, but the first treated it as a separate promise (as it was in point of fact) and the last as a joint promise; and the court, being warranted by the structure of the declaration in the last case in regarding it, in that action, as a joint promise, held that the first recovery on the separate promise was no bar to the second action on the joint promise. The result would have been the same, as I have already shewn, if the case had been properly presented by the pleadings; and the decision was doubtless according to the truth and justice of the cause.

In *Smith v. Black*, 9 Serg. & Rawle 142, Black sold goods to Nathan Smith, and took his note therefor, upon which he recovered judgment. Afterwards discovering Newberry Smith to be a dormant partner, he brought his action against both. The first count was on the promissory note: the second and third counts were for goods sold. It was held that the separate judgment was a bar to the second action: and the decision was, by agreement, made upon the merits of the cause, without regard to the pleadings. Duncan, J., delivered the opinion of the court. He evidently treats the second action as founded upon the promissory note, and that note as evidencing a joint promise. He pays no regard to the effect of the separate security in authorizing and requiring the action thereupon to be several; and gives no thought to the implied joint contract raised by law, that broad basis of the recovery against a dormant partner. And he misapprehends the decision of the supreme court in *Sheehy v. Mandeville*, stating it from the erroneous marginal note of the reporter to be, "that a several suit and several judgments against one of two makers of a promissory note is no bar to a joint action against both." He reasons however very forcibly and satisfactorily to shew, that the merger occasioned by a judgment upon the joint promise cannot be obviated by the plaintiff's ignorance, at the time, of the

561 dormant partnership, *and places in a strong light the inconveniences which would flow from a contrary doctrine.

It seems to me that there is nothing in the cases, thus examined, to justify the idea that the several security of the ostensible partner is to be regarded as the joint contract of the firm, which is at war with the well established doctrine on the subject; and that a want of attention to that doctrine is the source of the misapprehensions I have noticed of chief justice Marshall's opinion in *Sheehy v. Mandeville &c.* and of the difficulties which arose in that case. Much less is there any thing in those cases to warrant the inference, that the liability of the dormant partner is destroyed by the separate security of the ostensible partner. In truth they proceed upon the opposite idea, of their joint liability, and the merger thereof by a separate judgment upon the joint contract. And if I have succeeded in shewing that the separate simple contract security of the ostensible partner ought to be regarded as collateral to the joint implied contract of the firm, there is still more reason for so considering his separate specialty security; for the former may, under very special circumstances, be treated as the security of the partnership, but the latter in no case whatever.

The foregoing views, if correct, attain the substantial merits of the cause, and preserve in its true spirit and policy the liability of dormant partners; and are not opposed by even technical obstacles, those stumbling-blocks in the path of justice, chiefly worthy of regard in order that they may be shunned. I think there is no error in the judgment of the circuit court.

STANARD, J. The acuteness and ability with which this case was argued required the most careful and deliberate investigation of it. Such an investigation I have endeavoured to make, and now proceed to state the results.

562 *The plaintiff in error insists on two general propositions: 1st. That as the specialty for the price of the goods was given by Fisher at the time of the purchase, that was the only duty or responsibility incurred, and as that did not charge a partner, whether ostensible or dormant, there was not only no contract on which such partner could be charged, but the contract that was confessedly made was utterly incompatible with a partnership responsibility. 2dly, That if on the purchase an assumpsit had been made, so as to create a simple contract debt for the goods, for which a dormant partner might be made responsible had the responsibility remained unchanged, the specialty given by Fisher the ostensible debtor and accepted by the creditor extinguished the simple contract debt, and discharged at law the other partner, whether known or dormant, from responsibility on the assumpsit. If either of these propositions be sustained, the judgment of the court below must be reversed.

The special verdict finds that the specialty was given for the payment of the price at the time the goods were sold and delivered. The purchase and the obligation by specialty to pay the price were cotemporary,—*uno flatu*; and it is plausibly, and I incline to think justly said, that the consummated contract for the purchase on the part of the purchaser was by specialty, on the giving of which, and not until then, his title to the goods and his obligation to pay became complete, so that at no time was the ostensible partner responsible in assumpsit, and consequently there was no contract preexisting the specialty on which a partner known or dormant could be sued. But as this view of the case is liable to be encountered by a criticism on the terms of the special verdict, and that criticism may involve in some doubt the interpretation of the verdict in this regard, I forbear to give a definitive opinion on this, and proceed to the consideration of the second question.

563 *The counsel of the defendant in error have, with much learning and ingenuity, endeavoured to maintain, that where several are bound jointly by simple contract, the merger or extinguishment of such contract by a higher security, as by specialty or judgment, does not take place as a necessary legal consequence, unless all bound by the simple contract be bound by the higher security; and that where such higher security is given by a part of those bound by the simple contract, such higher security does not merge or extinguish the simple contract, but operates its discharge by way of satisfaction, if given and accepted as such. The conclusion from these propositions to the case in judgment is, that the specialty of the one did not in law extinguish the assumpsit of both, and could not be considered as accepted in satisfaction of the then unknown responsibility of the dormant partner.

It is our province to enquire into and declare what the law is, not to speculate and reason and decide on what it ought to be. The law, on its own reason, has provided that where two or more are jointly bound by contract, the legal remedy must be pursued against all; and one or more of several jointly bound has the right to intercept judgment in a suit premitting others. A kindred principle is, that if, by act of the claimant in such joint contract, one or more of the parties jointly bound be discharged, so that all cannot be subjected to a joint judgment, none are liable to judgment on the joint contract; in other words, all are discharged from the legal remedy on the joint contract. Unity of action and unity of responsibility on the same contract must be coexisting, and the destruction of the one is the destruction of the other. Hence a release of one of several jointly bound operates a discharge of all, and this too though no such discharge was intended. The immediate corollary from this principle is, that unless the creditor who may have taken the specialty of,

564 or prosecuted *his claim to judgment against, one of two joint debtors by simple contract, retains, notwithstanding, the legal right to sue on the original joint contract all the parties therein, including the one from whom he may have taken the specialty or against whom he may have obtained judgment, the original joint simple contract is, as a necessary legal consequence, discharged at law.

This being premised, I proceed to enquire whether the position taken by the defendant in error be sustained by authority. The passage cited from 3 Bac. Abr. 106, 7, does not support the broad proposition that a merger or extinguishment of a simple contract is not produced by a specialty, unless all jointly bound by the simple contract be also bound by the specialty. The case from 1 Mason 482, proceeds on the ground that a debt by statute was not merged in the specialty of a third person not bound for the debt, and would not have been merged, as would a simple contract debt, in the specialty of the debtor himself. The case of Sheehy v. Mandeville &c., 6 Cranch 253, will be the subject of future notice.

The cases hostile to the position of the counsel for the defendant in error are numerous, and in my estimation decisive.

Among the cases shewing that according to the principles of the common law a judgment obtained by the creditor on the joint contract, against one or more of the parties bound by it, merges or extinguishes the joint contract, as well in respect to the other parties originally bound by it, as in respect to the parties against whom the judgment may have been rendered, I refer to Robertson v. Smith &c., 18 Johns. R. 459. In that case a judgment had been obtained against two partners. Other partners, then unknown, were afterwards discovered, and suit was renewed on the original contract against them. To 565 this the plea of the former *judgment against the two was held to be a bar. In passing, it may be remarked that in the very able argument of the plaintiff's counsel in that case, he felt himself constrained to admit, that had the creditor taken the specialty of the two, instead of prosecuting the claim to judgment against them, such specialty would have extinguished the simple contract as to all.

I also refer to the following cases:

Ward v. Johnson &c., 13 Mass. Rep. 148. Henry Johnson gave a promissory note to the plaintiff, on which judgment was rendered against him. It was afterwards discovered that Thomas Johnson was a dormant partner, and the suit was renewed on the note against both. The judgment against Henry Johnson was pleaded in bar, and the plea was sustained.

Smith v. Black, 9 Serg. & Rawle 142, almost identical with Ward v. Johnson &c. in circumstances and result.

In the case of Willings & Francis v. Consequa, 1 Peters' C. C. R. 301, the doctrine in respect to the legal effect of a judg-

ment against an ostensible, on the liability of a dormant partner, is thus laid down: Should the creditor, after the judgment against the ostensible partner, bring suit against K. (the dormant partner) separately, he may be defeated by plea in abatement; and the judgment in this action (against the ostensible partner) would be a bar to any suit he might bring against Willings & Francis and K. The judgment would have as completely extinguished the original debt as to Willings & Francis, as if they had given a bond for it, which it would clearly have done; the rule that a bond given by a stranger is no extinguishment of a simple contract of the real debtor, not applying to a case where it is given by one of two or more joint contractors.

Drake v. Mitchell &c., 3 East 251. In that case one of several joint covenantors gave a bill of exchange, which, however, was not taken in satisfaction. The 566 *bill being dishonoured, suit was brought on it, and judgment therein recovered against the drawer.

A suit was afterwards brought on the joint covenant, to which the judgment on the bill was pleaded in bar. This plea was disallowed, on the principle that it being a judgment on the bill, though the bill was merged in the judgment, the covenant was left intact. The bill did not operate an extinguishment of the covenant as to the drawer or the other covenantors, and the judgment on it, without satisfaction, in no wise affected the covenant. It is however conceded in that case, that had the judgment been on the covenant, the legal remedy on the covenant as to the party against whom it was rendered, and consequently as to the other joint covenantors, would have been extinguished.

It may here be remarked, that in each of the cases from Johnson's and Serg. & Rawle's reports, the case of Sheehy v. Mandeville &c. was cited and commented on by the court. It was not deemed an authority governing those cases. And in the judgment of the court in the case of Ward v. Johnson &c. it is said, that in Sheehy v. Mandeville &c. "it is admitted or strongly intimated that the facts disclosed in that case were sufficient, had they been properly pleaded, to bar the action against Jameson." A reference to the case itself will shew that there was warrant for the comments made on it by the courts of New York and Massachusetts; and in the complexity caused by the state of the pleadings, the general question now under consideration was not distinctly presented, argued or adjudicated. This is further evinced by the fact that judge Washington, who was one of the court concurring in the decision of Sheehy v. Mandeville &c. gave the judgment cited from 1 Peters' C. C. R. Willings & Francis v. Consequa.

While in the foregoing cases the effect of a judgment against one of several joint contractors, on the legal responsibility of the others upon the original contract. 567 *was the subject of controversy and

decision, it was in some of them conceded, as free from reasonable doubt, that the specialty given by and accepted from one would in law extinguish the simple contract as to all: and those cases therefore conclude a fortiori as to the law governing the latter case.

But the adjudications on the latter case are numerous and unvarying. Opinions to this effect are distinctly expressed by this court in its judgments in the cases of *Sale v. Dishman's ex'ors*, 3 Leigh 548; *Galt's ex'ors v. Calland's ex'or*, 7 Leigh 594, and *Weaver v. Tapscott*, 9 Leigh 424; and though it was justly remarked at the bar that in the first and last of these cases a decision of that question was not indispensable, yet in the case of *Galt's ex'ors v. Calland's ex'or* the court considered that as a material question, and adjudged it as one important to the decision of the case. That adjudication, not in conflict with any that the diligence and learning of the counsel for the defendant in error has discovered, is supported by those before referred to, and more precisely by *Clement v. Brush*, 3 Johns. Cas. 180, and *Tom v. Goodrich &c.*, 2 Johns. R. 213.

The decision of judge Story in 1 Mason 482, conflicts with that of *Tom v. Goodrich &c.* on the point whether a bond for duties would merge the debt created by statute, but it does not conflict with the proposition of law on which the judgment in the case of *Tom v. Goodrich &c.* rests, to wit, that the specialty of one of two joint debtors by simple contract, in point of law extinguishes the simple contract.

It is urged, however, that the case of a dormant partner is distinguishable from that of an ostensible one, and that such a partner cannot be discharged from legal liability for the debts of the partnership, by the transactions of the creditor with the ostensible partner, in ignorance of the fact of partnership. In support of

568 *this proposition, the case of *Leslie v. Wilson*, 7 Eng. C. L. R. 395, reported also in 6 J. B. Moore 415, is cited. That case is inapplicable, because it was an action of tort. One of the parties had signed a charter party under seal; but that, it was adjudged, did not protect the other from the action. The case proceeds on the grounds that the action for the tort was independent of that on the contract, and was not merged in the specialty; and upon the principles of that case, the action for the tort might have been sustained, though all the partners had signed the charter party.

The case of *Robinson v. Wilkinson*, 3 Price 538, 1 Eng. Exch. R. 417, appears, on a cursory view of the general expression of chief baron Richards, more applicable and stringent. But on examination it is found that the dealings with the ostensible partner, in virtue of which the dormant partner claimed to be discharged, were of such a nature that the creditor was left at liberty to resort to the original contract, even against the ostensible partner. Those dealings had neither extinguished nor sat-

isfied the original demand as to the ostensible partner, had he only been liable for it; and on that ground only was the action against the dormant partner sustained. Graham, baron, says, "The debt against Cay" (the ostensible partner) "remained undischarged, and the plaintiff had a right to resort to his original remedy, which was then revived against all persons primarily liable." Wood, baron, says, "The drawing of the bill which was afterwards dishonoured is no discharge. If Cay had been discharged, the defendant as his partner would have been discharged, but that was not so here." The remark of Richards, chief baron, that "a dormant partner cannot discharge himself from liability to pay the debts of a creditor through the medium of his ostensible partner, by any acts of his during the concealment of the unknown partner," is to be limited in its gen-

569 erality to the case in *judgment. Beyond the case the judge is not to be understood as intending to extend his remark; and if he did so intend, it is to that extent extrajudicial and no adjudication.

On the whole case my opinion is, that the giving and acceptance of the specialty of Fisher mentioned in the verdict extinguished the simple contract, and thereafter the creditor had no legal remedy on that simple contract against Fisher and his partner, whether ostensible or dormant, or against either of them; and that the law arising on the verdict is for the plaintiff in error.

ALLEN, J., concurring in the opinion of Stanard, J., the judgment of the circuit court was reversed with costs, and judgment entered on the special verdict for the defendant.

570 *Savage and Others v. Mears and Wife.

December, 1843, Richmond.

(Absent CABELL, P., and STANARD,* J.)

Will—Pretermitted Child—Revocation—Case at Bar.—

A testator having six children, four the issue of a deceased wife, and two the issue of his present wife, devises to his two sons each a tract of land described by metes and bounds, directs that all his other lands shall be equally divided among his four daughters and their heirs, and then devises and bequeaths as follows: "My will is that my negroes be apportioned equally amongst my six children, under the following regulation, to say, that the one third thereof which shall be allotted to my wife as her dower shall be the full part of the two children I had by her, and also that the several negroes I have from time to time furnished any of my children be their right, but that they shall be each appraised and accounted for in their part of the division of my slaves. Lastly, I desire that all the residue of my estate not before specifically given be equally divided amongst my aforesaid six children." The will is made the 81st of December 1792, and the testator dies in 1794, prior to the

*He had been counsel for the appellants.

28th of October; between which periods, to wit in November 1793, a third child of the testator by his second wife is born. HELD, 1. According to the authority of *Yerby v. Yerby*, 3 Call 334, the birth of such third child was not a revocation of the will. 2. As the will was published, and the testator died, before the passage of the act of 1794 providing for pretermitted children, the case does not fall within the operation of that statute. 3. Upon the true construction of the will, the afterborn child has no claim to share in the division of the dower slaves after the death of the widow.

Ralph Justice of Accomac county died in the year 1794, prior to the 28th of October, having duly made and published his last will and testament, bearing date the 31st of December 1792, whereby, after giving to his wife some personal chattels in addition to the dower which the law entitled her to, and to his two sons each
571 *a tract of land described by metes and bounds, and directing that all his other lands should be equally divided among his four daughters and their heirs, he further devised and bequeathed as follows:

"Fifthly. My will is that my negroes be apportioned equally amongst my six children, under the following regulation, to say, the one third thereof which shall be allotted to my wife as her dower shall be the full part of the two children I had by her, and also that the several negroes I have from time to time furnished any of my children be their right, but that they shall be each appraised and accounted for in their part of the division of my slaves.

"Lastly. I desire that all the residue of my estate not before specifically given be equally divided amongst my aforesaid six children."

Four of the testator's children were the issue of a former marriage. At the time of making his will, he had only two children by his second wife, namely, James and Elizabeth: but afterwards, and in the lifetime of the testator, to wit in November 1793, a third child, Catharine by name, was born.

The will was proved and recorded in Accomac county court on the 28th of October 1794. The widow of the testator died in the year 1833; whereupon James Justice and John Savage (who had intermarried with Elizabeth Justice) took possession of the whole of the dower slaves, about 30 in number, and divided them between themselves, in exclusion of Catharine, who was now married to Thomas Mears.

In February 1834, Mears and wife exhibited a bill in the circuit superior court of Accomac against James Justice and John Savage and wife, setting forth the will of the testator, and the facts above stated; charging that the defendants had refused to allow the plaintiffs any share of the dower slaves; and praying that one third of the said slaves, and of their hires and
572 profits *since the death of the widow, might be decreed to the plaintiffs.

The defendants answered, admitting all

the facts set forth in the bill, but nevertheless insisting that the plaintiffs had no manner of interest in or title to the said slaves, because the law by which a child under circumstances similar to those of the female plaintiff would now be entitled to a share of his or her father's estate, was not enacted till the 5th of December 1794, some time after the death of Ralph Justice the testator, and had no application to cases existing before its passage.

The court directed an account, shewing the number, ages, names and respective values of the dower slaves which had come to the possession of the defendants, and the amount for which the said slaves would reasonably have hired since the death of the widow. This account being taken, the court decreed that the plaintiffs recover against the defendants 76 dollars 17 cents, being one third of the net hires for the year 1834; and appointed special commissioners to divide the slaves into three equal parts, and to assign one of those parts by name to the plaintiffs. Such division and assignment being accordingly made and reported by the commissioners, the court, on the 9th of April 1835, pronounced a decree, that the plaintiffs hold the slaves so assigned them, and that the division made by the said commissioners be forever held firm and stable between the parties.

On the petition of the defendants, an appeal was allowed.

Lyons for appellants. The female plaintiff had no right at all under the statute of December 5, 1794, 1 Old Rev. Code p. 319, 20, ch. 170, § 1, for that statute was passed subsequent to the execution of the will and to the death of the testator. And the

statute of December 13, 1792, 1 Old 573 Rev. Code p. 160, 61, ch. 92, *§ 3, providing for children born after the execution of a will made when the testator was childless, and for posthumous children, has no application to this case. In *Yerby v. Yerby*, 3 Call 334, it was decided that prior to the statute of 1794, even a second marriage and the birth of children would be no revocation of a will disposing of the testator's estate among the issue of his first marriage. As to the circumstances which amount to an implied revocation of a will, see the case of *Wilcox v. Rootes & others*, 1 Wash. 140, and 1 Williams on Ex'ors 96.

G. N. Johnson for appellees. This case turns mainly on the proper construction of the will.

A will, in respect to the personal estate of the testator, speaks at the time of his death; and particularly where the question is as to the persons who are to take, and those persons are children. Thus where a legacy of 50 pounds each was given "to the children that Joseph Ringrose hath," all the children living at the death of the testator were held entitled. *Ringrose v. Bramham*, 2 Cox's C. R. 384. And numerous cases are to be found deciding that the

children born after the death of the testator are to be excluded under the terms of such a provision. In *Matchwick v. Cock*, 3 Ves. 609, a case decided by the court of king's bench is stated, in which that court is said to have gone very far in construing the intention of the testator to embrace children born after the making of the will and before his death, even where the terms of the will would seem almost necessarily to exclude them: so far, that the vicechancellor seems to have considered it an extreme case. To these may be added the case of *Viner v. Francis*, 2 Bro. C. C. 658; 2 Cox's C. R. 190.

Here the slaves to be allotted to the wife for her distributive share are given to the two children the testator had by her. If the will speaks at the death of the
574 *testator, he had at that time three children; and there is obviously no intention to disinherit any child of his second wife. Which two of the children shall be selected as the legatees?

The main purpose of the testator was to give to the children of his then wife the remainder of the slaves given to her for life: the reference to them as his two children was merely used as an incidental description of them as they existed at that time, without any purpose to restrict his bounty to those two, in case there should afterwards be an increase of the number. He was evidently making provision for his children in classes; for those of the first marriage in one class, and for those of the second in another. If the use of the word two be held an inaccuracy merely,—a mistake of description, inadvertently employed as correct at the time and embracing then the whole class of beneficiaries, without attention on the part of the testator to the circumstance that it might at a future day be inapplicable to the beneficiaries as a class, the court will, in order to effectuate the general intent, reject that part of the description which is inaccurate, and thus correct the mistake. *Bradwin v. Harpur*, Amb. 374, and *Smith v. Campbell*, 19 Ves. 400, are strong cases of this sort. If the testator, after the birth of the third child, had been asked whether he had provided for the children of his second wife by his will, there can be scarcely a doubt that he would have answered in the affirmative. [*Brooke, J.* There can be little doubt he would have said that his intention was to provide for them all by his will: but in a case before lord Mansfield, cited by me in *Boisseaus v. Aldridges*, 5 Leigh 239, it was said of the testator, *quod voluit non dixit*; and the question is whether that remark is not applicable here.]

If the court should differ with me on this point, I refer to our statutory provisions on the subject, as shewing the legislative intent that no child of a decedent,
575 *born after the making of his will, should in any case be disinherited, if merely pretermitted and unnoticed by the will. Judging of the legislative intent by the reason and spirit of the enactment in

the 3d section of the act of 1785, (1 R. C. of 1819, p. 376, ch. 104, § 3,) and by the construction of that intent given in the subsequent act of 1794, and not merely by the precise scope of the words employed, the case of an afterborn child, situated like the female plaintiff here, was fairly and properly embraced. In *Yerby v. Yerby*, the will had given the whole property to the children of the first marriage, without any reference at all to a second marriage, the testator being married to his second wife after the execution of the will. Here there is a provision for children of the second marriage.

C. Johnson on the same side. Our statutes have proceeded step by step in making provision for children pretermitted by the will of the father. These successive amendments shew the spirit by which the legislature was actuated in relation to this subject. And we invoke that spirit as the appropriate one in which to consider the main question in this case—that of the construction of the clause by which the testator has expressed his intentions concerning the issue of his second marriage.

In *Sherer v. Bishop*, 4 Bro. C. C. 55, 60, (which will doubtless be relied upon on the other side) the testator bequeathed legacies to the six children of John and Mary Sherer, and it was held that an afterborn child of those parties was excluded. There the testator was providing, not for his own children, but for those of other persons; he was fulfilling no natural duty, but exercising his legal and natural right to dispose at his own pleasure of that which was his; and in doing so, he selected as the objects of his bounty the children who were then
576 *already acquainted, not contemplating other issue of the same parties,

in excluding which he would be chargeable with no dereliction of natural duty. But where the provision is made by a father for his children, every presumption militates against the conclusion that he designed his bounty to be confined to those existing at the date of the will, in exclusion of others who might subsequently come into existence, occupying the same relation to himself with the former, and equally calling upon his natural duty to provide for them. And it is a principle established by many cases in the english courts, that the will is to be construed in every way it can, for the purpose of embracing the afterborn children, and acquitting the testator of a violation of his natural duty to provide for his own offspring, each and all, when no reason exists or can be imagined for any discrimination among them. This is strongly shewn in the cases already cited on behalf of the appellees.

Stanard in reply. The question mainly argued on the other side is in substance this—Whether Ralph Justice shall be permitted to make a will for himself, or the court will undertake to make one for him? Though the court must construe the will

according to the intention of the testator, yet where the words are plain, they must be taken as the sole evidence and explanation of his intention. Now is there, upon the face of this will, any ground whatever to support the construction contended for on the other side—namely, that the testator's intent was to provide for his children in classes? The testator's clear intent was to provide for all his six children equally, by dividing his slaves equally among them. [C. Johnson. He charged the whole dower interest of the wife upon the third of the slaves which are given to her children. He could not therefore mean to place the six children on an equality in the division
577 *of the slaves.] The main and obvious intent still was to make the shares equal, merely postponing the enjoyment of the shares given to the two children of the second marriage, until their mother's death. By bringing in the third child to share with the two elder, the effect of the construction contended for would be to increase the inequality already created by the charge of the wife's dower interest.

In *Viner v. Francis*, 2 Bro. C. C. 658, 2 Cox's C. R. 190, (cited for the appellants) the opinion of the master of the rolls was, that if the testator had bequeathed to the three children of his late sister, instead of bequeathing to the children of his late sister (as he actually did) the death of one of the three would have caused a lapse of his interest in the legacy, because the children would in such case have been *personæ designatæ*. The case supposed by the judge is our case; and his opinion on it is an authority directly in our favour. And in *Matchwick v. Cock*, 3 Ves. 609, the master of the rolls expressed the opinion, that if the testator has given his property to the children then in existence, forgetting and omitting those which might afterwards come into being, the court, however much disposed to do so, cannot supply the omission. If we had made the most diligent search for a judicial opinion expressly in our favour, we could have found none more so than the opinion in this case. And see 1 Roper on Legacies 46, where the principle on this subject is stated in accordance with that opinion.

The child claiming here is not a posthumous child; if the testator wished and intended to provide for her, it was completely in his power to do so by an alteration of his will. Having failed to do that, how can the court undertake to say that he meant to provide for her, or supposed he had already done so; or even that he had not good reasons for omitting all provision for her? The will was made on the
578 last day of 1792, and this *child was born in 1793. The testator was bound to know the provisions of his will, and it cannot be supposed that he had forgotten them, when the execution of the will took place so recently before.

The case of *Sherer v. Bishop* has been referred to by Mr. Johnson, and he admits

that the only distinction between that case and ours is, that the testator there was not providing for his own children; if the legatees had been his own children, it is conceded that the case would in every particular have been full and direct authority in our favour. As to *Smith v. Campbell*, 19 Ves. 400, it appears from the abstract of that case given by Roper, (1 Roper on Legacies 135,) that Sir William Grant founded his opinion expressly on the ground that the testator, in using the terms "my next of kin in Ireland," did not employ the last two words as descriptive of the persons who were to take, but merely as a reference to the place in which he supposed his next of kin to reside. The case is no example of rejecting part of a description.

It is contended for the appellants, on the authority of *Ringrose v. Bramham*, 2 Cox's C. R. 384, that the words "the two children I had by my present wife" are to be regarded as spoken at the testator's death, at which time he had three children, and so, unless all the three are embraced by the bequest, there will be an ambiguity as to which two of them are to take, and therefore the provision will be void for uncertainty. This is an extraordinary proposition—that a will, perfectly unambiguous at the time of its execution, may be made ambiguous by extrinsic circumstances occurring between that period and the testator's death. The principle that a will is to be considered as speaking at the death of the testator has reference merely to the subject,—the property on which the will is to operate; and even in that sense, its application is confined to after
579 acquired personality. The only mode

in which a will can be *made to speak at the death of the testator, to any other purpose, is by a republication; and this whether it be a devise of land or a testament of chattels. *Wind v. Jekyl*, 1 P. Wms. 575; 1 Lomax on Ex'ors 65, and cases there cited.

The case of *Ringrose v. Bramham*, so far from being an authority to support the general proposition that a will is to be considered as speaking at the testator's death, distinctly shews that the master of the rolls recognized no such principle. He resorted to construction for the purpose of letting in the afterborn children; but if the will spoke at the death of the testator, there could have been no necessity for reasoning or construction, since the words used to designate the legatees, if regarded as spoken at the death of the testator, would necessarily include all the children of J. Ringrose living at that time. The construction employed in that case, which made the words "every child that J. Ringrose hath" equivalent to "every child that J. Ringrose shall have at the time when the legacies shall vest," was not only far less violent than that which is contended for here, but was countenanced by the testator's own use of the present tense in another clause, where the word come was

evidently employed and necessarily to be construed in the sense of shall come.

As to the cases in which a legacy is given to a class of persons, (children, for example) the principle on which they rest is clearly stated in 1 Roper on Legacies p. 48. Those cases stand upon distinct ground, and have no application to this.

It is impossible to conceive a case more exactly falling within the scope and terms of the act of 1794, than the case here. Yet if the argument urged on the other side as to the construction of the will be sound, the female plaintiff could not have claimed under that statute as a pretermitted child, though the statute had been enacted before the death of her father and before the execution of his will.

She could not claim both under the will and against it,—both as provided for by the will, and as pretermitted. Suppose, in that case, she had brought her suit under the statute, claiming as a child of this testator born after the execution of the will, and pretermitted by it; and that her claim had been resisted on the ground of the construction here contended for: with what temper would the court have listened to the argument which is now urged?

The case of Yerby v. Yerby is a full and direct answer to all the considerations urged for regarding this case as embraced by the spirit or equity of the statute of 1785.

It was also objected for the appellants, that the decree was wrong in the manner of making provision for the plaintiffs. But it is unnecessary to report the argument on that point.

ALLEN, J., delivered the opinion of the court as follows:

The court is of opinion, that according to the authority of Yerby v. Yerby, 3 Call 334, the subsequent birth of the child in this case was not a revocation of the will, and as the will was published, and the testator died, before the passage of the act of 1794 providing for the case of pretermitted children, this case does not fall within the operation of that statute. The court is further of opinion, that upon the true construction of the will there is nothing from which an intention can be gathered to provide for the children in classes. That the general intent of the testator was to give to each of his six children then living an equal proportion of the slaves, but that the time for enjoyment was postponed, as to the two children by the second wife, by giving them the third which should be allotted to the wife as her dower. That in this case the children

581 in *existence at the date of the will precisely answered the description given, as to number and the mode in which the property was to be distributed amongst them, and that the expression of the will is equivalent to a description of the six children by name. That if the testator had survived the passage of the act of 1794,

and died without altering his will, the pretermitted child would have had a clear right to call upon all of the devisees and legatees to contribute, and it would not have been in the power of the four children by the first marriage to repel such claim, upon the ground now set up, that the will had made provision for her; and the fact of the testator's dying before the said act was passed cannot change the construction of the will. The court is therefore of opinion that the decree is erroneous, and that the circuit court, instead of making such decree, ought to have dismissed the bill with costs.

Decree reversed and bill dismissed.

582 *Farneyhough's Ex'ors v. Dickerson &c.

December, 1848, Richmond.

(Absent CABELL, P.)

Supersedas—Executorial Account—Admission to Record.—An executorial account being settled by commissioners under an order of the court of probate, some of the legatees file exceptions to the account, and the court overrules the same, orders the account to be recorded, and adjudges the exceptors to pay the executor's costs. **Held**, this is a final proceeding or order, within the meaning of the act in Sess. Acts of 1830-31, ch. 11, § 20, p. 50; Suppl. to Rev. Code p. 145, to which, on the petition of the exceptors, a supersedeas may be awarded. Accord. Triplett's ex'ors v. Jameson, 2 Munf. 242.

Executors and Administrators—Commissions.*—As a general rule, an executor is not entitled to commission on the amount of debt due from him to the testator, and credited to the estate in the executorial account. Accord. Carter's ex'ors v. Cutting and wife, 5 Munf. 227.

Same—Same.—The commission of an executor should not be on the amount of his disbursements. He ought generally to be allowed a commission on the amount of the credits in his account, except on a credit for a debt due from him to the testator. Though some of the credits are for bonds due the estate, that were passed over by the executor to legatees, and voluntarily received by the latter, commissions will nevertheless be allowed the executor on the amount of such bonds.

Same—Charges for Clerk's Hire.—An item of \$21, paid by executors for services rendered by a clerk, being allowed by commissioners, the same was excepted to by legatees, upon the ground that what the clerk did ought to have been done by the executors, and therefore that he should be paid out of their commissions. The record contained no evidence on the subject, except that the date of the item was a few days after the date of a large credit for sales at public auction, which

***Executors and Administrators—Commissions.**—See foot-note to Claycomb v. Claycomb, 10 Gratt. 589. The principal case is cited in Buxton v. Shaffer, 43 W. Va. 296, 27 S. E. Rep. 320; Claycomb v. Claycomb, 10 Gratt. 592; Gregory v. Parker, 87 Va. 451, 13 S. E. Rep. 801. See monographic note on "Executors and Administrators" appended to Rosser v. Depriest, 5 Gratt. 6.

furnished some ground for the inference that the clerk was employed during those sales. *HOLD*, the court of probate did not err in overruling the exception.

On the application of Nimrod Branham and Edward Farneyhough junior, executors of Edward Farneyhough senior deceased, the court of Albemarle county, at 583 August *term 1832, appointed commissioners to settle the accounts of the said executorship. The accounts were accordingly settled from January 1832, when the executorship commenced, to July 1832, and a report returned, to which there were seven exceptions filed by legatees.

The second exception was to an item of 21 dollars "paid B. Townley for services as clerk." It was excepted to upon the ground that if the executors thought proper to engage the services of a clerk to perform labour which they should themselves have performed, he should be paid out of their legal commissions. The date of this item was the 31st of January 1832; the credit for sales at public auction bore date on the 23d of that month; and the amount of those sales was 14695 dollars 51 cents.

The credits to the estate being 23813 dollars 51 cents, and the disbursements 22177 dollars 70½ cents, a commission of 5 per cent. on the disbursements was allowed, amounting to 1108 dollars 88 cents, and the said disbursements and commissions being deducted, a balance was reported in the executors' hands of 526 dollars 92½ cents. One of the credits was "Nimrod Branham's note, 1123 dollars 47 cents." And the third exception was because the executors were allowed a commission of 5 per cent. on this debt, and it was deemed illegal and unjust that an executor should be allowed a commission for paying his own debt.

Among the sums credited as received by the executors, were credits on account of notes assigned to Douglass Dickerson and Thomas Birkhead, two of the legatees. By statements subjoined to the report, it appeared that the amount of notes assigned to Dickerson was 2029 dollars 19 cents, and that the amount of notes assigned to Birkhead was 2687 dollars 34 cents. The fourth exception was because the commissioners

584 mission on the *amount of notes so assigned to the said Dickerson and Birkhead. The notes, it was stated in the exception, were in part in possession of the testator at the time of his death, and in part for property sold by the executors, and were assigned, at the instance and request of the said executors, to the legatees, who assumed the trouble, expense and responsibility of collecting the same.

The county court overruled the exceptions to the report, ordered the said report to be recorded, and adjudged the legatees who filed the exceptions to pay the executors their costs. On the petition of the legatees, a *supersedeas* was awarded. The circuit court was of opinion that the county court

erred in overruling the second, third and fourth exceptions, which alone were insisted on; and the order of the county court was therefore reversed with costs, and the report directed to be recommitted for the purpose of being reformed accordingly.

On the petition of the executors, a *supersedeas* was awarded.

Leigh for plaintiffs in error. The first question is whether, under the present circuit court law, a *supersedeas* lay to the order of the county court. Under the old circuit court law, 1 R. C. of 1819, p. 239, ch. 69, § 56, it was held in *Triplett's ex'ors v. Jameson*, 2 Munf. 242, that an appeal lay from such an order. But now by the new law, the judgment, proceeding or order to which a *supersedeas* may go must be "final, and nowise interlocutory." *Sess. Acts of 1830-31*, p. 50, ch. 11, § 30; *Suppl. to Rev. Code* p. 145. Here the order settled nothing finally,—established no right to the credits. It merely had the effect of making the account *prima facie* evidence in case a bill to surcharge and falsify that account should subsequently be filed in chancery by the legatees.

585 *II. There is no ground on which this court can pronounce the allowance of 21 dollars for clerk hire unreasonable or improper. All that we know is, that the commissioners and the county court thought it reasonable, that in point of fact the charge had been incurred by the executors. It may have been expended in procuring the services of a clerk at the sale of the decedent's estate, to keep the account of sales, take bonds from the purchasers, &c.

III and IV. The exceptions to the commissions allowed proceed upon the idea that an executor is only entitled to a commission on money actually collected or bonds actually taken by him, for debts due the testator or proceeds of sales of the estate. Even on this principle, a commission ought to have been allowed on such of the notes as were the proceeds of sales made by the executors. But an executor is not to be thus restricted. The commission is not given merely on account of his personal trouble, but as a compensation also for the risk and responsibility which he incurs.

Patton for defendants in error. The order of the county court disposed finally of the whole case before that court, which then had neither the power nor the materials for any further action. And any order which is the final action of the court in the cause is a final judgment of the court, and nowise interlocutory. What the effect of that judgment may be as evidence,—whether it is to conclude the parties to the proceeding, or merely to operate as *prima facie* proof of the matters determined by it, in any other and distinct litigation involving the same question, is a consideration which cannot in any degree bear upon the question whether the judgment is final or not. But here the judgment of the county court was pronounced *inter partes*.

The legatees appeared and controverted the propriety of allowing the items in question. Having done so, they could 586 *not be permitted to file a bill in chancery for the purpose of surcharging and falsifying the account in respect to the same items. Therefore, even in the sense of finality which is contended for on the other side, the judgment of the county court was final: it concluded the legatees until reversed, and left them no means of continuing or reviving the controversy except by the proceeding which they have resorted to.

II. Where an item of an administration account is excepted to, the party relying on the account must prove the item; the burthen of proof is on him; and until that proof is adduced, the item is inadmissible. The other side reverses this principle, and contends that as there is no evidence to shew that the charge for clerk hire was unreasonable, this court cannot say that it was so. The commission ordinarily allowed to the executor is to be considered as full compensation for all the trouble and expense incurred by him in the administration, until its inadequacy is shewn. In *Hipkins v. Bernard & c.*, 4 Munf. 83, it was expressly decided that clerk hire is not to be allowed to an executor generally, though it was allowed in that case under special circumstances; the estate being large, and the administration unusually troublesome, so that a bookkeeper was regarded as necessary.

III. *Carter's ex'ors v. Cutting and wife*, 5 Munf. 227, decides that where an executor is indebted to the estate, no commission is to be allowed for the collection of that debt.

IV. *Hipkins v. Bernard & c.*, 2 Hen. & Munf. 21, is relied upon as sustaining the fourth exception.

C. Johnson in reply. It should be borne in mind that the present statute was passed after the decision in *Triplett's ex'ors v. Jameson*, in which the court of appeals with great hesitation came to the conclusion that the appeal might be sustained. It is at least probable, then, 587 *that the emphatic language in the present statute, whereby the proceeding to which a supersedeas may go is required to be nowise interlocutory, was introduced for the purpose of excluding from an appellate court such cases as this, where the whole litigation, however protracted, could settle nothing whatever.

II. It is very probable that the 21 dollars was allowed for the hire of a clerk at the auction sale made by the executors. The payment was made within four or five days after the sale. And the exception is not for defect of proof that the services were rendered, but proceeds on the ground that the allowance is wrong in principle,—that an executor is not to be allowed for clerk hire. There is no such rule. The act of assembly provides that all disbursements by the executor shall be allowed, and that

a compensation for his personal trouble shall also be allowed. 1 R. C. of 1819, p. 389, ch. 104, § 59; 2 Rob. Pract. 369. In *Hipkins v. Bernard & c.* the charge for clerk hire was allowed as a proper one, in addition to 5 per cent. commission on an estate of 40,000 pounds.

III. The effect of the credit for the whole amount due on Nimrod Branham's note is to make the executors jointly responsible for the amount, and to treat it as cash in their hands. Moreover, the balance appearing against the executors upon the account is only 500 and some odd dollars; so that at least 600 dollars of Branham's note was actually disbursed. The case of *Granberry's ex'or v. Granberrys*, 1 Wash. 246, decides that an executor may charge himself with the amount of his debt to the estate, and scale it as of the date of the charge, besides being allowed his commission upon it. In 2 Rob. Pract. 368, it is laid down that an executor indebted to the decedent should generally be charged with the amount of the debt due from him, and *Decker & c. v. Miller*, 2 Paige 149, is there referred to. The case of *Carter's ex'ors v. Cutting and wife*, 5 Munf. 227, 588 *is no decision of this court on the point for which it was adduced; though the principle is laid down by chancellor Taylor, in the instructions given by him to the commissioner in the court below. What were the circumstances under which that instruction was given does not appear. They may have been such as to render the instruction in that case correct.

IV. The legatees were not bound to accept the bonds, but might have required the executors to collect the money due upon them. Having accepted them as so much money, they cannot object to the allowance of commission on them. The opinion of the chancellor in *Hipkins v. Bernard & c.*, 2 Hen. & Munf. 21, was overruled in toto by this court in 4 Munf. 83. Under the decision of this court in that case, and the other decisions cited in 2 Rob. Pract. 370, the commissions allowed the executors in this case were not unreasonable. It being admitted that the executors are entitled to commissions upon the amount of bonds taken at their sale of the estate, and the legatees being in possession of the bonds assigned them, if they rely upon the fact that a part of the bonds were executed to the testator before his death, they are bound to produce the evidence of that fact; the onus probandi is on them. The executors producing the receipt of the legatees for so much paid them in bonds, make at least a prima facie case of title to commission on the whole.

STANARD, J., delivered the following as the opinion of the court:

The court is of opinion that the circuit court erred in sustaining the exceptions to the allowance of 21 dollars to the executors for clerk hire, and to the allowance to the executors of commission on the amount of bonds due the estate, which the executors

passed over to the legatees, and which were, as far as appears, voluntarily received by the legatees from the executors.

589 The court *is further of opinion, that, as a general rule, an executor is not entitled to commission on the amount of debt due from him to the testator, and brought to his debit in the executorial account, and that nothing appears in this case to prevent the application of this general rule to it; and that therefore the county court erred in overruling the exception to the allowance of commission on the debt of the executor Branham to his testator. The executors ought to have had credit for commission on the amount of the credits in the executorial account, except the credit for the said debt of Branham; instead of limiting their commission, as was done by the commissioners of the county court, to the amount of the disbursements. Therefore it is considered that the judgment of the said circuit court be reversed and annulled, and that the plaintiffs in this court recover against the defendants their costs expended in the prosecution of their writ of supersedeas here. And this court proceeding to render such judgment as the said circuit court ought to have given, it is further considered that the order of the county court admitting the account of its commissioners to record be reversed and annulled, and that the plaintiffs in the said circuit court recover against the defendants there the costs by them in the prosecution of their writ of supersedeas in that court expended. And it is ordered that the cause be remanded to the said circuit court, and from thence to the county court, with instructions to recommit the said report of the commissioners, to be so reformed as that, instead of the commission thereby allowed the executors, a commission be allowed them on all the credits to the estate except that for the debt of Branham the executor, and that the account so reformed be admitted to record in the said county court.

590

*Chappell v. Robertson.

December, 1848, Richmond.

(Absent CABELL, P.)

Equity Practice—Codefendants—Decree against One in Favor of Another—Appellate Practice—Parties—Objection—Waiver.—A party having covenanted to pay a sum of money in trust for the benefit of the covenantee and his wife and children, the covenantee afterwards takes the oath of insolvency, and transfers to the sheriff, for the benefit of the creditor, his interest under the covenant. Upon a bill by the creditor against the covenantor, the covenantee, and the wife and children of the latter, (the sheriff not being made

*Appellate Practice—Party Not Interested in Property.—An appellate court will not reverse a decree, though erroneous, at the instance of a party not interested in the property involved in the suit. *Elcan v. Lancasterian School*, 2 P. & H. 68, citing the principal case.

a party) the court decrees that the covenantor pay to a trustee, appointed by consent of the other defendants and the plaintiff, the money secured by the covenant, and directs the trustee to invest the same, and out of the interest pay the plaintiff the amount of his debt. From this decree the covenantor alone appeals. **HOLD.** 1. The objection that the sheriff was no party to the suit, not having been taken in the court below, cannot be made a ground in the appellate court for reversing the decree. 2. The decree was properly rendered in favour of the codefendants of the covenantor, as well as in favour of the plaintiff. 3. The appellant, being bound by his covenant to pay the money, has no interest in the question how it shall be applied, and therefore is not entitled to make the objection that the fund secured by the covenant was not liable to the creditor of the covenantee.

On the 21st of May 1831, an agreement was entered into between Daniel Oglesby and Richard T. Chappell in the following terms:

"Memo. of an agreement entered into this 21st day of May 1831, between Daniel Oglesby of the one part, and Richard T. Chappell (both of the county of Bedford) of the other part, witnesseth that the said Daniel Oglesby doth agree to relinquish and abandon all claims, actions or causes of action, as well on account of several assaults and batteries committed on his the said Oglesby's body by him the said Chappell, as on all other accounts whatsoever.

He the said Chappell, in consideration *of the premises, and for divers other good and valuable causes and considerations, doth bind himself, his heirs &c. to convey in trust for the benefit of the said Oglesby and family two thousand dollars, three hundred of which is to be paid on demand, and the balance in twelve months; the trust to cease on the death of the said Oglesby, at which time one third of its amount is to be paid to Mrs. Oglesby, and the balance to be equally divided amongst the said Oglesby's children. In testimony whereof the said Oglesby and Chappell have hereto set their hands and seals the day and year first above written.

his
Dan'l X Oglesby [L. S.]

mark.
Rich'd T. Chappell [L. S.]"

"Teste, N. J. Manson,
Balda M'Daniel."

In pursuance of this agreement, Chappell, on the 6th of June 1831, paid 300 dollars to William Witt as trustee for Oglesby and his family.

On the 18th of July 1831, Oglesby took the oath of an insolvent debtor at the suit of two several creditors, Archibald Robertson and Augustine Leftwich. In each case, the schedule subscribed and delivered in by Oglesby contained the following clause: "A certain Richard T. Chappell hath entered into a covenant to convey in trust for the benefit of myself and family the sum of 2000 dollars, under certain limitations in the covenant set forth. So far as I

am entitled to any thing under the said covenant applicable to the payment of my debts, the same is hereby transferred to the sheriff of Bedford." And in neither schedule was any other property surrendered or specified.

In May 1832, Archibald Robertson, one of the creditors at whose suit Oglesby had taken the oath of insolvency, filed a bill in the circuit superior court of Bedford, 592 *against Oglesby, his wife, their three children (all of whom were infants), and Richard T. Chappell, setting forth the debt due from Oglesby to the plaintiff, and Chappell's agreement with Oglesby, and praying satisfaction of the said debt out of the fund which Chappell, by his said agreement, had covenanted to settle upon Oglesby and his family.

On the 4th of June 1832, Chappell, then a resident of Charlotte, was declared a lunatic by the court of that county, which thereupon appointed Josiah W. Chappell committee of his estate. By an amended bill shortly afterwards filed, the said committee was made a defendant in the cause.

Daniel Oglesby, in his answer, stated that the covenant in the bill mentioned was entered into by Chappell as a compensation for the personal injury which he had recently before inflicted upon the respondent by a violent assault and battery upon his body; and submitted to the court whether the sum secured by the covenant was liable to the plaintiff's demand.

Mrs. Oglesby filed a separate answer, insisting that the fund secured by the covenant of Chappell was not liable to the creditors of her husband. Her answer concluded as follows: "If this respondent be entitled to the money, (and she submits that question to the judgment of the court) she prays the court to appoint a suitable trustee, and to direct such investment thereof as the court shall think best for herself and children."

The infant defendants, by a guardian assigned ad litem, answered, submitting to the court the protection of their rights.

Josiah W. Chappell, the committee of Richard T. Chappell, answered, that if the covenant alleged in the bill was ever in point of fact signed and sealed by Richard T. Chappell (of which he required full proof), the same was nevertheless wholly null and void; 1st. because Richard T.

Chappell was insane at the time of 593 executing *it; 2dly, because it was extorted from him by duress and other improper means; and 3dly, because it was unconscionable and without sufficient consideration.

Upon the questions of fact put in issue by the answer of Chappell's committee, numerous depositions were taken and filed on both sides.

The cause coming on to be heard the 16th of October 1834, the circuit court held, that the principal sum stipulated to be secured by the covenant of Chappell was not a debt to Daniel Oglesby himself, and therefore was not liable to his cred-

itors, but that he was entitled to receive the interest during his life, which consequently was liable to them. The court therefore proceeded to decree, that Josiah W. Chappell committee of Richard T. Chappell, out of the estate of the said Richard T. Chappell, do pay unto Balda M'Daniel (who, by consent of the plaintiff and of the defendants Daniel Oglesby and wife, was thereby appointed a trustee under the agreement aforesaid) the sum of 1700 dollars with interest from the 21st of May 1832 till paid; that the said trustee be authorized and required to collect from William Witt the 300 dollars of the trust fund paid to him by Richard T. Chappell, and all interest due thereon; that the whole principal of the trust fund, when collected, be put at interest by the said trustee, upon good security; that out of the interest accrued and to accrue thereon, the said trustee pay the plaintiff his debt, amounting to 445 dollars 7 cents, with interest on 278 dollars 57 cents, part thereof, from the 3d of October 1834 till paid; and that the said committee of Richard T. Chappell, out of the estate of the said Richard T., pay the plaintiff his costs of suit. And liberty was reserved to the plaintiff, and the defendants Daniel Oglesby, his wife and children, to apply thereafter for any such further order and decree as they or any of them might be advised to ask in relation to the said trust subject.

594 *On the petition of Chappell's committee, an appeal was allowed.

The cause was argued here by C. and G. N. Johnson for the appellant, and Leigh and Garland for the appellee.

I. The question mainly discussed was, whether the covenant entered into by Richard T. Chappell was valid and proper to be enforced in a court of equity? But it is unnecessary to report this part of the argument.

II. It was objected for the appellant, that if the plaintiff's claim had any foundation, the sheriff, in whom Oglesby's estate upon his swearing out became vested, should have been a party.

To this it was answered, that all the parties who had any real interest in the cause were before the court. The sheriff was a naked trustee, and if brought into the case at all, he would have been a merely formal party. If the objection was worth anything, it should have been taken in the court below: it could not now be made a ground in the appellate court for reversing the decree. On this point, the counsel for the appellee cited Buck v. Pennybacker's ex'ors, 4 Leigh 5; Moore's adm'r v. George's adm'r, 10 Leigh 228; Mayo v. Murchie, 3 Munf. 397, 8, 400, 404, 409; Story's Eq. Pl. 76, 197.

III. It was objected for the appellant, that the court could not in this case make a decree against him in favour of his co-defendants. No issue was made up in any form between the appellant and Oglesby. They were codefendants, both resisting the

claim of the plaintiff, but neither having any controversy with the other. Oglesby did not ask the decree which was rendered in his favour: the appellant did not acknowledge any liability to Oglesby, but confined himself to denying the right asserted by the plaintiff. The consideration of the relative rights and liabilities of Oglesby and the appellant was no farther

involved in the case, than inasmuch
595 *as the plaintiff claimed through Oglesby his debtor. Under such circumstances, the court should have confined itself to pronouncing on the question which alone was before it, namely whether the estate of Chappell should be held liable to satisfy the plaintiff's debt; leaving Oglesby to assert, in his own way and at his own time, his rights against Chappell's estate, if any he had. Those rights (if any such existed) did not in any manner grow out of the decree in favour of the plaintiff, but were additional to and wholly independent of that decree. For anything this court could know, Oglesby's claim might have been actually released prior to the decree: for he might release his own claim, though not that which his creditor derived through him.

The counsel for the appellee answered, that whatever a decree between codefendants is shewn to be proper by the pleadings and proofs between the plaintiff and defendants, a court of equity not only has the right but is bound to make such decree. *Chamley v. Lord Dunsany &c.*, 2 Sch. & Lef. 710, 718; *Conry v. Caulfield*, 2 Ball & Beatt. 255; *Templeman v. Fauntleroy*, 3 Rand. 434; *Morris &c. v. Terrell*, 2 Rand. 6. Here the pleadings and proofs between the plaintiff and defendants shewed the right of Oglesby and his wife and children to have the fund secured to them under the compromise; and Mrs. Oglesby, in her separate answer, expressly prayed that a trustee might be appointed to receive and invest the fund for the benefit of herself and children. Such a decree as that made by the court was more especially proper in a case like this, where the defendants chiefly interested in the trust fund were a married woman and her infant children.

IV. It was objected for the appellant, that whether the agreement entered into by Chappell was valid or not, the plaintiff had no right to satisfaction of his demand against Oglesby out of the fund thereby stipulated to be secured for the benefit
596 of Oglesby and his family. **Roanes v. Archer*, 4 Leigh 550, 568; *Scott &c. v. Gibbon & co.*, 5 Munf. 86, 90.

The counsel for the appellee answered, that if this objection were valid in point of law, still it was an objection which could not be taken by this appellant. If part of a fund which could not properly be subjected to the payment of Oglesby's debts had nevertheless been so applied by the decree, those entitled to the fund, namely, Oglesby, his wife and children, were alone aggrieved, and they alone had the right to complain. They had not appealed, and did

not complain. Supposing that Chappell's estate was bound for the money which he covenanted to pay, it was obviously immaterial to the appellant to what party it was paid, or to what purpose applied.

ALLEN, J., delivered the following as the opinion of the court:

Without deciding whether the sum agreed to be paid by Richard T. Chappell, or the interest accruing thereon during the lifetime of Daniel Oglesby, was liable to the debts of said Oglesby, (it being unnecessary so to decide, as the parties who alone could litigate that question have acquiesced in the decree appropriating so much of the interest as might be requisite to the payment of the debt due the plaintiff) the court is of opinion that as to the appellant Chappell, the only party contesting the decree before this court, there is no error in the said decree, and that the same should be affirmed.

597

*Ellis v. Jenny and Others.

January, 1844, Richmond.

Slaves—Emancipation—Rights of Issue—Case Followed.*—The decision in *Maria and others v. Surbaugh*, 2 Rand. 228, still adhered to.

In 1792 the will of William Clarke was duly admitted to record, whereby he devised and bequeathed as follows:

"Touching such wordly estate as it has pleased God to bless me with, I give and devise in the manner and form following, to wit: Imprimis, I give and bequeath to my loving wife Ann Clarke my land and plantation whereon I now live; also I give to my said wife, Lucy, Charles, Jenny and Rhoda, together with all my stock of horses, cattle, hogs and sheep, together with my household and kitchen furniture; all the

**Slaves—Emancipation—Rights of Issue.*—The principal case is cited in *Wood v. Humphreys*, 12 Gratt. 384, to the point that where a female slave is entitled to freedom *in futuro*, her increase, born while she continues in servitude, are slaves.

This was the decision in *Maria v. Surbaugh*, 2 Rand. 228, which has been recognized and confirmed in many subsequent cases. *Isaac v. West*, 6 Rand. 662; *Erskine v. Henry*, 9 Leigh 188; *Crawford v. Moses*, 10 Leigh 377; *Anderson v. Anderson*, 11 Leigh 616; *Henry v. Bradford*, 1 Rob. 53; *Ellis v. Jenny*, 2 Rob. 597; *Osborne v. Taylor*, 12 Gratt. 117. The principal case is cited for this proposition in *Taylor v. Cullins*, 12 Gratt. 306; *Wood v. Humphreys*, 12 Gratt. 384. See *foot-note* to *Osborne v. Taylor*, 12 Gratt. 117.

Same—Same—Consent of Personal Representative Withheld—Equity Jurisdiction.—The principal case is cited in *Reld v. Blackstone*, 14 Gratt. 306, for the proposition that the equity has jurisdiction, where a personal representative improperly withholds his assent to the freedom of slaves emancipated by will, or retains possession of them longer than is necessary. See also, *Patty v. Colin*, 1 Hen. & M. 519; *Dempsey v. Lawrence*, Gilm. 333; *Dunn v. Amer*, 1 Leigh 465; *Paup v. Mingo*, 4 Leigh 163; *Anderson v. Anderson*, 11 Leigh 616; *Peter v. Hargrave*, 5 Gratt. 12; *Jincey v. Winfield*, 9 Gratt. 708. See *foot-note* to *Peter v. Hargrave*, 5 Gratt. 12.

above to her during her life. I give to William Clarke, son of my brother Edward Clarke, after the death of my wife, the above-mentioned plantation, to him and his heirs forever. My desire is that the above-mentioned negroes, as they arrive at lawful age (after my wife's death), shall have their freedom; and if the said Charles should not be of age at my wife's death, my desire is that my brother Edward Clarke have the said Charles until he arrives to the age of twenty-one years; also my desire is that if the said Jenny and Rhoda should not be of age at my wife's death, that Benjamin Lennard have the said Jenny and Rhoda until they arrive to the age of twenty-one years. My desire is that my negro woman Rachael be sold for the payment of my debts. Also my desire is that at my wife's death all my estate, except land and negroes, be divided between my sister Sarah Bowry and Elizabeth Lennard daughter of Benjamin Lennard."

598 *The will concluded with the appointment of an executrix and executor, and they qualified as such.

In February or March 1833, the widow died. At her death there were living various descendants of Lucy, Jenny and Rhoda, born after the testator died. In a suit in chancery between the next of kin of the testator, a decree was made upon the principle that he died intestate as to the descendants so born between the time of his death and the death of his widow, under which decree a division was made.

A bill of injunction was afterwards filed in the circuit court of Charles City, by Jenny and other descendants, suing in forma pauperis for their freedom, against John Ellis and the other next of kin, some of whom it was alleged were about to remove some of the plaintiffs out of the commonwealth.

The plaintiffs contended that the will bestowed on Lucy, Jenny and Rhoda an immediate right to freedom, though it postponed the enjoyment thereof until they should respectively attain the age of 21 years, and until the death of the tenant for life: and they claimed that all the descendants of the said Lucy, Jenny and Rhoda, born after this right to freedom was given, and before the time of its enjoyment, were free also. The circuit court was of opinion that this claim was well founded, and, by a decree made the 13th of July 1843, declared the plaintiffs entitled to their freedom.

From which decree, on the petition of Ellis, an appeal was allowed.

The cause was argued by Taylor and Leigh for the appellant, and by Robert G. Scott for the appellees. For the appellant it was contended that this case was like that of Maria and others v. Surbaugh, 2 Rand. 228, which had been since adhered to in Crawford v. Moses, 10 Leigh 277, and Henry v. Bradford, 1 Rob. 53, and the principle of which is confirmed by

599 decisions in *Tennessee, Kentucky and

Maryland, as appears by M'Cutchen and others v. Marshall and others, 8 Peters 220. For the appellees it was insisted, that, taking the whole will together, this case was distinguishable from Maria and others v. Surbaugh, and that it fell more properly within the principle of Isaac v. West's ex'or, 6 Rand. 652. The subsequent cases of Elder v. Elder's ex'or, 4 Leigh 252, Erskine v. Henry and wife and others, 9 Leigh 188, and Anderson's ex'ors v. Anderson, 11 Leigh 616, were also relied on.

CABELL, P. The court is of opinion that this case is not distinguishable from that of Maria & others v. Surbaugh. The decree is therefore reversed, and the bill dismissed.

BROOKE, J. I entirely concur in the opinion delivered by the president for the whole court, that this case comes within the rule which governed the case of Maria & others v. Surbaugh. But as that rule has been sometimes questioned, I shall make some remarks upon it.

The rule is, that the issue shall follow the condition of the mother; a rule taken from the civil law, and adopted by one of our early statutes. The application of the rule in Maria & others v. Surbaugh was to the condition of the mother at the time the issue were born, and not to her prospective condition when she should arrive at the age of thirty-one years, at which period she was to be free. At the birth of the issue she was a slave to all intents and purposes. That was the condition the issue were to follow. To have extended to the issue the future condition of the mother would have been to place them in a condition the mother might never attain, as she might die before she arrived at the age of thirty-one, or she might be sold for the debts of the testator, and might never

600 be free. *The application of the rule

by the court to the actual condition of the mother at the birth of the issue avoided these contingencies, and was more humane as regarded the issue. There was no legal obligation on the master to take care of the issue, especially in cases in which the mother might be set free at an early age, and before he could be compensated by their labour for the expense of raising them. The property in a slave did not give the right to the master to create a new status of slavery unknown to the law. I differ with justice Thompson in what he says on this subject in his opinion in the case of M'Cutchen & others v. Marshall & others, 8 Peters 220, in which case the rule and application of it in Maria & others v. Surbaugh was followed. He says, that as a general proposition, it would seem a little extraordinary to contend that the owner of property is not at liberty to renounce his right to it, either absolutely or in a modified manner, as he may think proper: that as between the owner and his slave, it would require the most explicit prohibition by law. All this is undeniable as regards his property: but his slave would

still be a slave, unless he was authorized by law to manumit him, by renouncing all property in him. I think it one of the highest acts of sovereignty to exalt a slave into the rank of a freeman, as I have before said in one of these cases. It is true that at an early period there was a law prohibiting persons to emancipate their slaves. But it is not to be inferred that the right existed before. As soon as the mischief was felt, it was corrected by law. That maxim of the law, *sic utere tuo ut alienum non lœdas*, forbade it, until afterwards the legislature pointed out the mode of emancipation; which unfortunately has not been pursued according to its terms, or the cases of prospective emancipation would never have existed.

601 ***Matthews & Co. v. Woodson and Others.**

January, 1844, Richmond.

(Absent BROOKE and ALLEN, J.)

Husband and Wife*—Marriage Settlements—When Husband Mere Trustee for Wife—Case at Bar.—By deed of marriage settlement, personal property of the wife is conveyed to the husband for the exclusive benefit of the wife and her children during her life, and at her death for her issue, if any then living; and it is provided that in the event of the wife's dying without issue, the property shall be distributed in the same manner as if the deed had not been made. Upon the death of the husband without children (the wife still living), a creditor of the husband, at whose suit the latter took the oath of insolvency, claims that the husband has an interest in the property, which may be charged in the event of the wife's dying without issue. **Held**, the conveyance to the husband was merely in the character of trustee, and its effect was to intercept the marital rights of the husband, and preclude him from all beneficial interest during the existence of the trust; that the provision for the event of the wife's dying without issue looked not to the state of things existing at the time of the marriage, but to such as should exist at the death of the wife; that the purpose was in such event to divest the legal title conveyed to the husband as trustee, and let the personal estate stand upon the same footing as any other personal chattels of a wife not reduced into possession by the husband during the coverture; that if the husband had survived the wife, he would have had a right to administer upon her personal estate, and hold the same free from distribution; but in the event that actually occurred, of the survivorship of the wife, the husband at no time acquired any individual ownership of the subject.

By a deed made the 31st of December 1833, between Judith F. Christian of the one part and Charles Woodson of the other part, it was recited, that a marriage was intended to be solemnized between the said Charles Woodson and Judith F. Christian,

***Husband and Wife.**—The principal case is cited and approved in *Coatney v. Hopkins*, 14 W. Va. 354. See also, monographic note on "Husband and Wife" appended to *Cleland v. Watson*, 10 Gratt. 159.

and it had been agreed between them that the property of every description then owned

by the said Judith F. should, previous
602 to *the said intended marriage, be conveyed and settled in the manner and for the uses and purposes therein set forth; and it was thereby witnessed that the said Judith F. Christian conveyed unto the said Charles Woodson all her property, consisting of land, slaves and other personalty, in trust that "during the life of the said Judith F. the said Charles Woodson shall hold the said property, and every part thereof, for the sole and separate use and benefit of the said Judith F. and her children, if any she shall have, and apply the profits thereof to and for her sole and separate use, and the use and benefit, maintenance and support of her children, if any she shall have; and after the death of the said Judith F. the said Charles Woodson shall hold the same in trust for the use and benefit of such child or children as she may bear, and may be living at the time of her death; and if she shall have children, and any one or more should die during her life leaving issue, then such issue shall be entitled to the same portion of the estate as the parent would if still living; and after the death of the said Judith, if she shall leave children, the said estate shall be divided and delivered to them by the said trustee as soon as their interest may require it; and if the said Judith F. shall die without issue, then the said property shall be distributed in the same manner as if this conveyance had never been made." The deed then contained a clause declaring that the property, its increase and profits should be held by Woodson for the purposes aforesaid, and should not be liable for any debts or obligation of his, either before contracted or thereafter to be contracted, and that Woodson, notwithstanding the intended marriage and coverture of the said Judith F., should permit her to have the benefit of, use and enjoy the said property, its increase and profits, in common with her children if any, in like manner as if she were an unmarried woman, and that the benefits thereby secured to her she

603 was to have as might *suit her best, either in the use and service of the said property, or in the rents, hires or other profits thereof, if it should be thought most advisable to rent or hire it out. And Woodson covenanted that he would not subject the property, or its increase or profits, to the payment of his debts; that he would not sell the slaves or land without her consent, free and voluntary, first had in writing; and then that he would appropriate the proceeds to her sole and separate use, either by purchasing other property, to be conveyed to the same uses before set forth, or in such other way as might better suit the convenience and necessities of her and her children, if any she should have. The marriage took place soon after the deed was made, and the deed was immediately proved and recorded.

Soon afterwards, to wit, on the 25th of

January 1834, Woodson, being in custody under a writ of *capias ad respondendum* issued against him by William Matthews & Co. for a debt due them, confessed judgment in the clerk's office of Amherst, and thereupon took the oath of an insolvent debtor and was discharged.

Woodson had possession of the property specified in the deed until his death; but after that event the said Judith F. had the possession.

In March 1836, a bill was filed in the circuit court of Amherst by Matthews & Co. against the sheriff of Amherst, in whose custody Woodson was when he took the insolvent oath, and against Judith F. Woodson and Charles Woodson's administrator, insisting that when Charles Woodson took the insolvent oath, all his beneficial interest in the property passed by operation of law to the sheriff; suggesting that it would not be proper for the sheriff to sell the contingent interest of Woodson in the property without the direction of a court of equity; and asking that the question of property might be decided.

604 *The ground taken in the bill is, that Woodson had the legal title to the property, which he held in trust for the separate use of the wife and her children (if she should have any) during her life, and at her death to the use of the children if any, if not, the land to the use of the wife's heirs, and the personal property to his own use, he being the person that would be entitled to it if the deed had never been made.

The defendant Judith F. Woodson answered, that her object in making the conveyance was to secure the property therein conveyed, and its profits and increase, for her own exclusive use and benefit, and that of her children should she bear any, and if not, for the benefit (at her death) of her next of kin, to the entire exclusion of the said Charles Woodson, his creditors and legal representatives, in any event and under any circumstances whatsoever. And she insisted that such was the legitimate construction of the conveyance. She contended that the trust confided to the said Woodson by the said conveyance was a mere personal one, coupled with no interest, and terminated at his death; and that neither the personal representative of the said Woodson, his heirs, or his creditors, had any claim to or interest in the said trust fund, or any part thereof.

The circuit court, being of opinion that Woodson, under the marriage settlement, took no interest, present or future, vested or contingent, but was a mere trustee without the least beneficial interest, made a decree, on the 7th of September 1836, dismissing the bill of the plaintiffs, and adjudging them to pay the defendant Judith F. Woodson her costs.

On the petition of Matthews & Co. an appeal was allowed.

The cause was argued by C. Johnson for the appellants, and Leigh for the appellees.

605 *BALDWIN, J., delivered the following as the opinion of the court:

The court is of opinion that the effect, as well as the intent, of the deed of marriage settlement in the proceedings mentioned, was to intercept the marital rights of the husband in regard to the property thereby conveyed, and to preclude him from all beneficial interest in the subject during the existence of the trusts declared by the deed. The property of the wife was conveyed to the husband merely in his character of trustee, for the exclusive benefit of the wife and her children during her life, and at her death for her issue, if any then living. It is true the deed provides that in the event of the death of the wife without issue, then the property should be distributed in the same manner as if the conveyance had never been made. But this provision looked not to the state of things existing at the time of the marriage, but to such as should exist at the death of the wife. In the event of her death without issue, its purpose was to divest the legal title conveyed to the husband as trustee, and confer the property upon those then entitled by law in her right. The result would be the descent of the real estate to her heirs, and the succession to the personal estate of those designated by law: and the personal estate would stand upon the same footing as any other personal chattels of a wife not reduced into possession by the husband during the coverture. If the husband had survived the wife, he would have had a right to administer upon her personal estate, and hold the same free from distribution amongst her next of kin. But in the event that has actually occurred, of the survivorship of the wife, the husband at no time acquired any individual ownership of the subject. He had not, and could not have during the coverture, any possession of the property in his character of husband; and he moreover never acquired any beneficial interest therein.

606 *The court is therefore of opinion that the claim of the plaintiffs, as creditors of the husband, to subject a supposed contingent interest in the personal property conveyed by said deed, is without foundation; and that there is no error in the decree dismissing their bill.

Decree affirmed.

Mason & c. v. Moyers.*

January, 1844, Richmond.

(Absent CABELL, P., and STANARD, J.)

Landlord and Tenant—Lease—Fixed Period for Termination—Way-Growing Crops.‡—The principle set-

*For monographic note on Landlord and Tenant, see end of case.

†He had been counsel for the appellants.

‡Landlord and Tenant—Lease for Fixed Period—Way-Growing Crops.—At common law where land is leased for a certain number of years, and the period of its termination is fixed and certain, and the lease is silent as to who is entitled to the way-growing crop

tied in *Harris v. Carson*, 7 Leigh 632, that where a lease has a fixed period for its termination, and there is nothing in it purporting to give to the tenant the crops growing upon the land at the time of its termination, the tenant has no right to reap those crops after his lease terminates, again recognized.

Same—Rent—Apportionment in Equity—Case at Bar.—

Pending a suit in chancery by creditors for the sale of their debtor's land, the heirs of the debtor lease the land to a tenant for 8 years from the first of April, unless there shall in the mean time be a decree of sale, in which case the tenant is to give possession on the first of April after the decree. A rent is reserved of \$300, to be paid at the end of each year of the tenancy. And according to the true construction of the lease, the tenant has a right to the crops growing on the land at the end of every year for which rent is reserved. In June of the third year, the land is sold under a decree in the creditors' suit, and the tenant applies to the purchasers for permission to proceed with the cultivation of the land; but one of the purchasers, in presence of the other (who had been one of the lessors), refuses, declaring that if the tenant sows the land, he the purchaser will reap the crop; and in consequence of this refusal the tenant proceeds no farther with his preparations for a fall crop, though

607 he remains in possession *of the land the third year. A few days before the expiration of that year, the purchasers sue out an attachment against the tenant for \$300 rent to become due the first of April, upon the levy whereof the tenant gives to the sheriff bond and security for the rent. Judgment being obtained on this bond, the same is enjoined as to \$200, upon the bill of the tenant praying an abatement of the rent according to equity. HELD by two judges, 1. that under the circumstances, the purchasers were not warranted in assuming the relation of landlord for the purpose of coercing the payment of the \$300; 2. that there not having been an actual eviction, there was no remedy at law, and it was competent for the tenant to come into equity upon the ground that he was entitled to an abatement; and 3. the evidence justifying the allowance of \$200 as a fair abatement, the injunction should be perpetuated.

By articles of agreement under seal, bearing date the 21st of January 1824, between James Mason, Joseph Grantham and four others, heirs and devisees of William Rush

on the land at the end of the term, the off-going tenant is not entitled to the crop; but where the lease recognized the right to sow in the last year of the term, and the tenant is restricted to the cultivation of certain portions of the land and pays an equal annual rent for its use he has a right to reap the way-growing crop where the lease is silent as to who is entitled to it. *Kelley v. Todd*, 1 W. Va. 203, citing *Mason v. Moyers*, 2 Rob. 606. See also, citing the principal case, *Scott v. Scott*, 18 Gratt. 170.

Written Contracts—Custom Inconsistent with.—The principal case is cited in *Southwest Va. M. Co. v. Chase*, 95 Va. 56, 27 S. E. Rep. 826, to the point that a local custom or usage cannot be relied on where it is inconsistent with the terms of the written contract. See the principal case cited in *foot-note* to *Delaplane v. Crenshaw*, 15 Gratt. 467.

deceased, of the one part, and Jacob Moyers and Jacob Kroh of the other part, the said heirs and devisees leased to Moyers, at a rent of 300 dollars per annum, a tract of land in Berkeley county containing 306 acres, for the term of three years from the 1st day of April then next, "unless there should be a decree from the chancellor of the Winchester district court, or some other, for the sale of said land for the use and benefit of said Rush's creditors; in which case the said Moyers is to give possession at the expiration of each or any one year, after having a proper notice of such decree." The rent was to be paid annually at the expiration of each year of the term. The lease contained also, among other provisions, the following: "The said Moyers is not to farm more than one half the cleared land on said premises in a year; at any time he should give up said land, the one half is to be clear and ready for tillage. The said Moyers is also not to cut or destroy any timber on said land more than will answer for firewood for one house, except it be for the purpose of making rails to repair the fences on said land.

608 The said Moyers is also to give said Joseph Grantham and James Mason the privilege of the barn for the purpose of getting out their grain now sowed on said land." Kroh was party to the agreement as the surety of Moyers.

Moyers received possession of the land under the lease, and held the same until the expiration of his term.

On the 26th of June 1826, the land was sold under a decree in the chancery suit referred to in the lease, and James Mason (one of the lessors) and William Short became the purchasers.

On the 21st of March 1827, Mason and Short sued out an attachment against Moyers, for 300 dollars rent to become due on the 1st of April then next, upon the ground that they had just cause to suspect and verily believed that Moyers would remove his effects from the leased tenement before the said rent would become due. The attachment being levied by the sheriff of Berkeley on sundry goods and chattels of Moyers, a bond was executed to the said sheriff on the 23d of March 1827 by Moyers, with Simon Kroh and Jacob Kroh as his sureties, in the penalty of 650 dollars, conditioned for the payment of 300 dollars (the amount of the rent claimed) and all costs on the first day of April then next. On this bond an action was afterwards brought in the county court of Berkeley, in the name of Jacob Wever sheriff of Berkeley, (suing for the use of Mason and Short) against Moyers, Simon Kroh and Jacob Kroh the obligors. The action abated as to Moyers by the return of no inhabitant. In November 1827, a judgment was recovered against the defendants Simon Kroh and Jacob Kroh for the penalty of the bond, to be discharged by the payment of 300 dollars with interest from the first of April 1827 till paid, and the costs of suit.

In May 1828, Moyers and Simon and

Jacob Kroh filed a bill in chancery, in the county court of Berkeley, 609 *against Mason and Short. The facts above detailed were set forth in the bill; and it was further alleged, that immediately after the sale of the land under the decree, Moyers applied to Mason and Short, the purchasers, for permission to proceed with the cultivation of the farm, promising that the rent should be paid to them at the end of the year; that they both refused such permission, and forewarned him not to sow the land, stating that they meant to put it in grain themselves; that Moyers had at that time made considerable progress in preparing the land for the coming crops, and had hired two slaves to work upon the farm; that in consequence of being thus arrested in his farming operations, the labour he had previously expended was lost, and his hirelings remained useless upon his hands; that Mason afterwards told Moyers he might proceed with the cultivation of the land, but the season was then too far advanced to make the necessary preparations to commence seeding; that when the attachment was sued out and levied upon the property of Moyers, he remonstrated against the proceeding as highly iniquitous and unjust, because whatever rent might be due was already amply secured, because he had then no intention of removing from the state, and because he claimed a considerable reduction of the rent for the causes above-mentioned; but understanding that there was no alternative but to give bond for the rent or submit to a sale of his property, and being further advised that whatever reduction he claimed was a matter properly and solely cognizable in chancery, he executed a bond with security as required by the sheriff. The prayer was, that 200 dollars of the judgment recovered on the bond might be enjoined until the matter of the bill should be fully heard; that the rent might be apportioned according to the principles of equity and good conscience; and for general relief.

The injunction prayed for by the bill was awarded.

610 *The defendants put in separate answers, and each respondent positively denied that he had prevented Moyers from proceeding to cultivate the land and make his crop, or had forewarned him to not do so. Short farther stated, that immediately after the sale, he proposed to Moyers that he should go on with his corn crop, haul out the manure upon the fields, and do the fallowing; that defendants should put in the small grain; and that Moyers should only pay as rent, in lieu of the 300 dollars, one third of the crop of corn and oats: to which proposition Moyers voluntarily agreed; but having neglected to comply with his agreement, so that the land was not prepared for a fall crop, this respondent informed him that he would be looked to for the rent stipulated in the lease. Both respondents also demurred to the bill. The ground of demurrer assigned

by the respondent Mason was, that the complainants had a full and sufficient defence at law in the suit upon the bond, and ought not now to be entertained in equity.

The evidence adduced for the plaintiffs proved, in substance, the case made by the bill. It appeared, that on the day of the sale, Moyers applied to Mason and Short for permission to proceed with the cultivation of the farm; that Short, in the presence of Mason, refused, declaring that if Moyers should sow the land, he (Short) would reap the crop; and that Moyers, in consequence of this refusal, proceeded no farther with his preparations for a fall crop, though he remained in possession of the land until the expiration of his lease. There was evidence also, that a proposition such as that mentioned in the answer of Short was made by the defendants to Moyers; but there was no evidence that he accepted it. And two of the witnesses deposed, that under the circumstances attending the occupation of the land by Moyers for the last year of his term, 100 dollars would be a sufficient rent for that year.

611 *The county court of Berkeley overruled the demurrers to the bill, and at September term 1833 pronounced a decree perpetuating the injunction with costs. Mason and Short appealed to the circuit superior court of Berkeley; which, on the 6th of September 1834, affirmed the decree with costs.

On the petition of Mason and Short, a judge of the court of appeals allowed them an appeal from the decree of the circuit court.

The cause was argued here by R. C. Stanard for the appellants, and Cooke and C. Johnson for the appellees. But it is unnecessary to report the argument, as it did not embrace the point on which the decision of the court turned, namely, whether the relation of landlord and tenant subsisted between the appellants and Moyers.

BALDWIN, J. By the true construction of the lease between the heirs of Rush and the appellee Moyers, the latter was to be entitled to a waygoing crop, whether the term should expire by efflux of time, or at the end of a previous year, by reason of the event contemplated and provided for by the parties. This is apparent from the stipulation, that Moyers was not to farm "more than one half of the cleared land in a year," and that "at any time he should give up the land, the one half was to be clear," (that is, of a crop) "and ready for tillage." This stipulation could only have been founded upon the understanding that the tenant was to have the privilege of sowing a fall crop in one half of the cleared land, the last year of his term; for, as the term was not to expire, in any event, until the first of April, and the tenant was inhibited from cultivating more than one half of the cleared land at all in any one year, it follows that without such privilege the tenant would have had no benefit from the lease; *inasmuch as the inhibi-

tion would have prevented him from cultivating one half the cleared land, and the danger of not reaping what he might sow the other also: unless we suppose that the parties fell into the absurdity of providing that there should be no fall crop in the moiety which the tenant was not to cultivate at all. This construction of the lease is fortified by the circumstance that there was a fall crop in the land, belonging to previous tenants, at the commencement of the term, and by the pleadings in the cause; both bill and answer tacitly taking for granted the privilege of a fall crop under the lease, if the premises had not been sold under the decree.

By the sale under the decree, the purchasers Mason and Short acquired a title to the premises paramount to that of the lessors the heirs of Rush, and a right to the immediate possession, but none to the rent. The effect of the sale would have been to abrogate the lease and exonerate Moyers the tenant from the rent in question, but for the stipulation that the tenant was to surrender possession at the end of the year in which such a sale should be made; by force of which the lessors were bound to assure to the tenant the enjoyment of the premises for that year of the term. If Mason, one of the purchasers, had done this for himself and his co-lessors, the tenant would have been bound to the lessors for the rent of that year. But this he did not do. On the contrary, his copurchaser and coappellant Short prohibited Moyers from putting in a fall crop, and by the pretensions of both Mason and Short in regard to the crop of corn and oats, they asserted their right to the immediate possession of the premises. That right they did not enforce by an ouster of the tenant; but their right to reap the waygoing crop, in the event of its being put in by Moyers, they could, and, the evidence justifies the belief, would have enforced; and he acted discreetly in declining to give them

613 an opportunity *of doing so. Under these circumstances, they were not warranted in afterwards assuming towards Moyers the relation of landlord, for the purpose of coercing payment from him of the rent in question. If he could have defended the attachment on the ground that they were not his landlords, (as to which I express no opinion) and thereby defeated the recovery of the whole year's rent, he was not bound to do it. It was competent for him to place his defence upon the just and equitable ground that he was entitled to an apportionment or abatement of the rent. That was a defence which he could not make at law, in any form, or by any mode of proceeding, there not having been an actual eviction; and it could only be asserted in a court of equity. And the evidence in the cause is sufficient to justify the allowance that has been made of 200 dollars, as the fair and reasonable abatement of the rent.

I am therefore of opinion that there is no error in the decree of the circuit superior court affirming that of the county court.

ALLEN, J. It was held in *Harris v. Carson*, 7 Leigh 632, that where land was leased for a fixed and determinate period, the offgoing tenant was not entitled in virtue of any supposed custom to the waygoing crop. The tenant, in the case under consideration, claims relief in consequence of his being prevented from putting in a crop, which he could not have reaped until after the determination of his term. Unless such a right was secured to him by the contract of lease, the ground upon which his claim rests will fail him. By the contract, he rented from the heirs of Rush a farm for three years at the annual rent of 300 dollars, the term to commence on the 1st of April 1824. The lease was of an improved farm, and for cultivation; the tenant

being restrained from cutting timber 614 except for firewood *and repairs. At the commencement of his term, a portion of the land was in crop; for a privilege is reserved to the previous tenants to use the barn to get out their grain "then sowed on said land." The land is situated in a quarter of the state where small grain is the principal crop. And as it appears that the previous occupants had the privilege retained to them to secure their crop growing in the spring of 1824, when the term commenced; unless the tenant was entitled to the waygoing crop, he would have bound himself to pay a money rent of 300 dollars annually for three years, and have been entitled to but two crops of small grain from which to make it. Such a contract would have been unequal; and though it was competent for the parties to enter into it, the circumstances are entitled to some consideration in ascertaining the meaning of the terms actually contained in the written agreement. If the terms of the contract left the intention of the parties in more doubt than I think they do, those circumstances might tend to shew that the parties contracted in contemplation of the right of the tenant to take three crops in consideration of the three years rent. But it seems to me the words of the agreement can only be satisfied by the recognition of such a right. The lease restricts the tenant from cultivating more than one half of the cleared land in any one year; and then provides that at any time he should give up the land, the one half was to be clear and ready for tillage. Though the writing speaks of his giving up the land at any time, a previous part of it explains this, and shews that by this phrase the parties meant, at the end of any one year of the term, and not at any time within a year. Reference was made to a suit then depending to subject the land to sale, which might put an end to the lease before the three years expired; and it was provided that in the event of a sale, the lessee was to give up the premises at the end of the

615 *year he should receive notice. So that whether he held on to the end of the term or not, neither party contemplated a surrender of the possession at any other time than the 31st of March. The phrase "clear and fit for tillage" can only refer to

the ground being in crop; for the land was all cleared. The agreement to have one half clear and fit for tillage must mean, free from crop; and free from crop on the 1st of April of each year: thereby distinctly recognizing the right to have the other half then in culture. At that season of the year and in that country, the only crop which could have been in the ground, according to the ordinary course of husbandry, was the crop of small grain put in the preceding fall. If the contract recognized the right to sow, the right to reap would follow. And in this mode the tenant would be entitled to take the three crops, for which he was to pay the three years rent. The parties themselves, in the pleadings, appears to have put this construction on the contract; for the defendants do not, in their answers, deny the right of the tenant to the waygoing crop, but contend that they did not interfere with the enjoyment of it.

But if by the agreement the plaintiff was entitled to the waygoing crop, the next enquiry is, what has prevented him from enjoying it? He remained in possession until the end of his term. It was in his power to have sowed, and it would have been soon enough to have complained when the defendants should have actually interfered to prevent him from reaping. This objection, at first view, seemed to be conclusive; and I was inclined to think that whatever loss the tenant may have sustained, it resulted from his own omission, and he was entitled to no redress. A more careful attention to the facts in the record has satisfied me that this impression was incorrect. If there had been no change in the relation which the parties bore to each

other, and the original lessors or their assignees had remained the landlords, the objection would have been decisive against the plaintiff. For though the landlord, differing in opinion with the tenant as to the correct construction of the lease, might have warned him not to sow, and declared that if he did he should not reap, such a declaration, not accompanied by any act disturbing the tenant during his term, would have furnished no ground of complaint, much less a foundation on which to lay a claim for damages. But the relation of landlord and tenant according to the terms of the original agreement did not continue. When the lease was made, the parties to it contemplated the probability of the term being terminated before the three years expired, and they provided for that event. In fact it was so terminated; the land was sold under a decree, and the defendants were the purchasers. The lease was made pendente lite, and the purchasers came in under a title paramount to that of the tenant. As purchasers they had a right to the immediate possession, unless, indeed, the decree contained some provision to protect the tenant; and that does not appear, nor is it pretended. The tenant, as against the purchasers, claiming in that character and not as assignees in fact or in law of

the lessors, could assert no right under his agreement with the lessors. He became a mere occupier of the premises at the will of the purchasers, liable to be turned out at any moment. Under these circumstances he could not safely do any act against their consent. Though his construction of the agreement was correct, and, so far as his immediate lessors were concerned, he could have asserted his rights against them; against the defendants, purchasers of the property, it would have afforded him no protection. The tenant, in this state of things, called on the defendants immediately after their purchase, to know what he was to do. Then was the time, if the purchasers intended to permit him to hold according to the terms of the

617 *lease, to have announced their determination. But this was not done. They both warned him not to sow a fall crop, declaring that if he did they would reap it. One of the joint purchasers admits in his answer that they asserted their right to possession, and alleges an agreement with the plaintiff, that he was to go on with the fallowing; that they the purchasers would put in the fall crop; and that the plaintiff, instead of the 300 dollars rent, should only pay one third of the corn and oats. Such an agreement is not proved; but the allegation in the answer shews that they disavowed at that time the contract of lease, and insisted on their superior right to the possession. The tenant had made preparations for putting in the crop, but was prevented from doing so by the declarations of the defendants. Under the circumstances it was his duty not to seed against their consent. The land was theirs, and they had the right to the immediate possession, and to put in the fall crop themselves, as they asserted their intention to do. For some reason not appearing, they failed to put in the crop themselves, and when the term had nearly expired, they assumed the character of landlords, and claimed the benefit of the contract, although they had repudiated it in the first instance, and so deprived the plaintiff of the advantage he might have derived from it.

In this proceeding their conduct was oppressive. In fact they were not entitled to any portion of the rent reserved by the agreement. But the plaintiff acquiesced in their claim, either because he supposed it to be just, or because he thought that as purchasers they occupied the position of the original lessors. Acting under the mistaken impression that they were entitled to a portion of the rent reserved, he could not have defended himself on the trial of the attachment as to the residue, for it was not a case for apportionment, as there was no eviction from a part of the demised 618 premises. *It is indeed very questionable whether at law he could have made any defence. The common law writ of replevin, if it could have been maintained in such a case, was abrogated by the act of 1823. And the act of 1819 speaks of the writ of replevin only in cases where

goods are distrained for rent. In *Redford v. Winston*, 3 Rand. 148, two of the judges thought that replevin, either at the common law or under the statute, did not lie in the case of an attachment, and a third considered the question as of little consequence since the act of 1823; from which it may be inferred that he did not suppose it would lie under the statute, as that act merely abrogated the common law remedy. The case of *Redford v. Winston* decided, that as the law then stood, the tenant was precluded from making any defence which might call in question the truth of the landlord's oath; and one of the judges remarked, that for any wrong thereby done to the tenant, he was left to his action at law, or bill in equity to stay proceedings. The act of 1827 permits the tenant to appear and contest the landlord's right to sue out such attachment; and provides, that if it shall be made to appear that the lessor had no just cause to suspect the tenant would remove, the attached effects shall be restored. As the restoration of the attached effects in one aspect of the case, and the order of sale in the other, are the only proceedings prescribed, and there is no provision for ascertaining the amount of rent, it would seem that the landlord's grounds of suspicion that the tenant will remove can alone be contested under this act. But it is unnecessary to pursue this matter farther, or give any definite opinion upon it. In this case there was no eviction from any part of the demised premises, and there could therefore be no apportionment at law. And if the tenant could have appeared and defeated the whole claim by shewing that the defendants were "entitled to no portion of the rent, it is not for them to object that he has failed to do so, by acknowledging that they were entitled to a part of the rent, the effect of which acknowledgment was to deprive him of a legal defence as to the residue.

Nor do I conceive that this is an attempt to recover unliquidated damages in equity. The defendants, as purchasers, were not bound by the agreement. The plaintiff could maintain no action on it against them for any breach of the covenants. And since they had, as purchasers, a right to immediate possession, he could not have sued them for the exercise of it. If, after they had asserted a claim to the whole rent reserved by that agreement, they might be considered as having recognized the obligation the agreement imposed upon them, it is still not very apparent how the tenant could have proceeded against them at law. It seems to me, that he has pursued the only course which afforded a certain and adequate remedy, and that under the circumstances it was a proper case for the jurisdiction of a court of equity, to make a proper and just abatement, after the tenant admitted his liability as to part.

The evidence is satisfactory to prove that the abatement made was no more than he was justly entitled to.

I think, therefore, that both decrees were right and should be affirmed.

BROOKE, J. There is some difficulty, on the pleadings in this case, in ascertaining whether the defendants *Mason and Short* are to be treated as purchasers under the decree for the sale of the land, or as landlords according to the lease. If they are to be treated as purchasers under the decree, they certainly could not sue out the attachment on the ground that the tenant was about to remove his effects and leave the state. If they are to be treated as landlords and entitled to sue out an attachment, surely the plaintiff might
620 "at law, on the return of the attachment, have proved that he did not intend to remove his effects and leave the state, and that there was no ground for the charge, and have quashed the attachment. But the main charge in the bill is, that as tenant he was prevented from sowing a fall crop. If so, and he was entitled under the lease to sow the fall crop to be reaped the next summer, the injury could only be redressed by recovery of damages at law, and of consequence he could not come into the court of chancery. But was he entitled under the lease to sow a fall crop to be reaped the next year? His term was to end the April following, and I see nothing in the lease which entitled him to sow a fall crop to be reaped after that period. *Harris v. Carson*, 7 Leigh 632. As to understanding the lease differently by inferences from circumstances not found in it, (for example, the circumstance that the preceding tenants were allowed to sow a fall crop) I cannot think that such circumstances are to be looked to for any such purpose. Nor do I think that the tenant's being only allowed by the lease to cultivate half the cleared land gave him a right to sow a fall crop the last year of his term. If the lease permitted him to sow only two fall crops in the three years, he may have made a bad bargain, but I do not think I can make a better one for him upon inferences not warranted by the terms of the lease. But how was he prevented from sowing the fall crop the last year of his term? There is not proved any act of the defendants to prevent him. It is true there is some evidence that he was warned by the defendants not to sow a fall crop which he would not be permitted to reap; but whether this warning was given in the character of landlords or of purchasers does not appear.

It could not be in the character of landlords, as, though one of the purchasers, *James Mason*, was one of the lessors, he was united in the lease with several others, who are not parties in the case.
621 "and he alone was not authorized to warn the plaintiff off the land. It appears to me, the tenant might have had other motives for declining to sow a fall crop. He may have been advised that his lease did not allow him to do so; as he remained on the land till the end of his term. I think that according to the correct construction of the lease, the tenant was not authorized to sow a fall crop the last year of his term, though he was bound to pay

the rent: but if he was so authorized, he might have defeated the attachment at law by shewing that the defendants were not his landlords, and also have recovered damages for the seizure of his property. It is said he only wanted an apportionment of the rent, and for this he must come into the court of chancery. But his bill is only against the defendants as purchasers, and only one of them was a lessor. As purchasers, there is nothing in the record to entitle them to the rent under the lease. On that ground the decree is wrong. To apportion the rent, the court ought to have had before it all the lessors of the plaintiff, or their representatives, in order to ascertain what portion of the rent was due.

On these grounds I think the decree ought to be reversed; first, because, if the defendants are to be treated as purchasers, the remedy of the plaintiff was at law for the wrongful distress of his property; secondly, because, if they are to be treated as landlords, they alone were not entitled to seize the property of the tenant, not being entitled to the lease.

Decree affirmed.

LANDLORD AND TENANT.

I. Creation of Relation.

II. Kinds of Tenancies.

1. At Will or by Sufferance.
2. Year to Year.
3. For Life.
4. Joint Tenancies and Tenancies in Common.

III. Leases.

1. Requisites and Validity.
2. Covenants.
 - a. To Repair and Leave in Repair.
 - b. For Quiet Enjoyment.
 - c. Of Fitness of Premises.
3. Construction.

IV. Termination of Lease.

1. Agreement.
2. Attornment.
3. Cancellation.
4. Death of Lessor.
5. Forfeiture.
6. New Lease.
7. Notice of Adverse Claim.
8. Notice to Quit.
9. Purchase of Reversion.
10. Re-entry and Eviction.

V. Assignment of Lease.

VI. Crops and Improvements.

VII. Estoppel of Tenant.

1. Generally.
2. To Deny Landlord's Title.
3. Adverse Possession of Tenant.

VIII. Renewal in General.

IX. Rent.

1. In General.
2. Who Entitled to Rent.
3. Who Liable for Rent.
4. Apportionment and Abatement.
5. Interest.
6. Lien.
7. Payment.
8. Set-Off.
9. Recovery.

- a. Assumpsit.
- b. Attachment.
- c. Covenant.
- d. Debt.
- e. Distress.

(1) Right to Distrain.

(2) Property Liable.

(3) Proceedings to Distrain.

(a) Constitutionality.

(b) Warrant and Affidavit.

(c) Hearing and Determination.

(d) Levy.

(e) Sale.

(f) Bonds.

(4) Wrongful Distress.

X. Actions in General.

1. Landlord against Tenant.

a. To Recover Possession.

b. To Recover Damages.

c. For Injunction.

2. Landlord against Third Persons.

3. Third Persons against Landlord.

4. Tenant against Landlord.

5. Tenant against Third Persons.

XI. Evidence.

I. CREATION OF RELATION.

No Particular Words Necessary.—No set form of words is necessary to constitute a lease, and in doubtful cases the nature and effect of an instrument must be determined in accordance with the intention of the parties, which may be collected from the whole instrument. *Upper Appomattox Co. v. Hamilton*, 88 Va. 819, 2 S. E. Rep. 196; *Mickle v. Lawrence*, 5 Rand. 571. So a contract between two persons that one should have certain land and negroes during the life of the other, paying annually a certain sum therefor, is not a sale but is sufficient to constitute a lease. *Mickle v. Lawrence*, 5 Rand. 571.

By Payment of Rent.—The relation of landlord and tenant may be proved by very slight evidence, and it has been held that the payment of rent by an alleged tenant to the owner is sufficient evidence to establish the relation. *Virginia, etc., Co. v. Hoover*, 83 Va. 449, 4 S. E. Rep. 689.

Reservation of Part of Crop Does Not Create.—A party in possession of land, but having no title thereto, was authorized by the owner to rent it on shares. This was not considered a lease as the reservation of a part of the crop was not incident to the reversion, and thus gave no right of distress. *Lowe v. Miller*, 3 Gratt. 305, 46 Am. Dec. 188.

The owner of land, furnishing another with necessities for the support of his family, contracts with him for the raising of crops, and agrees to pay him one-half of the crop raised for his services. It is agreed that the owner shall reimburse himself out of the other share of the crop for the advances made. This contract does not make the parties landlord and tenant. It is only a method of paying for services. *Parrish v. Com.*, 81 Va. 1.

Occupancy by Permission of Owner.—It may be stated as a general rule that the law will imply a tenancy whenever there is an ownership of land on the one hand, and an occupation by permission on the other, for in all of such cases it will be presumed that the occupant intended to pay for the use of the premises. *Hanks v. Price*, 32 Gratt. 107.

Mere occupancy of land does not necessarily imply the relation of landlord and tenant, yet if the occupant acknowledge the title of the owner, and

continue to occupy the land by his leave and license, he ceases to be a mere trespasser, and his possession is that of him whose title he has acknowledged. He cannot, therefore, by afterwards acknowledging the title of another be considered, consistently with good faith and fair dealing, to hold under the latter adversely to the former until after notice in some way to the claimant, or those claiming under him, whose title he first acknowledged. *Wilcher v. Robertson*, 78 Va. 602.

Acceptance of Lease by One in Possession under Contract to Purchase.—The possession under a contract of purchase may be determined by the acceptance of a lease, and thereafter the relation of landlord and tenant exists between the parties. *Locke v. Frasher*, 79 Va. 409.

By Occupancy of One Joint Lessee.—Where one of six joint lessees of land enters upon and occupies the premises in accordance with the agreement made with the owner and signed by all, the fact that the remaining lessees do not enter upon the premises does not prevent the occupancy of the one from being the occupancy of all, and they are all lessees of the landlord regardless of their relations. *Inter se*. *Howell v. Behler*, 41 W. Va. 610, 24 S. E. Rep. 646.

II KINDS OF TENANCIES.

1. AT WILL OR BY SUFFERANCE.

What Constitutes.—Where a tenant agrees by writing under seal that he will surrender possession when requested by purchaser, he becomes a mere tenant at will or by sufferance. *Harrison v. Middleton*, 11 Gratt. 527.

Same—Admission in Bill and Answer.—Where the parties to a mining lease agree that it was intended as a lease at will, as admitted by their bill and answer, the lease must be so treated, and the institution of a suit by the lessor determines the lease. *Oglesby v. Hughes*, 96 Va. 115, 30 S. E. Rep. 439.

Same—Executory Lease.—An executory gas and oil lease, which provides for its surrender at any time without payment of rent or fulfillment of any of its covenants on the part of the lessee, creates a mere right of entry at will, which may be determined at any time by the lessor before it is executed by the lessee. *Eclipse Oil Co. v. South Penn Oil Co.*, 47 W. Va. 84, 24 S. E. Rep. 923.

Both Parties May Terminate Lease.—It is well settled that a lease, which is at the will of one of the parties, is equally at the will of the other. One is no more and no further bound than the other. The lessee and lessor both have the right to terminate the tenancy at will. *Cowan v. Radford Iron Co.*, 83 Va. 547, 8 S. E. Rep. 120; *Eclipse Oil Co. v. South Penn Oil Co.*, 47 W. Va. 84, 24 S. E. Rep. 923.

Possession of a Mortgagor or Assignee.—The possession of a mortgagor or his assignee is not adverse to the mortgagee, and they are tenants at will, unless the assignee takes a conveyance without notice. *Newman v. Chapman*, 2 Rand. 93, 14 Am. Dec. 766. See monographic note on "Mortgages" appended to *Forkner v. Stuart*, 6 Gratt. 197.

Possession of Grantor in Trust Deed.—The possession of a grantor in a deed of trust, after the execution of the deed, is not adverse to the title of the trustee, but he holds as his tenant at will or sufferance, and he can be ejected without notice; or the trust subject may be conveyed to a purchaser, whose tenant at will or sufferance the grantor then becomes, by whom he may also be ejected without notice. *Creigh v. Henson*, 10 Gratt. 231. See monographic note on "Deeds of Trust."

Right of Landlord to Peaceably Enter—Trespass.—In a tenancy at will a landlord is entitled to peaceably enter upon the premises, but this will not justify an illegal search for stolen goods. Such acts make him a trespasser *ab initio*. *Faulkner v. Alderman*, Gilm. 231.

2. YEAR TO YEAR.

Holding Over—Receipt of Rent—Inference.—Where a tenant holds over after the expiration of his lease, and the lessor receives rent accruing subsequently to the expiration of the term, or does any act, from which it may be inferred that he intends to recognize him still as tenant, he becomes thereby a tenant from year to year upon the conditions of the original lease. *Allen v. Bartlett*, 20 W. Va. 46; *Emerick v. Tavener*, 9 Gratt. 230, 58 Am. Dec. 217; *Williamson v. Paxton*, 18 Gratt. 475. Otherwise, he is merely a tenant at sufferance, not entitled to notice to quit. *Emerick v. Tavener*, 9 Gratt. 230.

Same—Absence of New Agreement—Presumption.—Where a landlord allows a tenant for a term of years to hold over after the expiration of his term, without any new agreement, he becomes a tenant from year to year, and the law presumes the holding to be upon the terms of the former lease so far as they are applicable to the new situation. *Peirce v. Grice*, 93 Va. 763, 24 S. E. Rep. 392; *King v. Wilson*, 98 Va. 259, 35 S. E. Rep. 727; *Voss v. King*, 38 W. Va. 607, 18 S. E. Rep. 762.

But the presumption of law that a tenant holding over with his landlord's permission is a tenant from year to year may be repelled by proof that he holds over in some other character, or for some other purpose. *Williamson v. Paxton*, 18 Gratt. 475.

Same—Option of Landlord.—A tenant for years, who holds over after the expiration of his term, without paying rent or otherwise acknowledging a continuance of the tenancy, becomes either a trespasser or a tenant, at the option of the landlord. *Voss v. King*, 38 W. Va. 607, 18 S. E. Rep. 762.

Extinguished by New Contract.—A tenant from year to year, who has been paying an annual ground rent of six dollars, which was worth much more, and who had built a meatshop on the land, under an agreement that he might remove all buildings erected by himself, executed the following instrument: "On or before the first day of January 1899, I promise to pay to" the lessor "the sum of twenty-five dollars, for rent of beef shop on Main street from Jan. 1, 1898, to Jan. 1, 1899. Given under my hand this 17th day of May, 1898." This instrument established such a new contract as would extinguish the tenancy from year to year. *Edwards v. Hale*, 37 W. Va. 193, 16 S. E. Rep. 487.

Sale by Trustee—Stipulations as to Purchaser's Possession—Rent.—The trustee for a married woman, with power to sell, sells land by contract, which provides for the payment in cash of a certain sum, and if the purchaser fail by a certain day to do a certain act, that he shall hold the land for a year, and the cash payment shall be the rent for that year. The purchaser fails to do the act, holds as tenant for the year, and then holds over. This does not constitute him a tenant from year to year, and so entitle him to notice to quit; and neither does the payment of rent for the second year have that effect. *Williamson v. Paxton*, 18 Gratt. 475.

Stipulation to Give Tenant Preference Each Year.—The agreement for the renewal of a lease provides that the tenant is to get the house, at the price stated therein, for one year after his present year expires, and is to have the preference each succeed-

ing year thereafter. It was held that this did not create a tenancy from year to year, so as to entitle the tenant to the legal notice to quit. *Crawford v. Morris*, 5 Gratt. 90.

3. FOR LIFE.

Rights—Open Mines.—A tenant for life, unless restrained by covenant or agreement, has a right to the full enjoyment and use of the land and all its profits during his estate therein, including mines of oil or gas open when his estate began, or lawfully opened and worked during the existence of such estate. *Koen v. Bartlett*, 41 W. Va. 569, 28 S. E. Rep. 664. But he cannot open new ones. *Williamson v. Jones*, 43 W. Va. 562, 27 S. E. Rep. 411.

Liability to Account.—A tenant for life in sole possession claiming exclusive ownership, taking petroleum oil, and converting it to his exclusive use, is liable to account on the basis of rents and profits, not for annual rental. *Williamson v. Jones*, 43 W. Va. 562, 27 S. E. Rep. 411.

Liable for Waste.—It is waste in a tenant for life to take petroleum oil from land, for which he is liable to the reversioner or remainderman in fee. *Williamson v. Jones*, 43 W. Va. 562, 27 S. E. Rep. 411.

Same—Jurisdiction.—A remainderman or reversioner has jurisdiction in equity against a tenant for life to enjoin waste, and to have compensation for the damages, the same as if sued at law, to avoid multiplicity of suits. *Williamson v. Jones*, 43 W. Va. 562, 27 S. E. Rep. 411.

Same—Right to Proceed.—A tenant for life, who by waste has severed from the realty petroleum oil, which is a part of it, has no right to have the proceeds invested so that he may have interest therein during the life estate, but the proceeds go at once to the owner of the next vested estate of inheritance. *Williamson v. Jones*, 43 W. Va. 562, 27 S. E. Rep. 411.

Realty Going to Loss—Protection in Equity.—Where there is a life tenant, and timber or other things which is part of the realty going to loss, and imperative need calls for it, equity may cause it to be cut or otherwise be secured for the remainderman or reversioner, if it do no harm to the life tenant, or he be compensated. *Williamson v. Jones*, 43 W. Va. 562, 27 S. E. Rep. 411.

Oil under Tract—Sale—Royalty.—The petroleum oil underlying a tract of land which has been devised to a life tenant who is in possession, and which is to go to certain infant children after the decease of the life tenant, may be sold upon the petition of the guardian of the infants under provisions of ch. 82 of the Code, or may be leased; and the life tenant will be entitled to the interest on the royalty during the continuance of the life estate, and then the residue or corpus of the realty will be paid to the remaindermen. *Wilson v. Youst*, 43 W. Va. 826, 28 S. E. Rep. 781.

4. JOINT TENANCIES AND TENANCIES IN COMMON.—See monographic note on "Joint Tenants and Tenants in Common."

Joint Tenancy—Additional Lease by One—Presumption.—In order to cure a defect in a joint lease, one of the lessees takes an additional lease in his own name. It will be presumed that he is acting for the benefit of all, and that the additional lease is merely a confirmation of the first lease. *Weaver v. Akin*, 48 W. Va. 456, 37 S. E. Rep. 600.

Same—Same—Notice of Adverse Claim.—Where one of several joint lessees takes an additional lease in his own name to cure a defect in the first lease, before he can deprive the other colessees of the benefits of the additional lease, he must show that after

they had notice that he intended to hold adversely to them, they delayed for an unreasonable time in accepting the terms of the subsequent lease. *Weaver v. Akin*, 48 W. Va. 456, 37 S. E. Rep. 600.

Same—Same—Same—Dealings Must Be Fair.—If one of several joint owners of a lease, who has cured a defect in the lease by taking a subsequent lease in his own name, for eleven months by his actions leads the rest of the lessees to believe that he has no intention of asserting the second lease in avoidance of the first, but during this time the property is developed in common and mutually enjoyed, he cannot suddenly and without reasonable notice to them, claim exclusive ownership under the second lease. The dealings between them must be fair and open, and free from all deception. *Weaver v. Akin*, 48 W. Va. 456, 37 S. E. Rep. 600.

Tenancy in Common—Liability for Waste.—It is waste in a tenant in common to take petroleum oil from land, for which he is liable to his cotenants to the extent of their right in the land. *Williamson v. Jones*, 43 W. Va. 562, 27 S. E. Rep. 411. See further, monographic note on "Joint Tenants and Tenants in Common."

III. LEASES.

1. REQUISITES AND VALIDITY.

Certainty in Description.—Lease is not void for uncertainty in description which described the premises as a tract adjoining a certain farm, and formerly occupied by a certain person, containing a specified number of acres. *Emerick v. Tavenor*, 9 Gratt. 230.

Words of Present Demise—Future Lease Intended.—An agreement to lease a house for a stated time, rental and purpose, concludes with the statement: "The above to be covered by a regular lease subject to approval by all parties." This was held not a binding contract, as words of present demise, however strong, will not constitute a lease, if it can be clearly inferred from the writing that the parties had in mind a future lease. *Boisseau v. Fuller*, 96 Va. 45, 30 S. E. Rep. 457.

Privilege of Additional Lease on Giving Notice.—Where a lease is made for five years, with the privilege at the end of the term to extend the lease for an additional five years by giving six months' notice, this does not constitute a present lease for ten years. *James v. Kibler*, 94 Va. 165, 28 S. E. Rep. 417.

Joint Lease—Separate Tracts—Mine on One.—A husband, owning a tract of land containing 153 acres, and his wife, owning 35¼ acres, leased the whole as one tract of 187¼ acres for oil and gas purposes, and the rent was paid to both, and receipted for by them jointly, and the royalty was put aside to their joint credit. Although the well was bored upon the husband's tract, this was held a joint lease of one tract of land. *Harness v. Eastern Oil Co.*, 49 W. Va. 232, 38 S. E. Rep. 662.

Right to Use Wharf a Covenant.—In a lease of a lumber yard, and a wharf extending along the entire front of the yard and building adjoining, which stipulated that a third party should have control of the entire wharf, subject to the rights of the tenant of the yard to use that part of the wharf along the lumber yard for his business, the provision in the lease of the warehouse relative to the wharf was not a demise of the wharf but a covenant. *Tunis v. Grandy*, 22 Gratt. 109.

Mining Lease—Privilege of Searching, Mining and Erecting Buildings.—Where a grantor gives to the grantee the right and privilege of entering upon a tract of land for the purpose of searching for min-

erals and of mining to such an extent as he might desire, the lessee to have the right to erect and maintain sufficient buildings and machinery to work the mines, using the necessary timber and water for this purpose, the lessee agreeing to pay \$25 a year if the minerals were not actually mined, and to pay ten cents per ton for all ores mined and shipped during the time which the mine shall be worked, the agreement was termed therein a "lease" and was to last for ninety-nine years. This was held to constitute a lease and not a mere license which was revocable. *Young v. Ellis*, 91 Va. 297, 21 S. E. Rep. 480.

A conveyance of the right of searching and digging and working for gold, or other minerals upon the grantor's land, which was to continue as long as the grantees deemed it worthy of searching for the minerals, was held to constitute an unassignable lease in *Hodgson v. Perkins*, 84 Va. 706, 5 S. E. Rep. 710.

Same—Right of Way for Profits of Mine.—Where a land owner by an agreement assigns to another all his rights to all mineral on his lands "to farm," with the provision that the assignee shall have the right of way over the lands provided he pays to the land owner a certain per cent. of the profits he makes from mining, constitutes a mining lease, which is forfeited when the lessee fails to do the mining in a reasonable time. *Sbenandoah, etc., Co. v. Hise*, 92 Va. 238, 23 S. E. Rep. 308.

Same—Executory—Covenants Not Binding—Right of Entry.—An executory oil and gas lease, which does not bind the lessees to carry out its covenants, but reserves to them the right to defeat the same at any time, and relieve themselves from the payment of any consideration therefor, is invalid to create any estate other than the mere right of entry, which is subject to termination at the will of either party. *Trees v. Eclipse Oil Co.*, 47 W. Va. 107, 34 S. E. Rep. 933.

2. COVENANTS.—See monographic *note* on "Covenants" appended to *Todd v. Summers*, 2 Gratt. 167.

a. TO REPAIR AND LEAVE IN REPAIR.

Specified Repairs Enumerated—Property Wholly Destroyed.—In a deed of lease, immediately after the covenant to keep the buildings in repair, and separated from it only by a semicolon, is the provision: "That it will replace, at its expense, all glass broken during its tenancy; that any damage caused by the bursting of water pipes, from failure to turn off water in cold weather, will be repaired at the expense of the lessee; that it will leave the property in good repair." This provision was construed to apply merely to the repairs enumerated, and not to a destruction of the property. *Richmond Ice Co. v. Crystal Ice Co.*, 99 Va. 239, 37 S. E. Rep. 861.

Damage by Unavoidable Accidents Excepted.—A written lease of a building provided that the lessee should keep the same in repair except as to "unavoidable accidents, and natural wear and tear." Held, in an action of assumpsit by the lessee against the lessor to recover for the failure of the latter to repair damages caused by unavoidable accident, that, there being no express covenant that the lessor would make such repairs, the lessee could not recover. *Kline v. McLain*, 33 W. Va. 32, 10 S. E. Rep. 11, 5 L. R. A. 400.

When a written lease of property provides that the lessee shall keep the same in repair, except as to unavoidable accidents and natural wear and tear, the law will not imply a contract on the part

of the lessor to repair damages caused by unavoidable accidents. *Clifton v. Montague*, 40 W. Va. 207, 21 S. E. Rep. 858, 52 Am. St. Rep. 872, 33 L. R. A. 469.

Mill Destroyed by Movement of Ice.—Where a lessee of a mill covenanted to leave it in repair, and it was carried away by a sudden and unexpected movement of ice, it was held that he was bound to pay the rents, and perform the covenants. *Ross v. Overton*, 3 Call 309.

Mill Destroyed by Accidental Fire.—A lot was leased for four years with the agreement to return it to the plaintiff with all of its appurtenances. At the time of the lease a gristmill and carding machine were on the premises, and were destroyed by fire from some unknown origin during the term. It was held that the contract was not binding on the tenant to rebuild. *Maggott v. Hansbarger*, 8 Leigh 582.

Agreement to Make Repairs—No Time Specified.—Where the premises are out of repair at the time of the lease, and the tenant agrees to make certain repairs, without specifying when they are to be made, the tenant has until the end of the lease to make them, unless there is something in the nature of the repairs requiring them to be made sooner. *Colhoun v. Wilson*, 27 Gratt. 639.

Repairs to Fences.—In the absence of any special covenant requiring the landlord to maintain the fences on leased land, it is incumbent on the tenant to keep the said fences in repair. *Hoyleman v. Kanawha, etc., R. Co.*, 33 W. Va. 489, 10 S. E. Rep. 816.

Statutory Modification.—The rigorous construction put upon covenants to repair at common law has been modified by statutes in Virginia and West Virginia. See § 2455, Va. Code, and § 22, ch. 72, W. Va. Code; also, monographic *note* on "Covenants" appended to *Todd v. Summers*, 2 Gratt. 167, where the subject of covenants is fully treated.

b. FOR QUIET ENJOYMENT.

Not Implied from Words of Lease.—Where the defendant by an indenture rented and leased to the plaintiff a tract of land, to have and hold the same so long as she should live, and the defendant entered on the possession of the plaintiff, expelled and removed him, in an action of covenant thereon, it was held on a general demurrer no covenant for quiet enjoyment was implied from the words "rent" and "lease." *Black v. Gilmore*, 9 Leigh 446, 33 Am. Dec. 258.

In a conveyance of freehold estates words of lease do not amount to a covenant for quiet enjoyment. *Black v. Gilmore*, 9 Leigh 446, 33 Am. Dec. 258.

c. OF FITNESS OF PREMISES.—There is no implied covenant that demised premises are suitable or fit for the particular use for which they are intended by the tenant. Thus where a party in a written lease describes the property as "the premises known as the 'Bedford Salt Furnace Property,' together with all six salt wells, tools and fixtures of the same," there is no implied covenant on the part of the lessor that there are on said premises six salt wells of any particular productive capacity, or suitable for the purposes for which they are leased. *Clifton v. Montague*, 40 W. Va. 207, 21 S. E. Rep. 858, 52 Am. St. Rep. 872, 33 L. R. A. 449.

3. CONSTRUCTION.

Agreement to Pay Taxes and Dues—Assessment for Street.—A tenant agreed to pay, in addition to the rent, "all taxes and other public dues in any manner accruing." Assessments for paving the street

in front of the property was held not to be included in the covenants of the lease, and when the lessee had paid such assessments he was entitled to recover the amount so paid of his landlord. *Bolling v. Stokes*, 2 Leigh 178, 21 Am. Dec. 606.

Lease of Railroad—Implied Agreement to Operate.—A branch railroad was built with the aid of county subscriptions for the purpose of giving the county seat railroad connections and conveniences. The road was leased, the lessor agreed to furnish the rolling stock, and the lessee agreed to pay from the annual receipts derived from the operation of the road, the running expenses, the annual rental, the dividends to the stockholders, and to return the line at the expiration of the lease in as good repair as it was when it was received. Although there was no express covenant requiring the operation of the road, the obligation of the lessee to do so for the term of the lease is a necessary implication. *Southern Railway Co. v. Franklin, etc.*, Ry. Co., 96 Va. 608, 32 S. E. Rep. 485.

Failure to Pay Rent an "Abandonment"—Option of Lessor.—The provision in a lease that the failure to pay the rental within a certain time shall be considered as an "abandonment," makes the lease void at the option of the lessor on such failure, only when the covenant was intended for his benefit, and he avails himself of the privilege. *Bowyer v. Seymour*, 18 W. Va. 12.

Mining Lease—Royalty.—A tract of land is leased for the purpose of mining coal thereon, and is assigned. The lessors reserved as royalty ten cents for every ton passing over a certain screen, and five cents a ton for every ton passing through the screen. The lease also provides that the minimum rental should be \$3,000 regardless of the amount of coal mined. A distress warrant being sworn out, and a receiver appointed, the works were closed, with five months' rental unpaid, for which the royalty on the coal actually mined amounted to \$500 for the five months, which was decreed to be paid to the lessors. It was held on appeal that the lessors were entitled to five-twelfths of \$3,000, which should have been decreed to them for unpaid royalty. *Coaldale, etc., Co. v. Clark*, 43 W. Va. 84, 27 S. E. Rep. 204.

Same—Same—Rights of Life Tenants and Owners of Fee.—An owner in fee simple makes an oil and gas lease for a term of five years, and as much longer as the premises are operated for oil and gas, or the rent for failure to commence operating is paid, for, among other things, one-eighth part of all oil produced and saved, to be delivered in the pipe lines to the credit of the lessor. The lessor then sells and conveys one undivided moiety or the one-sixteenth part of all the oil produced and saved. Afterwards, but before any oil is bored for or produced, the lessor sells, grants, and conveys the land in fee simple to his six children, to each one a part, by metes and bounds, in consideration of natural love and affection, by deed of general warranty, "except that the party of the second part takes the same subject to any lease for oil or gas made by the party of the first part or any sale of royalty for oil or gas made by him;" and, by the same deed, he retains full control of said land in all respects, and for all purposes, during his lifetime. Soon thereafter oil wells are bored, and oil produced, saved, and put in the pipe lines in large quantities. *Held*, that one-eighth royalty goes of right to the tenant for life and his grantees, during the continuance of the estate for life, and not to the owners in fee of the es-

tate expectant thereon. *Koen v. Bartlett*, 41 W. Va. 559, 33 S. E. Rep. 664.

Same—Same—Reservation in Grantor.—Land was conveyed in fee, but the grantors reserved to themselves as royalty, one-sixteenth of all oil and petroleum underlying the tract. The grantee leased the exclusive right to drill for oil and gas, reserving one-eighth of all petroleum obtained from the premises. The lease was construed to reserve to the lessor one-eighth of the oil vested in the lessor, and was exclusive of the one-sixteenth, which was outstanding in the original grantor. *Harris v. Cobb*, 49 W. Va. 350, 38 S. E. Rep. 559.

Same—Same—Perpetuation of Lease.—A lease of land for oil and gas purposes contains the following provision: "Term of lease two years, and as much longer as oil or gas is found in paying quantities. If gas only is found, second party agrees to pay \$250 each year, quarterly in advance, for the product of each well while the same is being used off the premises." This was construed to mean that the production in paying quantities of either oil or gas, and the payment of the rent or royalty as agreed upon, would perpetuate the lease during the time of such production. *Harness v. Eastern Oil Co.*, 49 W. Va. 232, 38 S. E. Rep. 602.

Same—Same—Agreement to Mine Certain Average of Ten Years—Termination.—The mining rights in a tract of land was leased for ten years, the lessees agreeing to pay twenty-five cents a ton for all ore mined, and to remove not less than an average of 12,000 tons per year. They paid according to agreement \$3000 in advance, which was to be reimbursed by the royalties on the first 12,000 tons mined. This was construed to require an average of 12,000 a year, and not that such amount should be mined each year, and where the lessor had ended the lease at will in sixteen months after its commencement, the lessee could recover whatever amount the advancement exceeded the royalties. *Oglesby v. Hughes*, 96 Va. 115, 30 S. E. Rep. 439.

Same—Sale—Interest of Parties.—An oil lease investing the lessee with the right to remove all the oil in place in the premises, in consideration of his giving the lessors a certain per cent. thereof, is in legal effect, a sale of a portion of land, and the proceeds represent the respective interests of the lessors in the premises. *Wilson v. Youst*, 43 W. Va. 826, 28 S. E. Rep. 781.

Same—Conditional.—An oil lease for oil and gas purposes is a conveyance or sale of an interest in land, conditional and contingent on the discovery and reduction to possession of the oil or gas. *Lawson v. Kirchner*, 50 W. Va. 344, 40 S. E. Rep. 344.

Same—Right of Exploration.—A lease for the purpose of operating for oil and gas for the period of five years, and so much longer as oil or gas is found in paying quantities, on no other consideration than prospective oil royalty and gas rental, vests no present title in the lessee except the mere right of exploration; but the title thereto, both as to the period of five years and the time thereafter, remains inchoate and contingent on the finding, under the explorations provided for in such lease, oil and gas in paying quantities. And the completion of a non-productive well, though at great expense, vests no title in the lessee. Because such lease must be construed as a whole, and, if there is no provision therein contained requiring the boring of another well after the first unsuccessful attempt is completed and abandoned, the lease becomes invalid,

and of no binding force as to any of its provisions. *Steelsmith v. Gartlan*, 45 W. Va. 37, 29 S. E. Rep. 978.

Mortgagee of Term—Liability on Covenants.—A mortgagee of a term of years, though he never enters into possession, is bound to perform the covenants of the lease from the date of the mortgage, like any other purchaser. *Farmers Bank v. Mutual Assur. Soc.*, 4 Leigh 69.

Option to Renew on Conditions—Holding Over—Amount of Rent.—Land was leased for a period of ten years, with an option for an additional period, provided the lessee should build thereon a store-room of a certain value, but if the lease was not continued after the expiration of the first term, then the lessor should pay the lessee the full value of the building. After the expiration of the second term the lessee continued in possession without any additional agreement. In an action for the use of the building the lessee was held only chargeable for the amount of annual rent as fixed by the original agreement which had been paid, and verdict was for defendant. *Peirce v. Grice*, 93 Va. 768, 24 S. E. Rep. 392.

Lease for Oil Purposes Only—Tenant Not Accountable for Gas from Same Wells.—A landlord leased to his tenant certain premises for the purpose of mining and taking carbon oil therefrom at a fixed royalty and for no other purpose; the tenant opened a well which produced both oil and hydro-carbon gas, the former in small quantities pumped from the well for which the royalty is paid, and the latter in large quantities, issuing by its own force from the well, and which is separated from the oil by the tenant, and by means of pipes conducted beyond the leased premises where it is either sold or appropriated by the tenant for his own use without accounting to the landlord therefor. In a suit brought by the landlord for an account and the value of said gas, held, the tenant is not accountable to the landlord for said gas or its value. *Wood County Petroleum Co. v. W. Va. Transportation Co.*, 28 W. Va. 210.

IV. TERMINATION OF LEASE.

1. AGREEMENT.

Renders Notice Unnecessary.—Where a lease provides that for nonpayment of rent it shall be forfeited and surrendered in ten days' notice, and the lessor demands rent in arrear, and the lessee does not demand notice and pay, but agrees to end the term and surrender his lease, though he has no other notice, the tenancy is thereby ended, and the lessor becomes entitled to possession. *Clator v. Otto*, 38 W. Va. 89, 18 S. E. Rep. 378.

Agreement to Surrender Possession on Sale—Assignment.—Land was leased for a term of ten years for the annual rental of \$150, with the proviso that if the lessor should sell during the lease the lessee should give possession at the end of the current year. The lessee assigned the lease with the same provision, and the assignee also reassigned, but reserving an annual rent of \$200, with the understanding that if the original lessor should sell during the lease, then the latter contract should expire. It was held that in accordance with the original covenant between the lessor and lessee, the sale of the premises alone would not determine the lease without surrender by the lessee, which was accepted by the lessor, or at least, without demand of surrender. *Dudley v. Estill*, 6 Leigh 562.

2. ATTORNMEN.—A tenant cannot destroy the possession of his landlord by a secret attornment to another, and such an attornment as against the

landlord is of no effect. *Voss v. King*, 33 W. Va. 236, 10 S. E. Rep. 402.

3. CANCELLATION.

Option to Cancel.—The lessors of a lease were held entitled to cancel it, when its condition, that it should be void at their option, if certain condemnation proceedings by a railroad were not commenced by a certain day, was not complied with. *Laurel, etc., Co. v. Browning*, 99 Va. 528, 39 S. E. Rep. 154.

Fraudulent Procurement—Facts—Promises.—Where a lease was procured by means of fraudulent representations of material facts, which were peculiarly within the knowledge of the lessees, with the result that undue advantage was taken of the owners, this constitutes sufficient grounds for cancelling the lease. *Rorer Iron Co. v. Trout*, 83 Va. 397, 2 S. E. Rep. 713, 5 Am. St. Rep. 286.

False promises by lessees by means of which they were enabled to secure the lease, are not sufficient grounds for setting aside the lease for fraud, as in order to rescind a contract such representation must be made in regard to existing facts. *Love v. Teter*, 34 W. Va. 741.

Work Abandoned for Seven Years.—Where a lease is made for the purpose of drilling and operating for oil and gas for a term of years, or as long as oil or gas is found in paying quantities, with a provision that the work should be commenced by a certain date, and nothing is done under the lease for seven years after said date, the lessee is presumed to have abandoned the lease, and it is proper for equity to cancel the lease and quiet the title to the land. *Crawford v. Ritchey*, 48 W. Va. 252, 27 S. E. Rep. 220.

Subsequent Lease Subject to First—Cancellation by Mistake.—Where the lessor of property makes a subsequent lease of the same property with the indorsement that the second lease is taken subject to the first lease, the latter by mistake having been handed back to the lessor to be cancelled, such indorsement saves to the first lessee his right, if any, to have the mistake corrected. *Schaupp v. Hukill*, 34 W. Va. 375, 13 S. E. Rep. 501.

4. DEATH OF LESSOR.—An executory oil and gas lease, which is not binding upon the lessees to carry out its covenants, but is optional with either party to defeat the same at any time and relieve themselves from the payment of any consideration, is terminated by the death of the lessor. *Trees v. Eclipse Oil Co.*, 47 W. Va. 107, 34 S. E. Rep. 933.

5. FORFEITURE.

How Enforced.—Where a lease for years contains a clause of forfeiture for breach of its covenant to pay rent or other covenant, but no clause of re-entry for such forfeiture, demand and re-entry is not the only mode by which the landlord may enforce the forfeiture. *Guffey v. Hukill*, 34 W. Va. 411, 11 S. E. Rep. 754.

Forfeiture Must Be Unequivocally Claimed.—When a forfeiture for the benefit of the lessor is contracted for in case of default on the part of the lessee, before the lease can be regarded as at an end the lessor must, by word or deed, in some unequivocal way, manifest a purpose to treat the lease as forfeited. *Thomas v. Hukill*, 34 W. Va. 385, 12 S. E. Rep. 522.

Mere Refusal to Pay Rent.—A lease for a certain number of years in land, created by deed, will not be forfeited by a simple refusal to pay rent, or any mere words, where there is no open act of unmistakable hostility to the landlord's title, with full notice from the tenant of his adverse title, or asser-

tion of adverse title, and of his holding possession of the premises adversely to the landlord, when no condition or covenant of forfeiture is contained in the deed, especially when the term exceeds five years. *Gale v. Oil, etc., Co.*, 6 W. Va. 200.

Performance of Covenants Prevented by "Act of God."—A lease for oil and gas purposes contained a covenant that the lessee should commence operations for a test well within one year from the date thereof, at some point in the district in which the leased premises were located, and complete such well in eighteen months after its commencement. Before the expiration of a year from the date of such lease the test well was located by surveying and leveling; the timbers afterwards used in constructing the derrick were cut down and hewn; a contract was made with a party for drilling the well; and the machinery was ordered to be hauled to the location, but neither the timber nor machinery was hauled to the location within the year, by reason of the impassable condition of the roads. The well was, however, completed in less than eighteen months after the date of the lease. *Held*, that the lease was not forfeited on the ground that operations were not commenced within a year from the date thereof. *Fleming Oil & Gas Co. v. South Penn Oil Co.*, 37 W. Va. 645, 17 S. E. Rep. 208.

Effect of Second Lease.—Where the lessor of land gives a subsequent lease of the same property to another person, on which was endorsed before execution that it was taken subject to the prior lease, it was held that the second lease was not an unequivocal declaration of forfeiture of the first. *Schaupp v. Hukill*, 34 W. Va. 375, 12 S. E. Rep. 501.

In *Thomas v. Hukill*, 34 W. Va. 385, 12 S. E. Rep. 522, where two leases had been made of the same property, it was held that the execution of the second lease could not be taken as conclusive evidence of a purpose to declare the first one forfeited when by its own terms it shows such not to be the purpose. And if silent on the subject it could be shown that the lessor executed and delivered the new lease on condition that it was to be given back if the first lessee objected, if the obligee knew of the condition. See *Stuart v. Livesay*, 4 W. Va. 45; *Newlin v. Beard*, 6 W. Va. 110; *Ward v. Churn*, 18 Gratt. 812.

A lease for drilling for petroleum oil and gas contained covenants as to the commencement of operations, with the provision that a failure to comply would work a forfeiture of the lease. There was no covenant for re-entry. The covenants were broken, and the lessor leased to another person. The first lease was avoided, and the second was good against it, as the execution of the second lease was a sufficient declaration of forfeiture without demand and re-entry. *Guffey v. Hukill*, 34 W. Va. 49, 11 S. E. Rep. 754.

Incorporation of Forfeiture Clause by Indorsement.—A mere indorsement on a lease that it is taken subject to another lease does not incorporate in the former lease a forfeiture provision contained in the latter lease. *Schaupp v. Hukill*, 34 W. Va. 375, 12 S. E. Rep. 501.

Equitable Relief from Penalty.—If, in case of a lease with forfeiture clause for nonpayment of rent, the lessor by his conduct clearly indicates that payment will not be demanded when due, and thus lulls the lessee into a feeling of security and throws him off his guard, and because of this he does not make payments when due, the landlord cannot, without demand or notice, declare a forfeiture, and there is no forfeiture which equity would recognize,

and if there is in such case technically a forfeiture at law, equity would relieve against it. *Hukill v. Myers*, 36 W. Va. 639, 15 S. E. Rep. 151.

The forfeiture clause in a gas and oil lease, under which a valuable estate vested in the lessee in so far as the rentals are concerned, made payable in gas, oil and money, is in the nature of a penalty to secure such rentals, against which a court of equity will grant relief, when compensation for such rentals can be made, and great loss wholly disproportionate to the injury occasioned by the breach of the contract would otherwise result to the lessee negligently, but not fraudulently in default. *South, etc., Co. v. Edgell*, 48 W. Va. 348, 37 S. E. Rep. 506.

Specific Performance.—The purchaser of an agreement for a lease and those under whom he claims, having committed such acts as would have amounted to a forfeiture had a lease been actually executed with such covenants as were usually inserted in leases to other tenants of the same estate, shall not have the aid of a court of equity to enforce specific performance against a judgment at law recovered by a purchaser of the fee-simple estate. *Jones v. Roberts*, 3 H. & M. 436.

Waiver—Acceptance of Rent.—Acceptance by the landlord of rent accruing after breach of a condition contained in the lease, with full knowledge of the breach and all of the circumstances, is a waiver of the right to declare a forfeiture and re-enter upon the premises. *Hukill v. Myers*, 36 W. Va. 639, 15 S. E. Rep. 151; *Allen v. Bartlett*, 20 W. Va. 54; *McKildoe v. Darracott*, 13 Gratt. 278.

Same—Quo Animo.—The acceptance of rent after a forfeiture of a lease will be regarded as a waiver of the forfeiture or not, according to the *quo animo* with which it is received. *Jones v. Roberts*, 3 H. & M. 436.

Same—Consent of Lessors to Assignment.—A lease of mining lands assigned, and payment was made in part by note. In an action on this note the defendants claimed that the lease had been forfeited previous to the assignment, but the evidence showed that the lessors had acquiesced in the assignment, and had waived the forfeiture by not declaring the lease forfeited until some time after the defendants had been in possession, and had violated the terms of the lease. Judgment in lower court for plaintiff was affirmed. *Deaton v. Taylor*, 90 Va. 219, 17 S. E. Rep. 944.

Same—Indulgence by Lessor.—Where in an oil lease there is a clause of forfeiture for nonpayment of rental, but the lessor consents that it need not be paid at the times when due, and indulges the lessee, and acquiesces in his failure to pay, there is no forfeiture for nonpayment. *Hukill v. Myers*, 36 W. Va. 639, 15 S. E. Rep. 151.

Same—No Waiver after Subsequent Lease.—Waiver of forfeiture of a lease for nonpayment of rent cannot be made by the lessor after he has granted a lease of the same premises to another lessee. *Guffey v. Hukill*, 34 W. Va. 49, 11 S. E. Rep. 754.

A subletting is not a continuing act of forfeiture, and if the forfeiture is once waived it cannot afterwards be retracted. *McKildoe v. Darracott*, 13 Gratt. 278.

Same—No Revival after Waiver.—A forfeiture, if not by a continuing act, such as a neglect to repair, once waived, cannot be revived. *McKildoe v. Darracott*, 13 Gratt. 278.

Performance of Condition before Petition.—If land be forfeited for nonpayment of quit rents or want

of cultivation, still if the condition be performed before the land is petitioned for, the title is saved. *Wilcox v. Calloway*, 1 Wash. 38.

6. NEW LEASE.

Amounts to Surrender.—If a lessee for life or years take a new lease of the reversioner for a longer or shorter term than before, it is a surrender of the first lease. *Wade v. South Penn Oil Co.*, 45 W. Va. 380, 32 S. E. Rep. 169; *Edwards v. Hale*, 37 W. Va. 193, 16 S. E. Rep. 487.

The execution of a new lease to other lessees, and possession thereunder, render a prior executory lease at will invalid. *Eclipse Oil Co. v. South Penn Oil Co.*, 47 W. Va. 84, 34 S. E. Rep. 923.

7. NOTICE OF ADVERSE CLAIM.

Relation Ceases on Notice.—As a general rule a tenant is not permitted to question his landlord's title; yet from the time that the landlord has notice that the person, who formerly held as tenant, claims to be in possession, not as tenant, but in his own right, the relation of landlord and tenant ceases. *Campbell v. Fetterman*, 30 W. Va. 308; *Emerick v. Tavener*, 9 Gratt. 230; *Alderson v. Miller*, 15 Gratt. 279.

Same—Surrender of Possession.—It is settled law in Virginia that a tenant may sever the relation of landlord and tenant without first surrendering the possession of the premises, but in order to hold adversely he must make a clear, positive and continued disclaimer and disavowal of the title of his landlord, who must be put on notice of the adverse claim before a foundation can be laid for the operation of the statute of limitations against him. *Neff v. Ryman* (1902), 8 Va. Law Reg. 497; *Erskine v. North*, 14 Gratt. 60, 66; *Creekmur v. Creekmur*, 75 Va. 480.

Secret Lease or Conveyance.—If a tenant takes a secret lease or conveyance for the land from a third party, claiming to be the owner, without the knowledge of his landlord, the character of his possession will not be changed. *Voss v. King*, 33 W. Va. 236, 10 S. E. Rep. 403.

Refusal to Pay Rent—Condition in Deed.—An estate for a fixed number of years created by deed will not be forfeited by a simple refusal to pay rent, or any mere words, where there is no open act of unmistakable hostility to the landlord's title, his grantees or assignees, with full notice from the tenant of his adverse title, or assertion of adverse title, and of his holding possession of the premises adversely to the landlord, his grantees or assignees, when no condition or covenant of forfeiture is contained in the deed of lease, especially when the term exceeds five years. *Gale v. Oil, etc., Co.*, 6 W. Va. 200.

8. NOTICE TO QUIT.

Tenant at Will or by Sufferance Not Entitled.—An agreement under seal by a tenant that he would surrender possession whenever a purchaser from the landlord required it, constituted him a tenant at will or at sufferance, and he was not entitled to six months' notice to quit. *Harrison v. Middleton*, 11 Gratt. 537.

Unnecessary Where Formal Disclaimer Made.—Notice to quit is unnecessary where formal disclaimer has been made by a tenant holding over, before bringing an action against him for unlawful detainer. *Emerick v. Tavener*, 9 Gratt. 220.

Tenant Claiming to Hold Adversely.—If a tenant claims to hold adversely to his landlord, he is not entitled to notice to quit. *Harrison v. Middleton*, 11 Gratt. 537.

Purchaser from Tenant Who Had Notice or Made Disclaimer.—Purchaser in fee under tenant is not entitled to notice to quit before the lessor can maintain an action for unlawful detainer against him and the tenant jointly, where the tenant has received notice to quit or has made a formal disclaimer. *Emerick v. Tavener*, 9 Gratt. 230.

Provision That Lease Shall Cease When Lessee Ceases to Work.—Where a lease provides that the same shall terminate and cease whenever the lessee, from any cause, ceases to work for the lessor, and it appears that the lessee had ceased to work for the lessor before the action was commenced, said lessee is not entitled to notice to quit. *Marmet Co. v. Archibald*, 37 W. Va. 773, 17 S. E. Rep. 290.

What Is Proper Notice.—Where a lease contained a stipulation that if the lessor should sell the demised premises during the term, upon proper notice the lessee should surrender possession, it was held that any notice that distinctly informed the tenant that a sale had been made would be a "proper notice." Neither the law nor the contract required any particular form or length of notice. *Millan v. Kephart*, 18 Gratt. 1.

Tenancy from Year to Year.—Where a tenancy from year to year has been created, notice to quit must be given by the party wishing to terminate the lease. The period of such notice depends on statutory provisions. *Allen v. Bartlett*, 20 W. Va. 46. See *supra*, "II. Kinds of Tenancies," subsection "2. Year to Year."

Five Days' Notice—Tender of Rent—Demand—Unlawful Detainer.—Premises were leased for a term of years, with a clause of re-entry for ten days' default in paying any instalment of rent. Default was made and notice was given the tenant that unless he quit the premises in five days action of unlawful detainer would be instituted against him. The day following the service of the notice the rent was tendered the lessor's agent, who refused to accept it. It was held that as no demands had been made the action was not maintainable either at common law or under the statute. Code 1873, ch. 130, § 4 (§ 2719, Code 1887); *Johnston v. Hargrove*, 81 Va. 118.

9. PURCHASE OF REVERSION.

Estoppel.—A purchase of the reversion in fee by a tenant for years ends the tenancy, and the tenant is not thereafter estopped from denying further continuing title or rent in the landlord. *Wade v. South Penn Oil Co.*, 45 W. Va. 380, 32 S. E. Rep. 169.

Option in Lease.—Where there is a lease for years with rent, and an option to purchase the fee, an election to purchase under the option, and tender of purchase price under it, ends the lease and its rent. *Wade v. South Penn Oil Co.*, 45 W. Va. 380, 32 S. E. Rep. 169.

Same—Not Inconsistent.—A lease yielding rent and an option to purchase the fee outright are not inconsistent, and the taking such lease during the term of the option will not abrogate or surrender it. *Wade v. South Penn Oil Co.*, 45 W. Va. 380, 32 S. E. Rep. 169.

10. RE-ENTRY AND EVICTION.

Common-Law Rule—Demand before Re-entry.—It is an ancient rule of the common law, that before a lessor can exercise a stipulated right of re-entry for breach of covenant to pay rent, he must make an actual demand upon the tenant for payment thereof, unless by special agreement between the parties the requirement of demand has been dispensed with. *Johnston v. Hargrove*, 81 Va. 118.

How, When and Where Demand Made.—How, when

and where demand for rent in arrear must be made is well settled by the authorities. It must be for the precise sum due for the last instalment, on the day it is due, at some convenient hour before sunset, on the premises, at the most notorious place thereon, and if there be a dwelling-house, at the front door thereof. *Johnston v. Hargrove*, 81 Va. 118.

Failure to Make Re-entry—Ejectment.—If, on a tenant's failure to fulfill the covenant of payment, or to comply with the landlord's demand therefor, made as prescribed by the common law, the landlord does not re-enter in fact, he may bring ejectment, under Code, ch. 98, sec. 16, and recover, subject to the provisions of sec. 17, as to the tenant's being completely barred of all rights, etc., in 12 months. *Bowyer v. Seymour*, 18 W. Va. 12. See monographic note on "Ejectment" appended to *Tapecott v. Cobbs*, 11 Gratt. 172.

Possession under Contract of Purchase—Demand.—One who has taken possession of land under a parol contract of purchase from the owner cannot be ejected at the suit of a grantee of the owner, where there has been no previous demand for possession, since he is tenant at will of the owner. *Jones v. Temple*, 87 Va. 210, 12 S. E. Rep. 404, 24 Am. St. Rep. 649.

Removal during Term.—The simple fact, that a tenant moves off the leased premises during his term, does not entitle his landlord to enter and put another tenant in possession; and if the landlord does so enter during the term, the first lessee may recover the premises from the second lessee by action of unlawful entry and detainer. *Chancey v. Smith*, 25 W. Va. 404, 52 Am. Rep. 217.

Abandonment—Demand—Option.—Where a lease provides that the failure to pay the rent within sixty days after it is due shall constitute an abandonment of the same, and the tenant fails to comply therewith, and the landlord demands payment at the time, place, and in the manner prescribed by common law, and the payment of the rent is not made in proper time, he is at his option to enter upon the premises, or such part thereof as can be entered upon by him. *Bowyer v. Seymour*, 18 W. Va. 12.

Demand—No Property Liable for Rent.—If a grant be made, reserving a yearly rent with a condition that the grantor may re-enter if the rent be not paid after demand made upon the premises, if no property is found on the land, whereof distress can be made; the grantor, upon demand made, and failure to pay, no property to distrain being found on the land, may re-enter and grant over to another. *Wartenby v. Moran*, 3 Call 491.

Definition of Eviction.—The term eviction may be defined as not a mere trespass, but something of a grave and permanent character done by the landlord, with the intention of depriving the tenant of the enjoyment of the demised premises. *Tunis v. Grandy*, 22 Gratt. 109.

Surrender No Eviction.—In a suit against the lessor of premises, to which the tenant was not a party, a decree directing the sheriff to lease the demised premises, which was done, the tenant giving possession, his surrender was held not to amount to an eviction. *Murray Caldwell & Co. v. Pennington*, 3 Gratt. 91.

Sub-lease—Remainder Rented with Consent of Landlord—No Eviction.—On October 3rd, 1792, land was leased for a term of five years, On Nov. 9th, 1795, the lessee demised the remainder of his term to M., who agreed with the landlord in May, 1797, that

he might rent the remainder of his year to whomsoever he wished. Accordingly the landlord rented to G. for two years. In an action by the original lessee against G. it was held the lease to G. was not an eviction of the plaintiff, and did not prevent the landlord's recovering a balance due for rent on the original contract. *Cooke v. Wise*, 8 H. & M. 468.

Recovery by Title Paramount—Discharge of Rent.—If leased land be recovered by a third person by title superior to that of the lessor, the tenant is discharged from the payment of rent after the eviction by such recovery. *Tunis v. Grandy*, 22 Gratt. 109.

Wrongful Deprivation of Whole or Part of Premises Discharges Whole Rent.—If a lessor wrongfully deprives a tenant of the whole or any part of the premises, the tenant is discharged from the payment of the whole rent until such possession is restored. *Tunis v. Grandy*, 22 Gratt. 109. See section on "Rent."

If the tenant be at any time deprived of leased premises by the agency of the landlord the obligation to pay the rent ceases. *Tunis v. Grandy*, 22 Gratt. 109.

Liability of Lessee—Warranty.—In the absence of an express warranty, a lessee is not liable for an eviction of his assignee of the lease under paramount title. *McClenahan v. Gwynn*, 3 Munf. 556.

Conveyance in Fee—Election.—Conveyance in fee by tenant is no disseisin of the lessor, except at the latter's election. *Emerick v. Tavener*, 9 Gratt. 220.

Liability of Landlord—Original Lessee—Assignee.—If the landlord is liable in case of eviction under paramount title to the original lessee, he is equally liable in damages to the assignee. *McClenahan v. Gwynn*, 3 Munf. 556.

V. ASSIGNMENT OF LEASE.

Relation Attaches to All Succeeding to Possession.—It is an elementary principle, which has been repeatedly approved by the Virginia courts, that when the relation of landlord and tenant has been once established, it attaches to all who may succeed to the possession through or under the tenant, whether immediately or mediately; and the succeeding tenant is as much bound by the acts of his predecessor as if they were his own. *Neff v. Ryman* (1902), 8 Va. Law Reg. 497; *Emerick v. Tavener*, 9 Gratt. 224.

Where the lessee of a term for years holds over, creating a tenancy from year to year, and assigns his lease, the assignee holds subject to all the stipulations and conditions in the original lease. *Allen v. Bartlett*, 20 W. Va. 46.

An assignee of a lease is fixed with notice of its covenants, and takes the estate of the assignor *cum onere*, and each successive assignee of a lease, because of privity of estate is liable upon covenants maturing and broken while the title is held by him. *W. Va., etc., R. Co. v. McIntire*, 44 W. Va. 210, 28 S. E. Rep. 696.

Liability of Landlord to Assignee.—The landlord is liable to the assignee of a lease for damages whenever he would have been similarly liable to the lessee. *McClenahan v. Gwynn*, 3 Munf. 556.

Lease of Factory—Assignee Assumes Liabilities—Rights of Lessor.—A factory was leased for the annual rental of two-thirds of its product, with the stipulation that a certain quantity should be produced each year, the lessee agreeing to sell the lessor's share. It was further agreed that the lease should not be sub-let or assigned without the written

permission of the lessor, who had the privilege of terminating it on two months' notice. Within a year the lease was assigned, and the lessor entered into a new agreement with the sub-lessee, the latter assuming all of the lessee's liabilities. The sub-lessee paid off the debts of the lessee. For the failure of the lessee to manufacture the required amount the lessor was entitled to damages, but as the new lease was made within a year, the lessee's covenant was not broken, and therefore the sub-lessee was only required to account to the lessor for two-thirds of the stock left by the lessee, after deducting all expenses attending the sale of what was sold. *Prestons v. McCall*, 7 Gratt. 121.

Assignees Holding Over—How Amount of Rent Determined.—Salt works held under a lease by court, which lease terminated January 1, 1861, was assigned by the lessee in 1860 for a term of ten years, the assignees holding over from the termination of the lease in 1861, until the end of the assignment in 1869. It was held that, in determining the rent for which the assignees should be held liable, the court might require them to produce, before the commissioner selected to ascertain and report what would be a reasonable rent, all contracts in their possession or control by which leases of the property were made to them, or privileges granted to others to manufacture salt during the period of their lease, and all books and accounts and papers in their possession or control showing the quantity of salt manufactured during such period, and delivered to them by their sub-lessees, or those to whom such privileges were granted under the contract. *Stuart v. White*, 25 Gratt. 800.

VI. CROPS AND IMPROVEMENTS.

Crops—Fixed Term—Way-Going Crop—Common-Law Rule.—At common law where land is leased for a certain number of years, and consequently the period of the term is fixed and certain, and the lease is silent as to who shall be entitled to the growing crop on the land at the end of the term, the off-going tenant is not entitled to such way-going crop; but where the lease recognizes the right to sow in the last year of the term, and the tenant is restricted to the cultivation of certain portion of the land and pays an equal annual rental for its use, he has a right to reap the way-going crop, where the lease is silent as to who is entitled thereto. *Kelley v. Todd*, 1 W. Va. 197; *Harris v. Carson*, 7 Leigh 682.

Where a lease has a fixed period for its termination, and there is nothing in it purporting to give to the tenant the crops growing upon the land at the termination of the lease, the tenant has no right to reap those crops after his lease ends. *Mason v. Moyers*, 2 Rob. 606.

Where land is rented for a fixed and certain period, the way-going tenant is not entitled to the way-going crop. *Harris v. Carson*, 7 Leigh 682, 30 Am. Dec. 510.

Stipulation for Wheat Crop Harvested after Term Ends—Rights Thereto.—A lease for a term of years stipulated that the land should be sown with wheat and timothy the last autumn of the term, which terminated in the spring. At the end of the term the lessee vacated, and they were leased again to another lessee, who harvested the wheat. It was held that the first lessee was entitled to recover of the second lessee the value of the wheat. *Kelley v. Todd*, 1 W. Va. 197.

No Restriction as to Cultivation—Right to Plow Certain Field.—In a suit to enjoin the defendant from

injurious cultivation of the land of his lessor, by plowing a certain river bottom set in blue grass in order to cultivate it in corn, it appeared that by the terms of the lease all the land was rented with no restrictions as to its cultivation, except that it was agreed that it should be farmed in such manner as to prevent injury to it, in so far as injury could be reasonably prevented; that the land had been in corn for twelve or fifteen times in the last thirty years; that it was good farming to plow this piece of land, as it never washed as other portions of the land did, but was the best corn land on the place, and was easily reset in blue grass. The injunction was dissolved. *Hubble v. Cole*, 85 Va. 87, 7 S. E. Rep. 242.

Improvements—Removal.—Where the terms of a lease require the lessee to erect buildings upon the leased premises, and there is no agreement for their removal by the lessee, he has no right to remove them. *Pelree v. Grice*, 92 Va. 703, 24 S. E. Rep. 302.

"Renewable or Pay for Improvements."—Where the language of a lease is that it is "renewable or pay for the improvements," after a renewal of the lease, the lessee is not entitled to the value of the improvements. *King v. Wilson*, 98 Va. 259, 35 S. E. Rep. 72.

VII. ESTOPPEL OF TENANT.

1. GENERALLY.

To Attorn.—In a suit to sell land it was sold to the plaintiff who conveyed it, and the grantees put a tenant in possession. Upon appeal a reconveyance was ordered, the first sale being set aside, and the deed was executed. Thereupon the tenant attorned and afterwards gave possession to the original owner, to whom the reconveyance had been made. On ejectment the relation of the tenancy did not estop the tenant to attorn. *Miller v. Williams*, 15 Gratt. 218.

To Repel Claim for Rent.—If a tenant has occupied and enjoyed the use of land, he will be estopped in an action by the landlord for the rent to repel his claim on the ground that the lease was void. *Watson v. Alexander*, 1 Wash. 340. See section on "Rent," *infra*.

To Acquire Rights at Tax Sale.—A tenant who is bound under the lease to pay the taxes on demised premises cannot by purchase at a tax sale acquire any rights against his lessor. *Williamson v. Russell*, 18 W. Va. 612.

To Claim Forfeiture.—A lease of coal lands to a company contains the condition that unless condemnation proceedings by a railroad company for a line to the land be commenced by a certain time, the lease shall be void at the option of the lessor. The owner of land sought to be condemned refuses to sell the right of way, and subsequently acquired the interest of some of the lessors. The condition being broken, it was held that he was not estopped from claiming a forfeiture of the lease. *Laurel, etc., Co. v. Browning*, 99 Va. 528, 39 S. E. Rep. 156.

To Deny Boundaries.—Tenant is estopped to deny boundaries of the demised premises as described in the lease, or that his possession is within them, in an action for unlawful detainer, where he has executed the lease acknowledging such description and possession. *Emerick v. Tavenor*, 9 Gratt. 220.

To Deny Covenants in Lease.—Where a written lease describes the property as containing six salt wells, the recitals as to the number of wells included in the premises after the lease has been accepted and acted on for more than two years by the lessee, with ample opportunity of knowing, not only the

contents of the lease, but also the character and quality of the leased property, must be regarded as conclusive of the fact between the parties to the lease. *Clifton v. Montague*, 40 W. Va. 207, 21 S. E. Rep. 858.

To Deny Power of Lessor to Contract by Assumed Name.—Where an action of unlawful detainer is brought by a mining company in its proper corporate name against one of its tenants, although the lease was in writing, and executed by the company in a name different from its true corporate name, assumed for its own convenience, the tenant accepting said lease, and occupying the premises, and paying rent thereunder is estopped from denying the power of the corporation to contract in its assumed name. *Marmet Co. v. Archibald*, 87 W. Va. 778, 17 S. E. Rep. 290.

Sub-tenants Bound by Acts of Predecessor.—When once the relation of landlord and tenant is established by the act of the parties, it attaches to all who may succeed to the possession through or under the tenant whether immediately or remotely, the succeeding tenant being as much bound by the acts and admissions of his predecessor, as if they were his own. *Allen v. Bartlett* 20 W. Va. 46.

2. TO DENY LANDLORD'S TITLE.

General Rule.—The general rule is firmly established that the possession of the tenant is the possession of the landlord, and is not adverse to him, and the tenant will not be allowed to deny his landlord's title. *Allen v. Paul*, 24 Gratt. 332; *Rakes v. Rustin Land, etc., Co.*, 2 Va. Dec. 156; *McClung v. Echols*, 5 W. Va. 215; *Gale v. Oil, etc., Co.*, 6 W. Va. 210; *Campbell v. Fetterman*, 20 W. Va. 412; *McFarland v. Douglass*, 11 W. Va. 632; *Miller v. Williams*, 15 Gratt. 218; *Reusens v. Lawson*, 91 Va. 258, 21 S. E. Rep. 347; *Bushong v. Rector*, 32 W. Va. 317, 9 S. E. Rep. 227; *Dobson v. Culpepper*, 23 Gratt. 353; *Voss v. King*, 33 W. Va. 236, 10 S. E. Rep. 402; *Voss v. King*, 33 W. Va. 607, 18 S. E. Rep. 762; *Bodkin v. Arnold*, 45 W. Va. 90, 30 S. E. Rep. 154; *Hodgkin v. McVeigh*, 86 Va. 751, 10 S. E. Rep. 1065; *Hurst v. Dulany*, 84 Va. 701, 5 S. E. Rep. 803; *Emerick v. Tavener*, 9 Gratt. 220; *Locke v. Frasher*, 79 Va. 409; *Genin v. Ingersoll*, 3 W. Va. 558; *Creekmur v. Creekmur*, 75 Va. 430; *Snittle v. Richmond, etc., R. Co.*, 76 Va. 280.

It was held in *Stuart v. Andrews*, 1 Va. Dec. 449, which was an action of unlawful detainer to recover the possession of land which had been leased, that where the defendant had acknowledged the right of the plaintiff "by a solemn contract under his hand and seal, under which contract he came into the possession and enjoyment thereof, and obligated himself to return the same to the plaintiff at the expiration of the lease, by the law as established for ages, he is estopped to deny his title, and is bound by his solemn covenant to surrender to him the possession."

Exception to Rule.—But, if a party is in possession of land under a claim of title, and is by fraud or mistake induced to believe that another has a better title to it, and thereby to take a lease from him, the tenant is not estopped by the lease from denying the landlord's title and showing that he has a good title to the property. *Alderson v. Miller*, 15 Gratt. 379; *Turpin v. Saunders*, 33 Gratt. 33; *Locke v. Frasher*, 79 Va. 409; *Gale v. Oil, etc., Co.*, 6 W. Va. 210; *Jones v. Fox*, 20 W. Va. 380; *Voss v. King*, 33 W. Va. 241, 10 S. E. Rep. 403. See also, *Voss v. King*, 33 W. Va. 607, 18 S. E. Rep. 762; *Bodkin v. Arnold*, 45 W. Va. 90, 30 S. E. Rep. 154.

Rule Applies Only When Controversy is between

Landlord and Tenant.—The rule that a tenant cannot deny the title of his landlord applies only in actions against the tenant for rent or possession, but does not render the tenant incompetent to deny such title in a controversy between other parties and the landlord, in which such tenant has no interest. *Bartley v. McKinney*, 28 Gratt. 750.

Rule Does Not Apply When Tenant Claims Life Estate, Which Landlord Has Acknowledged.—The rule that a tenant cannot set up against his landlord in ejectment an adversary title in a stranger, does not apply where the title set up by the tenant is a lease for life from the person under whom the plaintiff claimed to one under whom the tenant claimed, the validity of which the plaintiff had admitted by the regular annual receipt of the rents stipulated therein, from defendant and those under whom he claimed, down to a period of two months before the institution of the suit. *Smoot v. Marshall*, 2 Leigh 134.

Rule Not Affected by Possession under Contract of Purchase at Time of Lease.—The operation of the general rule that the tenant cannot deny his landlord's title is not affected by the fact that tenant is in actual possession, as under a contract of purchase, at the time he accepts the lease; that by such acceptance he as effectually recognizes the title and possession of the lessor as if he had entered and taken possession under and by virtue of the lease itself. *Jordan v. Katz*, 89 Va. 628, 16 S. E. Rep. 866; *Locke v. Frasher*, 79 Va. 409; *Emerick v. Tavener*, 9 Gratt. 220.

No Adverse Possession without Full Notice.—The relation of landlord and tenant is one carefully guarded by the law, and it will not allow one who has come into the possession of land under another to set up an adverse claim to it, without full notice of his disclaimer or assertion of adverse title. *Emerick v. Tavener*, 9 Gratt. 221, 227; *Creekmur v. Creekmur*, 75 Va. 430, 436; *Reusens v. Lawson*, 91 Va. 236, 21 S. E. Rep. 347. See next section, "3. Adverse Possession of Tenant," *infra*.

Applies to Substituted Tenant.—Possession of land obtained from the tenant of another is merely the substitution of one tenant for another, and such substituted tenant cannot be heard to set up title or possession in himself adverse to that under which he entered. *Genin v. Ingersoll*, 3 W. Va. 558.

Estoppel Attaches to All Successors under Tenant.—Tenant's estoppel to deny lessor's title attaches to all successors who acquire possession through or under such tenant, either immediately or remotely. So where one acquires possession under an absolute conveyance in fee from the tenant, the rule applies. *Emerick v. Tavener*, 9 Gratt. 220.

Applies to One Living with Tenant and Helping Pay Rent.—One living with a tenant and helping to pay the rent cannot acquire any rights to the demised land by adverse possession. *Hodgkin v. McVeigh*, 86 Va. 751, 10 S. E. Rep. 1065.

Tenant Estopped in All Actions.—In an action by a landlord against his tenant, whether the action be debt, assumpsit, covenant, or unlawful detainer, where neither fraud nor mistake is shown in the procurement of the lease, no proof of title is required by the landlord, for in such case the tenant is estopped from denying the title of his landlord. *Voss v. King*, 33 W. Va. 607, 18 S. E. Rep. 762.

Same—Direct or Collateral.—Tenant is estopped to impugn landlord's title during the tenancy, or until he has restored possession, or done something equivalent thereto, either by proof of title in him-

self or another, whether the question arises in a direct action to recover possession or in a collateral action. *Emerick v. Tavener*, 9 Gratt. 220.

Rule Not Applicable When Possession Surrendered or Recovered.—A tenant who surrenders possession at the end of his term, or from whom possession is recovered, is not prevented by the existence of such tenancy at one time, or by the deed of lease which he executed, from contesting the title of his former landlord. *Wild v. Serpell*, 10 Gratt. 405.

Finding by Special Verdict.—Where a special verdict finds that both the tenant of land, and one claiming possession of it claim an estate in fee simple under the same person, it is a finding of the seisin of the claimant, and the tenant is estopped to deny it. *Creigh v. Henson*, 10 Gratt. 231.

Absolute Deed—Mortgage—Rental—Injunction.—A lot is bought and a house is built thereon for one party, with money furnished by another, who takes the deed in his own name as security. Default being made in the monthly payment of money, which was agreed to be done until the debt was extinguished, by mutual consent the property was placed with a real estate agent who rented it to the purchaser. The parties subsequently had a disagreement as to the amount of rent, the grantee threatening to sue to recover the land, a suit was brought by the purchaser to enjoin the proceedings to recover the property. It was held that the bill should be dismissed as by the agreement under which the plaintiff became defendant's tenant, the former waived all rights under the deed, and was estopped to deny the defendant's title. *Jordan v. Katz*, 89 Va. 623, 16 S. E. Rep. 866.

8. ADVERSE POSSESSION OF TENANT.

Notice of Disclaimer and Adverse Possession.—A tenant cannot set up an adverse title against his landlord unless he first gives notice to the latter that he disclaims the relation and holds adversely. *Voss v. King*, 33 W. Va. 236, 10 S. E. Rep. 403; *Allen v. Paul*, 24 Gratt. 332; *Genin v. Ingersoll*, 3 W. Va. 558; *Reusens v. Lawson*, 91 Va. 226, 237, 21 S. E. Rep. 347; *Hulvey v. Hulvey*, 93 Va. 132, 23 S. E. Rep. 233; *Emerick v. Tavener*, 9 Gratt. 221; *Creekmur v. Creekmur*, 75 Va. 430.

As was said in the late case of *Neff v. Ryman* (1902), 8 Va. Law Reg. 497, quoting from *Reusens v. Lawson*, *supra*, "The relation of landlord and tenant is one carefully guarded by the law, and it will not allow one who has come into possession of land under another to set up an adverse claim to it, without full notice of his disclaimer or assertion of adverse title."

Deed Accepted from Other Than Landlord—Adverse Claim—Notice.—Thus if a tenant accept a deed from another person than his landlord, purporting to convey the land to him in fee, and later conveys it in fee to another, and he and his alienees claim the land in their own right under such conveyance, with the knowledge of the landlord, the possession by the tenant and his alienee is adverse. *Swann v. Thayer*, 36 W. Va. 46, 14 S. E. Rep. 423; *Swann v. Young*, 36 W. Va. 57, 14 S. E. Rep. 426.

Acceptance of Lease When in Possession—Termination—Surrender.—So a lessee in possession may accept a lease from one claiming to be the owner, and after the termination of his term terminate his tenancy by disclaimer and notice to such person, and he will not in such case be required to surrender the possession before he will be allowed to set up an adverse title in himself or a third person. *Voss v. King*, 33 W. Va. 236, 10 S. E. Rep. 402.

Restoration of Possession by Substituted Tenant.—And before a substituted tenant can set up adverse possession he must restore the possession acquired through the tenant of another and assert his claim, or give notice to the landlord or cotenant of his claim, or he must actually oust the tenant. *Genin v. Ingersoll*, 3 W. Va. 558.

Property Surrendered in Acquiring Rights Subsequent to Relation.—If a tenant acquires rights adverse to his landlord subsequent to the creation of the relation, he must surrender the property before he can assert such adverse rights. *Emerick v. Tavener*, 9 Gratt. 220.

Lessor Must Have Notice.—Tenant's possession does not become adverse by his holding over and disclaiming to hold under the lessor, and claiming the fee, unless full notice thereof is brought home to the lessor. *Emerick v. Tavener*, 9 Gratt. 220.

Evidence Required.—In order to make a tenant's possession adverse to his landlord, the notice of such adverse holding need not be shown by evidence so convincing as to preclude all doubt. *Reusens v. Lawson*, 91 Va. 226, 21 S. E. Rep. 347.

Person Living with Tenant and Helping Pay Rent.—A person who lives with a tenant and helps to pay the rent cannot acquire an adverse possession against the landlord while such condition exists. *Hodgkin v. McVeigh*, 86 Va. 751, 10 S. E. Rep. 1055.

Church Trustees Holding Property.—Church trustees holding property placed trustees of another church in possession thereof, and the latter acknowledged the former's title. The latter will not be allowed to set up any adverse right or title to their landlords, unless they prove that they disclaimed holding of them, or in good faith abandoned the premises, or asserted and claimed an adverse right with notice thereof to their landlords three years previous to the institution of the suit. *Allen v. Paul*, 24 Gratt. 332. See generally, monographic note on "Adversary Possession" appended to *Nowlin v. Reynolds*, 25 Gratt. 137.

VIII. RENEWAL IN GENERAL.

By Holding Over.—Where a tenant in possession under a lease continues in possession after the expiration of the term, the law implies a renewal of the lease on the same terms. *Voss v. King*, 33 W. Va. 607, 18 S. E. Rep. 762. See section "II. Kinds of Tenancies," subsection "2. Year to Year."

Effect of General Covenant for Renewal.—It is well settled that a general covenant for renewal in a lease does not imply a perpetual renewal. The most a lessor is bound to give on such a covenant is a renewal for one term only. Thus where land was rented for one or ten years at twenty-five dollars per annum, with the following provision "renewable, or pay for the improvements at their valuation" and the lessee holds over without any new agreement after the expiration of a renewal of ten years, the lessor was entitled to the possession of the premises at the end of any one year. *King v. Wilson*, 98 Va. 250, 35 S. E. Rep. 727; *Peirce v. Grice*, 93 Va. 763, 24 S. E. Rep. 392.

By One Joint Lessee—Notice.—Where six parties become joint lessees of real estate for the term of five years, with the privilege of continuing the lease for an additional term of five years, upon giving sixty days' notice prior to the end of the term, one of the lessees has no power to extend the lease by giving the required notice unless the other lessees concur therein. *Howell v. Behler*, 41 W. Va. 310, 24 S. E. Rep. 646.

By Purchasers of Share of One Joint Lessee—Notice.—A lease is made to six joint lessees for five years, with the privilege of an extension for an additional five years, upon sixty days' notice prior to the end of the term. Possession is taken by only one of the lessees, who dies before the expiration of the term. At the sale of the estate of the deceased lessee, a purchaser of the lease cannot extend the term for an additional five years, and a bill by him to enforce specific performance as to the extension of the term will be dismissed. *Howell v. Behler*, 41 W. Va. 610, 34 S. E. Rep. 646.

Lease Renewable Forever—Condition Not Complied with—Rent Paid Promptly—Notice to Quit—Tender.—A lease of land is made for ninety-nine years, renewable forever. It provides that the rent shall be paid annually on the first day of June in every year, and if the annual rent remains unpaid for six months after it becomes due, then the lessor shall re-enter and hold as formerly until all arrears in rent are paid. It is further provided that at the expiration of the term the lessor, in case the conditions are complied with, so as to entitle a lessee to a renewal, shall execute a new lease for the same term and on the same conditions as the first, except that one year's rent extraordinary, and the charges of making and recording the conveyance, shall be paid by the lessee at the time of the renewal, and that the lease may be continued forever at the expiration of each term by making new leases, subject to the above conditions. The right to renew is not lost where all the rents were paid without demands, although not upon the exact date when due, and notwithstanding that for several years after the termination of the first lease, the rent was paid and accepted as formerly, without any offer or demand for renewal; the lessee having immediately, on notice to quit from the lessor, made a tender of everything required. *Selden v. Camp*, 95 Va. 527, 28 S. E. Rep. 877.

IX. RENT.

1. IN GENERAL.

Definition.—Rent signifies a compensation or return, being in the nature of an acknowledgment given for some corporeal inheritance, and though of late years it usually consists of money, yet formerly it consisted of, and still may consist of, things incapable of any profit. *Newton v. Wilson*, 3 H. & M. 470.

How True Rental Estimated.—The true annual rental value of land is not the value of all the farm products which can possibly be realized from its use when the land is stocked, farmed, and managed with the greatest skill and industry, but it is the price which a prudent and industrious farmer can afford to pay for its use, after taking into consideration the probable amount and market value of his crop, and the probable injuries thereto resulting from the ordinary changes of climate and season. *Moore v. Ligon*, 30 W. Va. 146, 8 S. E. Rep. 573.

In estimating the rents and profits of land, which has been wrongfully held by the vendor in a contract for its sale, the annual value of the land in the hands of a prudent and discreet tenant upon a judicious system of husbandry is the proper rule in the case, which should be influenced in some measure by the mode of treatment by the occupant. *Bolling v. Lersner*, 26 Gratt. 36.

Landlord Has Insurable Interest in Tenant's Furniture.—Where a tenant owes rent to his landlord, the latter has an insurable interest in the tenant's

furniture, while on the premises, as such is liable by statute for the debt of the tenant. *Mutl. et al., Ins. Co. v. Ward*, 95 Va. 231, 28 S. E. Rep. 209.

Ground Rents in 1779—Scale of Depreciation.—Where there was conveyance of land in fee simple in 1779, upon a ground rent, charged thereon, payable in current money, the rent was subject to the scale of depreciation. *Watson v. Alexander*, 1 Wash. 340.

Rents Reserved by Lord Fairfax—Rents Charge.—The rent of five shillings sterling reserved by Lord Fairfax upon lots in the town of Winchester, Va., were not quit rents, but rents charge. Nor were such rents destroyed by any of the acts of the commonwealth passed during the Revolutionary War. *Marshall v. Conrad*, 5 Call 364.

2. WHO ENTITLED TO RENT.

Land Sold under Decree.—Land was sold under decree of court after a contract had been made for its rental. The purchaser was complete owner from the day of sale, and was entitled to the rent falling due thereafter. *Taylor v. Cooper*, 10 Leigh 317.

Guardian Leasing Ward's Land.—A guardian may lease the lands of his ward, during infancy, if the guardianship so long continues, and may reserve the rents to the ward or to himself; and payment of the rent, in either case, to the guardian, would be good. *Ross v. Gill*, 1 Wash. 87. See monographic note on "Guardian and Ward" appended to *Barnum v. Frost*, 17 Gratt. 308.

Devise of Rents and Reversion—Purchase of Reversion by Lessee.—The owner of land leased it for a term of twenty years, with the privilege to the lessee to end the term at any time on paying five shillings. The lessor then devised the annual rental to his daughter, and the reversion to his son, who sold to the lessor, and the latter immediately terminated his lease. It was held that the lessee could not disappoint the legatees, and he was decreed to pay them the rent. *Graham v. Woodson*, 2 Call 249.

3. WHO LIABLE FOR RENT.

When Part Only of Joint Lessees Take Land.—Where two of four joint lessees of land take possession in accordance with the agreement made between the owner and all of the lessees, the occupancy of the two is the occupancy of all, and they are all lessees of the landlord and are responsible to him in an action for use and occupation, regardless of their relations *inter se*. *Goshorn v. Steward*, 15 W. Va. 687.

Death of Tenant during Term—Estate Liable.—When a married woman becomes lessee of property for a term of years, her estate is liable for rent during the whole term, although she died soon after making the lease, and the property is occupied by others, as the lease continues as the property of the estate. *Hutchings v. Commercial Bank*, 91 Va. 68, 20 S. E. Rep. 960.

Lis Pendens—Successful Claimants.—Where the purchaser of property at a judicial sale had notice of a pending suit, setting up an adverse claim to the property, he is liable to the adverse claimants for rent, they being adjudged entitled to the property, although he immediately delivers possession, and shortly after title, to another, who is insolvent. *Simpson v. Dugger*, 88 Va. 963, 14 S. E. Rep. 760.

Partnership Occupying Premises under Unauthorized Lease.—One member of a partnership without authority from his copartners leases a tenement for a term of years by deed, which he signs and seals in the partnership name. The house is used and occupied for a portion of the term for partner-

ship purposes, and the yearly rents are credited to the lessor on the books of the partnership. The partner who signed the deed having died, his surviving partners abandon the tenement, and the executor and devisee of the lessor files a bill against them and the administratrix of the deceased partner for specific performance, and for a decree for rents for the residue of the term. It was held that although the deed of lease executed by one partner alone was not binding upon the partners, yet the agreement for the lease for the use of the partnership was binding on them, and was not extinguished by the deed, and as the partnership took the benefit of the lease, the surviving partners shall execute the agreement, and pay the rents for the whole term. *Kyle v. Roberts*, 6 Leigh 495.

Tenant Who Has Enjoyed Land.—If a tenant has enjoyed the land, he cannot repel the landlord's claim or rent, by saying "he has nothing in the land," or that the conveyance was void. *Watson v. Alexander*, 1 Wash. 340.

Voluntary Surrender of Premises to Sheriff.—In a suit between third persons and a lessor, to which the tenant was not a party, the sheriff was directed by a decree to rent out the demised premises, which was accordingly done and the tenant yielded possession. As the decree did not direct the sheriff to evict the tenant, and there was no paramount title under which he might have been evicted, his surrender did not release him from the payment of rent. *Murray Caldwell & Co. v. Pennington*, 8 Gratt. 91.

Absolute Sale—Intention to Reserve Rent.—Where there was an absolute sale of property, but the intention of the parties was to reserve the rent to the grantor for a number of years, the grantees incur a personal obligation to account to the grantor for the rent. *Kyles v. Tait*, 6 Gratt. 44.

Covenant to Deliver Possession on Sale—Assignment—Surrender.—Land was leased for a term of years with the understanding that if the lessor sold the premises during the term the lessee should give possession at the end of the current year. The lessee assigned the lease with a similar provision, and the assignee, the plaintiff, assigned the term to the defendants, reserving a yearly rent to be paid as long as the lease lasted, with the provision that if the original lessor should sell the property agreeably to the original contract between him and his lessee, then the latter contract should expire. It was held that the defendant was not relieved from his covenant to pay rent by the sale of the premises, if there was no surrender. *Dudley v. Estill*, 6 Leigh 562.

Lessee Stipulating to Pay Rental Until Well Is Completed.—A person who accepts an oil or gas lease, with a stipulation therein contained to pay a monthly rental until a well is completed, or until the termination of a certain fixed term, is bound to pay such rental, although he does not within such term enter upon the land and complete the well, unless he was prevented from doing so by the plaintiffs and not by mere personal default. *Lawson v. Kirchner*, 50 W. Va. 344, 40 S. E. Rep. 344.

4. APPORTIONMENT AND ABATEMENT.

Partial Eviction by Landlord Suspends Entire Rent.—An eviction of the tenant by the landlord from a portion of the premises suspends the payment of the entire rent during the continuance of the eviction. *Tunis v. Grandy*, 23 Gratt. 109.

Same—Crop of Hay Mowed and Taken Away.—A landlord entered upon a part of leased premises, and

mowed and carried away the hay without the consent and against the will of his tenant, who nevertheless continued to occupy the premises until the end of the year. In an action of assumpsit for the use and occupation of the land it was held that by such entry the landlord lost the benefit of the entire contract, and was not entitled to recover any portion of the rent. *Briggs v. Hall*, 4 Leigh 484, 36 Am. Dec. 826.

Complete Destruction of Premises.—It was agreed in the lease of a mill that the lessee should keep it in repair, except that heavy repairs, as injury by floods to the dam or forebay, or if the main shaft or wheel should give away, requiring a new one, should be made by the lessor in a reasonable time, which should not operate to suspend the rent. The mill was completely destroyed by an accidental fire, and the lessor refused to rebuild. The rent was held to be suspended from the time of the fire. *Thompson v. Pendell*, 12 Leigh 591.

Possession under Contract Held Void—Chargeable for Time Held.—Where a purchaser under a contract with a married woman was deprived of his purchase by reason of the fact that the contract was held not to be binding upon her, he was chargeable with the fair rental value of the land while he had it in possession, in the condition in which it was at the time he took possession thereof. *Moore v. Ligon*, 30 W. Va. 146, 3 S. E. Rep. 572.

Same—Improvements—Taxes.—Where a purchaser under a contract of sale with a married woman enters upon land and makes valuable improvements thereon, which greatly enhances the value thereof, and the contract was held not binding upon the married woman, the tenant was entitled to abatement on the amount of rent, with which he was chargeable, the value of the improvements, and all taxes upon the land paid by him while in his possession. *Moore v. Ligon*, 30 W. Va. 146, 3 S. E. Rep. 572.

Lease of Mill and Negro Miller—Emancipation.—A lease was made of a mill together with a tract of land adjoining, and a negro man as a miller, for a term of years, rendering an annual rent; the miller had previous to the lease been emancipated by the lessor by a deed entered of record, and before the expiration of the first year left the services of the lessee. It was held that the lessee was entitled to an apportionment of the rent. *Newton v. Wilson*, 8 H. & M. 470.

Two Leases—Partial Eviction—Partial Possession—Distress—Action for Use and Occupation.—If a tenant under a second lease is put into possession of the whole of the demised premises, and is afterwards evicted from a part thereof by the lessee under the first lease, then the rent will be apportioned, and the lessor may distrain for it. But if the lessee under the first lease is in possession, so that the lessee under the second lease cannot get possession of a part of the premises demised to him, then the second lease as to this part is void and the lessor cannot distrain for a portion of the rent, though he may recover the fair value of the balance of the premises in an action for use and occupation. *Tunis v. Grandy*, 23 Gratt. 109.

Partial Recovery under Title Paramount.—If part only of leased land is recovered by a third person by a title paramount to that of the lessor, such an eviction is a discharge of so much of the rent as is in proportion to the value of the part evicted. *Tunis v. Grandy*, 23 Gratt. 109.

Possession of Wrong Land by Mistake.—Where the vendor of land delivers to the vendee by mistake

other land, which does not belong to him, and the vendee is evicted, he will not be compelled to pay rent for the time he remained in possession, although he holds the full quantity purchased by certain metes and bounds. *Nelson v. Suddarth*, 1 H. & M. 350.

Deprivation of Crops by Threats.—While a suit was pending by creditors of a deceased person to subject land to the payment of their debts, it was rented by the owners for three years with the agreement that if it should be sold during the term then the lease should terminate on April 1st following the sale. In June of the last year of the term it was sold, and in consequence of the threats of the purchasers, one of whom was one of the lessors, to reap any crops that might be sowed, the lessee did not sow any fall crops. It was held that he was entitled to a deduction from his rent on that account. *Mason v. Moyers*, 3 Rob. 606.

Evidence under General Issue.—In an action of debt for rent, on the plea of the general issue the defendant may give in evidence special circumstances showing that the rent ought to be apportioned. *Newton v. Wilson*, 3 H. & M. 470. See section on "Evidence," *infra*.

5. INTEREST.

Not Allowed When Sufficient Property on Premises Liable to Distress.—Interest on rents in arrear ought not to be allowed if there were always effects on the premises, liable to distress, sufficient to have satisfied the rent, which were not paid, though demanded by the landlord. *Dow v. Adam*, 5 Munf. 81.

Interest on rents will not be allowed where the lessor allows it to accumulate, because he might have distrained for it if it were certain. If it was uncertain, interest was not demandable. *Skipwith v. Clinch*, 3 Call 353.

Depends on Circumstances.—Interest cannot be recovered as a matter of course in actions for the recovery of rent, but it may be given under circumstances to be judged of by the jury. *Mickle v. Lawrence*, 5 Rand. 574.

Where a jury state in a special verdict the circumstances under which they allowed interest in an action for the recovery of rent, the court should disallow the interest if, under the circumstances stated, interest ought not to be allowed. *Dow v. Adam*, 5 Munf. 31.

Allowed on Estimated Rents.—Where land is occupied by consent of the owner it is proper to charge interest upon estimated rents and profits. *Vance v. Evans*, 11 W. Va. 342.

When there is a decree for specific performance of a contract for the sale of land, and for an accounting of the rents and profits, although in such case the rents are estimated, it is proper to charge interest on them. *Bolling v. Lersner*, 26 Gratt. 36.

Interest Not Allowed.—But interest was not allowed on estimated rents and profits in *Roper v. Wren*, 6 Leigh 38, and *Payne v. Graves*, 5 Leigh 561.

Not Recoverable by Way of Damages.—Interest is not recoverable by way of damages in an action of debt for rent in arrear. *Cooke v. Wise*, 3 Hen. & M. 463.

Not Allowed on Rents in Arrear.—In *Kyle v. Roberts*, 6 Leigh 495, interest was not allowed on balance of rents in arrear.

Allowed Where Tenant Attempts to Defeat.—In *Graham v. Woodson*, 3 Call 249, interest was allowed on rents in arrear, as the defendant by uncon-

scientious conduct had endeavored to defeat the rents altogether.

Delay in Prosecuting Claim for Ground Rents.—It was held in *Mulliday v. Machir*, 4 Gratt. 1, that the proprietor of land upon which rent was reserved, having delayed for many years to prosecute the claim for the ground rents, would not be allowed interest thereon.

Replevy Bond—From Date of Bond.—Judgment ought not to be rendered on a three months' replevy bond for interest from a day anterior to the date of the bond, but it may be rendered for interest from the date of the bond on the rent and costs of the distress. *Williams v. Howard*, 3 Munf. 277.

Act of March 2, 1827.—Under the act of March 2, 1827, a landlord was entitled to interest on rent in arrear, from the time it was due. *Brooks v. Wilcox*, 11 Gratt. 411.

6. LIEN.

By Statute in Virginia.—It was held in *Re Wynne*, Chase (U. S.) 223, 30 Fed. Cas. 752, which case came up from the United States circuit court for Virginia, that by § 12, title 41, ch. 123, of the Revised Code of Virginia adopted in 1860, a lien for rent was given to the landlord on goods upon demised premises, independently of any proceeding by distress or attachment.

By Statute in West Virginia.—A lien is given by § 12, ch. 93, W. Va. Code 1891, for one year's stipulated rent, whether accrued or not, upon the goods of a tenant on the premises, over liens created after the commencement of the tenant's term, although no distress warrant has been issued for such rent. *Anderson v. Henry*, 45 W. Va. 319, 31 S. E. Rep. 998.

Goods Must Be on Demised Premises.—The landlord's lien for a year's rent on the goods and chattels of his tenant does not extend to protect them from being taken by virtue of any execution, except in cases when the said goods and chattels shall be in or upon the demised premises. *Geiger v. Harman*, 3 Gratt. 130.

Priority—Lien for Taxes Superior.—The lien for taxes in West Virginia is superior to the landlord's lien for rent. *Bartlett v. Loundes*, 34 W. Va. 498, 13 S. E. Rep. 702.

Same—Deed of Trust by Tenant—New Term.—A deed of trust was given on personal property by the tenant holding for a term of years, the lease containing no agreement for renewal. At the expiration of the term, a new term was agreed upon on terms materially different from the first lease. This was held to create a new tenancy and to give the deed of trust priority over the lien for rent due under the last lease. §§ 11 and 12, ch. 134, Code 1873, construed. *Upper Appomattox Co. v. Hamilton*, 33 Va. 319, 2 S. E. Rep. 195; *Wades v. Figgatt*, 75 Va. 575; *Richmond v. Duesberry*, 27 Gratt. 210.

Same—Tax Sale—Purchase by Lessee—Mortgage—Distress.—Goods are on leased premises, liable to rent. They are levied upon for taxes against the lessor, and sold therefor on the premises without removal, the lessee becoming the purchaser, and, he not paying the purchase money, two parties assume payment of it; and shortly after, while the property remains on the leased premises, the lessee executes to these two parties a deed of trust conveying such property to indemnify them against loss in case they should pay; the sheriff who sold the property still retaining possession after the execution of such deed of trust until actual payment to him, which payment is made by the parties who assumed it. After such payment the trustee takes posses-

sion of the property, and a distress for rent is made on the property within thirty days after its removal from the premises. The distress for rent has preference over the deed of trust. *Bartlett v. Loundea*, 84 W. Va. 493, 12 S. E. Rep. 762. See monographic note on "Subrogation" appended to *Janney v. Stephen*, 2 Pat. & H. 11.

Same—Assignment and Purchase of Furniture—Deed of Trust—Holding Over—Distress.—On January 1st, 1871, a house was leased for the period of one year. In March, without the assent of the lessor, a third person took the lease, and purchased his furniture on the premises, having borrowed the money and conveyed the furniture to secure the creditor. The assignee paid rent to the lessor and at the end of the term held over, and in March, 1872, without the consent of the lessor turned the house and furniture over to another, who paid the rent to the lessor until July or August, failing to pay any rent for the rest of the year. Then the lessor sued out a distress warrant which was levied on the property already conveyed in the trust deed. The holding over by the assignee in 1872 was held a new lease, and the lien of the deed of trust existing then, was valid against the lien for rent for 1872. *Richmond v. Dueberry*, 27 Gratt. 210, and note.

7. PAYMENT.

When Entitled to Additional Time.—Where the lessee of a mine has made frequent efforts to pay the rent, and the lessor has purposely prevented him, the lessee should be given additional time in which to pay the rent. *Young v. Ellis*, 91 Va. 297, 31 S. E. Rep. 480.

8. SET-OFF.

Lease from Executor—Debt Due by Testator.—A tenant having leased land from an executor cannot set off debts due to him by the testator against the rent. It might be otherwise, if the executor has acknowledged that he had a sufficiency of assets. *White v. Bannister*, 1 Wash. 166. See monographic note on "Executors and Administrators" appended to *Rosser v. Depriest*, 5 Gratt. 6.

Rents Payable Direct to Cestui Que Trust—Drafts of Trustee.—By order of court the rents of trust subject are decreed to be paid directly to the *cestui que trust* by the receiver. The trustee was held to have no powers in the matter, and his drafts against the lessee could not be set off against the rent. *Witt v. Warwick*, 88 Va. 699, 3 S. E. Rep. 352.

9. RECOVERY.

a. ASSUMPSIT.—See monographic note on "Assumpsit" appended to *Kennaird v. Jones*, 9 Gratt. 188.

On Implied Promise.—Assumpsit for the use and occupation of land by permission of the plaintiff lies on an implied as well as an express promise to pay rent. *Sutton v. Mandeville*, 1 Munf. 407, 4 Am. Dec. 549.

On Express Promise.—Assumpsit for the use and occupation of land by permission and assent of the plaintiff, will lie at common law on an express promise to pay the plaintiff a certain sum, or in general terms to pay him to his satisfaction for such use and occupation. *Eppes v. Cole*, 4 H. & M. 161, 4 Am. Dec. 512.

Lease Not Sealed—Statute.—The action of assumpsit for use and occupation of land is maintainable under the statute, § 7, ch. 98, W. Va. Code 1868, where the agreement of lease is not by deed. *Goshorn v. Steward*, 15 W. Va. 657.

Plaintiff Confined to Terms of Contract.—In an action of assumpsit by the lessee against the lessor,

the plaintiff will be confined to the terms of the contract sued on, and cannot recover upon a verbal understanding made contemporaneously with the written lease. *Kline v. McLain*, 33 W. Va. 23, 10 S. E. Rep. 11, 5 L. R. A. 400.

b. ATTACHMENT.—See monographic note on "Attachments" appended to *Lancaster v. Wilson*, 27 Gratt. 624.

Rent Not Due—Amount.—An attachment against the estate of a tenant for rent to become due at a future day cannot issue for more than the rent next due. *Redford v. Winston*, 3 Rand. 148.

Same—Revised Code.—By § 9, ch. 113, 1 Rev. Code, the lessor is not entitled to an attachment for rent not yet due, before the commencement of the term for which rent is to be paid. *Johnson v. Garland*, 9 Leigh 149.

Same—Same—Quashal.—If an attachment for rent not yet due be issued before the commencement of the term for which it is to be paid, and levied on the goods of the lessee, and the lessee thereupon enters a recognizance to pay the rent, he may, notwithstanding, move the court to which the process is returned to quash the attachment for irregularity. On such motion the court ought to quash the attachment and the recognizance likewise, which was founded upon it. *Johnson v. Garland*, 9 Leigh 149.

Same—Removal of Goods—Plea by Tenant.—Where an attachment is issued against the estate of a tenant for rent to become due at a future day, on the oath of the landlord that he has sufficient grounds to suspect that the tenant will remove his effects out of the county or corporation before the expiration of his term, it is not competent for the tenant on the return of the attachment to plead that his landlord had not sufficient grounds to suspect that the tenant was about to remove his effects. *Redford v. Winston*, 3 Rand. 148.

Grounds—Property under Deed of Trust—Threatened Removal by Trustee.—When the lessee, after removal of property to the leased premises, executes a deed of trust thereon, threatened removal of such property by the trustee authorizes attachment for rent. *Offerding v. Ford*, 92 Va. 636, 24 S. E. Rep. 246.

Same—Removal of Goods—Construction of Statute.—The statute, § 4, ch. 148, Code 1873, authorizing an attachment against a lessee's goods for rent not due, when he is removing, etc., so that probably sufficient goods will not be left to satisfy the claim for rent when due, applies to all removals, in regular course of business or otherwise, as there is no exception made in the statute, and the language is plain. *Offerding v. Ford*, 92 Va. 636, 24 S. E. Rep. 246. See further, monographic note on "Attachments" appended to *Lancaster v. Wilson*, 27 Gratt. 624.

Interpleading.—The section of the statute which allows interpleading in attachments without bail does not extend to attachments for rent. *Hallam v. Jones*, Gilmer 142.

c. COVENANT.—See monographic note on "Covenant, The Action of."

In covenant on a lease stipulating to pay rent, and binding the lessee to board the lessor and wife part of the term and to return the premises uninjured, the declaration described so much of the agreement as related to leasing and paying rent, and charged the lessee with having broken the covenant generally, and particularly in failing to pay rent, but said nothing about other stipulations.

This variance was not substantial. *Backus v. Taylor*, 6 Munf. 488.

d. DEBT.—See monographic note on "Debt, The Action of" appended to *Davis v. Mead*, 13 Gratt. 118. **Plaintiff with No Title.**—In an action of debt for rent, when the plea is *nil debet*, if the tenant has enjoyed the land uninterruptedly under the lease, the plaintiff is entitled to recover, whether he had a title to the land or not. *Ross v. Gill*, 1 Wash. 87.

Offset of Damages for Failure to Repair.—If a landlord covenants to make repairs to premises, the tenant may notify him to do so, and if he fails or refuses to comply with such covenant, the tenant may make the repairs, and in an action of debt instituted by the landlord for the rent, may recoup the same as offsets or payment against the rent demanded. *Cheuvront v. Bee*, 44 W. Va. 103, 28 S. E. Rep. 751.

e. DISTRESS.

(1) Right to Distrain.

Where Note Given for Rent.—A landlord taking the negotiable note of his tenant for rent may not distrain or sue for the rent until the maturity and nonpayment of the note. *Hornbrooks v. Lucas*, 24 W. Va. 493.

Two Leases—Second Lessee Unable to Get Part of Premises.—When the same premises are demised to two different tenants, under separate leases, executed at different dates, if the lessee under the first lease is in possession of part of the premises, so that the lessee under the second lease cannot get possession thereof, then the second lease is void as to that part of the premises, and the lessor cannot distrain for a proportion of the rent. *Tunis v. Grandy*, 22 Gratt. 109.

Code 1873—Rent Unpaid—Liability—Year's Rent.—"One year's rent" and "a year's rent," are used in Code 1873, ch. 134, §§ 11, 12, to denote the amount of rent to be distrained for in the one case and to be paid, or secured in the other, and it matters not for what year it accrued. As long as any rent arising under the tenancy remains unpaid by the persons liable therefor, as soon as it becomes due the persons entitled to it may distrain the goods for an amount not exceeding the rent for a year. *Wades v. Figgatt*, 75 Va. 575.

(2) Property Liable.

Must Be on Premises.—A distress for rent cannot be made off the demised premises, and in such case an attachment will be preferred to it. *Mosby v. Leeds*, 3 Call 430. See *Geiger v. Harman*, 8 Gratt. 180.

Same—Property of Stranger—Revised Code.—It was held in *Davis v. Payne*, 4 Rand. 332, that the property of a third person never was liable to distress for the rent of the tenant, unless it were found upon the premises; and even where it was found there, the distress was taken away by Act 1818, 1 Rev. Code, ch. 113, § 15.

Exception—Conveyance by Trust Deed of Property on Premises.—A tenant, having household furniture on the leased premises, conveyed it by deed of trust to trustees for payment of just debts; but the goods remained in possession of the tenant on the premises, and the lessor distrained them for rent in arrear. These goods were not exempted from distress within the meaning of 1 Rev. Code, ch. 113, § 15. *Harvie v. Wickham*, 6 Leigh 236.

(3) Proceedings to Distrain.

(a) Constitutionality.—In *Anderson v. Henry*, 45 W. Va. 319, 81 S. E. Rep. 998, the 14th amendment to the federal constitution was held not to render the

local statute allowing distress for rent unconstitutional and void.

(b) Warrant and Affidavit.

Warrant Must Be in Name of State.—A warrant of distress is a writ, within the meaning of the constitutional provision requiring writs to run in the name of the state. *Beach v. O'Riley*, 14 W. Va. 55.

Certainty in Describing Premises.—A distress warrant ought not to be quashed for uncertainty in describing leased premises, where the description was: "A certain messuage and tenement situated in the city of Huntington, in Cabell county, West Virginia, rented by the Central Land Company to F. J. Calhoun,"—it not being necessary to describe the premises in such a case as is necessary in case of a conveyance. *Central Land Co. v. Calhoun*, 16 W. Va. 361.

Returned to Circuit Court—Dismissed by Plaintiff—Same Pleadings Proper in County Court.—Rent reserved in salt being in arrear the landlord distrained therefor, and the affidavit and warrant were returned to the circuit court, where the tenant appeared and a jury was impaneled to find the value of the rent in money; but not being able to agree they were discharged, and the landlord dismissed the case. Using the same affidavit and warrant he applied to the county court to ascertain the value, which course was regular. See 1 Rev. Code, ch. 113, § 12, p. 449; *Brooks v. Wilcox*, 11 Gratt. 411.

(c) Hearing and Determination.

Object in Proceeding before Jury.—The only object of proceeding before a jury in the case of a distress for rent, is to ascertain the value in money of the rent in arrear. It is not necessary for the landlord to prove to the jury that a distress warrant has been levied for rent in something other than money, and that it is due and in arrear. *Brooks v. Wilcox*, 11 Gratt. 411.

Jury Sworn to Find Rent "Said to Be Due."—In an action of distress for rent, where a jury was impaneled to ascertain the value of the rent in arrears in money, it was not error to swear the jury to ascertain the value of the rent *said to be due*. *Brooks v. Wilcox*, 11 Gratt. 411.

(d) Levy.

Officer May Make Second Levy.—An officer levying a distress warrant, if he thinks he has not taken sufficient effects to satisfy the claims for rent, may make a second levy. *Brooks v. Wilcox*, 11 Gratt. 411.

(e) Sale.

By Proper Officer.—Property distrained for rent can be sold only by an officer duly qualified as such, as by a sheriff or constable. *Ferguson v. Moore*, 3 Wash. 54.

Landlord Cannot Sell—Property a Pledge.—Although a landlord may levy a distress warrant personally or by means of an agent, he cannot sell the distrained effects, which in such case are only to be held as a pledge to compel the tenant to pay the rent. *Smith v. Ambler*, 1 Munf. 596.

Surplus Belongs to Tenant.—In a proceeding by distress for recovery of rent, under ch. 113, 1 Rev. Code 1819, where the value of rent in arrear has been found by the jury, and the court orders an officer to sell the property distrained, the proceeds of the sale after the deduction of the rent, interest and costs, should be turned over to the tenant. *Brooks v. Wilcox*, 11 Gratt. 411.

(f) Bonds.

Where Returnable.—A bond to release property distrained for rent must be returned to the court to which the officer levying the distress belongs or to

the court of that county in which the land lies. *Ferguson v. Moore*, 2 Wash. 54. See generally, monographic notes on "Bonds" appended to *Ward v. Churn*, 18 Gratt. 801, and "Statutory Bonds" appended to *Goolsby v. Strother*, 21 Gratt. 107.

Execution by Original Lessee Not in Possession.—A replevin bond given in a distress proceeding is good if executed by the original lessee, though he is not the tenant in actual possession, nor the owner of the property distrained, if he had assigned his lease to a third person, without the privity or assent of the lessor. *Ferguson v. Moore*, 2 Wash. 54.

Remedy on—Taken by Proper Officer.—A landlord is not entitled to the summary remedy by motion on a three months' replevin bond, unless it appear that such bond was taken by the sheriff or other officer legally authorized to make distress and sell the distrained effects. *Smith v. Ambler*, 1 Munf. 506.

Same—When Distress for More Rent Than Due.—A landlord may recover on a forthcoming bond given on a distress warrant for rent, though the warrant of distress was for more rent than was due. *Carter v. Grant*, 32 Gratt. 760.

Same—Contract of Rent Must Be Proved.—In summary proceedings on a forthcoming bond given on distress for rent, the plaintiff must prove the contract of rent for which the distress was sued out. *Carter v. Grant*, 32 Gratt. 760.

Same—Defenses.—In an action of debt on a forthcoming bond, for property levied on a distress warrant, the tenant may plead and show in defense that the distress was for rent not due from him at the time of suing out the distress warrant mentioned in the bond, since § 5, ch. 142, of the Code, expressly allows such defense. *Hall v. Wadsworth*, 35 W. Va. 375, 14 S. E. Rep. 4.

If the defendant in a motion on a forthcoming bond appears and makes defense, and the plaintiff proves the execution of the bond and its forfeiture, on demurrer to the evidence judgment should be given for the plaintiff, though he fail to produce or prove the distress warrant on which the bond was based. *Central Land Co. v. Calhoun*, 16 W. Va. 361.

Payable to Agent of Creditor—Good as Common-Law Bond.—A forthcoming bond for property levied on under a distress warrant, § 1, ch. 142, of the Code, providing that the officer levying a distress warrant may take from the debtor a bond, etc., "payable to the creditor," is not good as a statutory bond, if made payable to one as agent of the creditor; but it may be upheld as a good common-law bond in an action of debt thereon, when the obligor has enjoyed benefits under it. *Hall v. Wadsworth*, 35 W. Va. 375, 14 S. E. Rep. 4.

(4) Wrongful Distress.

Declaration—Allegations.—In an action under 1 Rev. Code, ch. 113, § 5, for wrongful distress for rent when no rent is in arrear, the declaration must set forth the relation of landlord and tenant existing between the plaintiff and the defendant, otherwise it is bad on general demurrer. *Jones v. Murdaugh*, 3 Leigh 447.

Same—Same—Variance.—In an action on the case for wrongful distress, the plaintiff alleged that he held under a lease for five months for twenty dollars payable in repairs and labor. It appeared at the trial that the lease was for twelve months and for money rent of sixty-five dollars. The variance was fatal. *Olinger v. McChesney*, 7 Leigh 660.

Same—Same—Compensatory Damages.—In an action under § 2898, Va. Code 1887, for damages on account of illegal distress for rent, the declaration

alleged that the defendant levied on 80% of goods to satisfy a claim for rent amounting to \$400, and that in fact there was no rent due, and that the plaintiff thereby incurred expenses and losses by reason of being deprived of gains in his business. There being no allegation showing circumstances of aggravation, only compensatory damages could be recovered. *Fishburne v. Engledove*, 91 Va. 568, 23 S. E. Rep. 354.

Goods Not Sold—Trespass and Case May Both Be Brought.—Where a distress is made for rent pretended to be due, when there is none due, and the goods distrained are not sold, the remedy is by action at common law, and trespass may be maintained. But the party suing is not obliged to bring trespass, as he may waive the trespass and bring case. *Olinger v. McChesney*, 7 Leigh 660.

Replevin Sued Out and Not Prosecuted Will Not Prevent Action on the Case.—Where there is a wrongful distress, the fact that the party distrained upon sued out a writ of replevin which was never prosecuted, will not prevent him from maintaining case for the wrongful distress. Case will lie for suing out an attachment for rent maliciously and without probable cause. *Olinger v. McChesney*, 7 Leigh 660.

No Relief in Equity but by Damages at Law.—Where a landlord distrains property as being fraudulently removed from the premises, and does not show that it was so fraudulently removed, nor that the distress is levied within the time allowed by law, nor that the property ever was on the demised premises, the tenant ought not to seek redress in a court of equity but by damages at law. *Davis v. Payne*, 4 Rand. 332.

X. ACTIONS IN GENERAL.

See section "IX. Rent," sub-section "9. Recovery."

1. LANDLORD AGAINST TENANT.

a. TO RECOVER POSSESSION.

Landlord Proper Plaintiff.—A landlord sells land in possession of his tenant by agreement under seal and the tenant refuses to deliver possession. The landlord is the proper party to institute proceedings to obtain possession. *Harrison v. Middleton*, 11 Gratt. 527. See *Hawkins v. Wilson*, 1 W. Va. 121. See generally, monographic notes on "Unlawful Detainer" appended to *Dobson v. Culpepper*, 23 Gratt. 352.

Recovery According to Description in Warrant or Lease.—Plaintiff in action for unlawful detainer may recover according to description of the premises in his warrant or in the lease under which the defendant received possession from him, and must, at his peril, point out the premises to the sheriff, being compelled to make restitution if he takes more than he has recovered. *Emerick v. Tavener*, 9 Gratt. 220.

Recovery of Entire Premises—Not Merely Part Occupied.—Lessor may recover entire premises demised, and not merely the part actually occupied by the defendants, in an action for unlawful detainer against his tenant holding over and disclaiming to hold under him. *Emerick v. Tavener*, 9 Gratt. 220.

Same—Alienation by Tenant.—Tenant alienating part or all of premises remains liable to his lessor in an action to recover possession of the whole premises, if possession be withheld after termination of the tenancy, whether such alienation be by sub-lease or by conveyance in fee with warranty,

and whether the act be ejectment or unlawful detainer. *Emerick v. Tavener*, 9 Gratt. 320.

Defenses—Forfeiture for Taxes during Tenancy.—The fact that during the tenancy the title of the landlord has been forfeited for the nonpayment of taxes on the land in controversy constitutes no valid defense to an action of unlawful detainer, brought to dispossess the tenant, as the plaintiff is entitled to be placed *in statu quo*, unless, perhaps, the tenant has made a distinct disclaimer, and has been holding adversely for more than three years, or can sustain some other valid defense. *Voss v. King*, 38 W. Va. 607, 18 S. E. Rep. 702.

Same—Conveyance by Landlord during Term.—Although a tenant cannot deny his landlord's title at the time of the lease, he can show that subsequently the landlord has conveyed the land to another, in an action of unlawful detainer against the tenant for possession. *Dobson v. Culpepper*, 23 Gratt. 352.

Same—Lease Signed by Mistake Due to Fraud of Lessor.—In an action of unlawful detainer to recover possession of leased land, the lessee admits a lease, claiming that he signed it through mistake, that he was put in possession, erroneously supposing the landlord to have the better title, when as a matter of fact he himself was entitled to the land. It was held that if such mistake was induced by the fraudulent representations of the lessor, the lessee was entitled to such defence. *Locke v. Frasher*, 79 Va. 409.

b. TO RECOVER DAMAGES.

Abandonment of Lease—Amount of Damages.—If a lease is abandoned by the lessee, and he refuses to complete his contract, and after due notice the lessor sells the lease at public auction, damages may be recovered at once for the whole loss, and not merely for the loss up to the time of the sale. *James v. Kibler*, 94 Va. 165, 26 S. E. Rep. 417.

Same—Purchase by Lessor at Auction.—If the lessor, at a public auction of a lease which has been abandoned by the lessee, purchases the same, this will not prevent a recovery of damages by him for the breach of the contract. *James v. Kibler*, 94 Va. 165, 26 S. E. Rep. 417.

Failure to Develop Premises According to Contract.—The remedy of the lessor of land for oil and gas purposes for the failure on the part of the lessee to develop the leased premises according to the contract, or to protect it from drainage from wells on adjacent property, is ordinarily by an action at law for damages. *Harness v. Eastern Oil Co.*, 49 W. Va. 232, 38 S. E. Rep. 662.

Permanent Injury Due to Negligence.—Where premises are permanently injured by the negligence of the lessee, an action on the case may be brought by the lessor pending the lease, and the action will not be prevented by a covenant of the lessee to have the premises in good repair. It is not for the tenant to say that an action of covenant may be maintained against him for the same cause; for the lessor may have at his option either remedy. *Moses v. Old Dominion, etc., Co.*, 75 Va. 95.

Assumpsit—Breach of Covenant—Allegations.—Where an action of assumpsit is brought for damages for the violation of a covenant in a lease which provided for its renewal and which was conditioned on the performance of the terms of the lease, the lessee must allege a performance of such conditions, or a valid excuse for nonperformance. *Grubb v. Burford*, 98 Va. 553, 37 S. E. Rep. 4, citing *Carroll Co. v. Collier*, 23 Gratt. 302, 306; *Metropolitan L.*

Ins. Co. v. Rutherford, 95 Va. 773, 30 S. E. Rep. 333, and authorities there cited.

Covenant to Keep in Repair—Damage by Lessee's Negligence—Repairs by Lessor and New Lease—Liability of Lessee.—The lessor in a lease of a warehouse for three years covenanted that if the building should be so damaged by fire, or other cause as to make it untenable, the lease should be void, and the lessee covenanted to leave the building in good repair, ordinary wear and tear excepted. The lessee stored in the building a large quantity of iron and nails, and during a storm a portion of the building, including all the floors and the roof, fell down. The lessor claimed that the lessee was liable for damages, which the latter denied, and the former with the latter's consent, repaired the building, and the lessee again took possession and held under the lease. It was held that the lessor could sue in an action on the case against the lessee for the damage done to the building. *Moses v. Old Dominion, etc., Co.*, 75 Va. 95.

Same—Measure of Damages.—In an action on the case by a landlord against his tenant for damages to a building, which the latter had covenanted to keep in repair, on refusal of the latter to repair, and the building having been repaired by the landlord with the tenant's consent, the measure of damages is what was necessarily expended in placing the property in its former condition. *Moses v. Old Dominion, etc., Co.*, 75 Va. 95.

c. FOR INJUNCTION.—See monographic note on "Injunctions" appended to *Clayton v. Anthony*, 15 Gratt. 518.

Restrictions in Lease—Irreparable Injury.—When the lessee is restricted by the terms of his lease to a particular use of the premises, as a general rule equity will restrain him from using them in any other way, even though no irreparable injury will result from such other use. *Frank & Co. v. Brunemann*, 8 W. Va. 463.

Same—Waste—Implied Agreement.—A court of equity will enjoin a tenant from doing a certain act, whether it is waste or not, if it be directly contrary to the tenant's covenant, or even contrary to an implied agreement which is inferred from the course of dealing between the parties. *Frank & Co. v. Brunemann*, 8 W. Va. 462.

Enjoining Waste—Dissolution of Order.—An order dissolving an injunction to restrain a lessee from erecting a stable on the leased premises without the consent of the lessor, is not erroneous, it providing that the stable should be removed at the expiration of the lease, should the lessor so insist, it being erected against her will. *Hubble v. Cole*, 85 Va. 87, 7 S. E. Rep. 243.

2. LANDLORD AGAINST THIRD PERSONS.

Officer Removing Goods without Paying Rent—Damages.—An officer under execution removes goods of a lessee without paying the rent due to the landlord. In an action by the landlord against the officer the just measure of damages is the value of the goods and not the amount of rent in arrears. *Crawford v. Jarrett*, 2 Leigh 630.

3. THIRD PERSONS AGAINST LANDLORD.

Injury to Water Power by Erection of Boom.—A lessor who erects a boom in such close proximity to a milldam as to injure the water power of such dam, and thereby creates a nuisance against the same, is equally liable with his lessee with notice for the continuance of such nuisance. *Pickens v. Coal, etc., Co. (W. Va.)*, 41 S. E. Rep. 400.

Purchase of Salt—Possession Taken by Lessor—Destruction.—The owner of a salt factory leased it, reserving rent in salt. In July the lessee sold to a third person all the salt then made, or that should be made before the next January, except what would be due the landlord for rent. The purchaser sent for the salt early in December. A boat of it being loaded, and being on the point of starting, the landlord forbade its being taken away, declaring he would warrant it for the rent. The sheriff then came, saying he had a warrant, and forbade the removal of the salt and the boatman left. The landlord took possession, and sent the boat down the river, where it was sunk. In an action of trover by the purchaser against the landlord, it was held that the salt belonged to the purchaser. *Lewis v. Arnold*, 18 Gratt. 454.

4. TENANT AGAINST LANDLORD.

Injunction to Enjoyment of Land—Action on Bond—Covenant.—Where the lessor prevents the lessee from enjoying the leased property by preliminary injunction which is afterwards dissolved, the fact that the lessee has a right of action on the injunction bond will not bar his action of covenant. *Hubble v. Cole*, 88 Va. 236, 18 S. E. Rep. 441, 29 Am. St. Rep. 716, 18 L. R. A. 311.

Same—Same—"Case."—An injunction restraining a tenant from enjoying the leased premises was dissolved. The tenant may recover damages by action on the case, in addition to his remedy on the injunction bond. *Hubble v. Cole*, 88 Va. 236, 18 S. E. Rep. 441.

Failure to Deliver Possession—Ejectment—Measure of Damages.—In an action for damages for failure of the landlord to give possession of property which had been leased, or from which he has ejected the tenant, where the gist of the action is the deprivation of the benefit of the lease, whether the action is covenant or tort, the general rule is that the plaintiff is entitled, as the measure of the damages, to the difference between the rent reserved and the value of the premises for the term. He may also recover such special damages as have directly and necessarily been occasioned by defendant's wrongful act or default, but cannot recover what he might have made on the premises during his lease, nor for loss sustained by selling his stock, implements, etc., for less than their value. *Robrecht v. Marling*, 29 W. Va. 765, 2 S. E. Rep. 827.

The plaintiff rented a mill from the defendant, but possession was not delivered. No special damage being shown, the court held that the plaintiff in an action of covenant is entitled to recover only the difference between the rent contracted to be paid and a fair rent for the property at the time it should have been delivered. *Newbrough v. Walker*, 8 Gratt. 16, 56 Am. Dec. 127.

Specific Performance.—An executory lease that is unfair, unjust or unreasonable will not be enforced in equity. *Eclipse Oil Co. v. South Penn Oil Co.*, 47 W. Va. 84, 34 S. E. Rep. 923.

5. TENANT AGAINST THIRD PERSONS.

Trespass—Tenant Proper Plaintiff.—An action of trespass against a stranger should be brought by the tenant, and not by the landlord. *Kretzer v. Wyson*, 5 Gratt. 9.

Damage to Property—Measure of.—A life tenant in possession is entitled to sue for damages done the property, by which the rental value thereof is diminished or destroyed. The measure of damages, as in other cases, is the amount necessary to make good the loss, which must be determined by

the jury from the facts and circumstances shown in evidence. *Johnson v. Chapman*, 43 W. Va. 630, 28 S. E. Rep. 744.

Injunction to Waste.—A person holding a valid executory oil and gas lease, executed by several of a number of cotenants, is such an inchoate interest in the land subject to such lease as will enable him to maintain an injunction to prevent a wrongdoer from committing waste by the extraction of such oil and gas. *Trees v. Eclipse Oil Co.*, 47 W. Va. 107, 34 S. E. Rep. 933. See monographic note on "Injunctions" appended to *Clayton v. Anthony*, 15 Gratt. 518.

Contract between Landlord and Railroad—Violation—Who Can Sue.—Where a landowner makes a contract with a railroad company to fence its right of way through his lands, and subsequently the landowner leases for a year to a tenant, and at date of lease the fence was in bad condition, and down in several places, the tenant cannot maintain an action for damages on the contract. *Hoyleman v. Kanawha, etc., R. Co.*, 33 W. Va. 489, 10 S. E. Rep. 816.

XI. EVIDENCE.

Sufficiency to Establish Lease.—A party who had signed an agreement to lease, told a third person that he had rented his property, and requested him not to say anything about it, presumably because he did not want it known until it was all arranged. This evidence was held insufficient to prove the writing to be an actual lease. *Boisseau v. Fuller*, 96 Va. 45, 30 S. E. Rep. 457.

Admissibility—Action to Recover Rent—Destruction of Buildings.—Where an action of debt is brought to recover rent for leased buildings, it is admissible evidence to show the destruction of the buildings, which occurred without the fault of the lessee, as this exonerates him from the payment of the rent, by § 2455 of the Code. *Richmond Ice Co. v. Crystal Ice Co.*, 99 Va. 239, 37 S. E. Rep. 861.

Same—Same—Occupation by Unsealed Lease.—In an action of assumpsit for use and occupation of land, occupation by permission of the plaintiff may be proved directly by the production and proof of a written lease, not under seal, if one has been entered into. *Goshorn v. Steward*, 15 W. Va. 657.

Same—Same—Amount of Recovery by Unsealed Lease.—In an action of assumpsit for the use and occupation of land, the agreement not being under seal and being fully executed on the part of the plaintiff, he is entitled to introduce the written agreement, which fixes the rent, in evidence of the amount of recovery in the action. *Goshorn v. Steward*, 15 W. Va. 657.

Same—Same—Same—Nonsuit.—Where an action of assumpsit is brought for the use and occupation of a tract of land, and the declaration contains only two counts, one of which is *indebitatus assumpsit*, and the other on the *quantum meruit*, and a bill of particulars is filed with the declaration, if the defendants interpose the plea of nonsuit for five years, although a written agreement not under seal may appear in evidence, fixing the terms of the rental for one year, when the possession and occupancy continue for nearly six years thereafter, under the West Virginia statute, the plaintiff shall not be nonsuited by reason of the writing appearing in evidence, but the same may be considered in fixing the value of the rental. *Atkinson v. Winters*, 47 W. Va. 226, 34 S. E. Rep. 834.

Same—Same—To Prove Owner.—In an action of debt on a bond given for the lease of certain

premises, evidence is admissible to prove who is in fact the true owner of the land. *Barley v. Barley*, 1 Va. Dec. 103.

Same—Parol Evidence to Explain Lease.—Parol evidence of a usage for the off-going tenant to have the way-going crop is not admissible to explain a written contract of lease for a fixed and certain period. *Harris v. Carson*, 7 Leigh 632.

Same—Same—Inconsistent with.—Where a lessee had, by his written contract with the lessor, until the end of his term to make certain repairs to the property, a verbal agreement to make them at an earlier period is inconsistent with the written contract, and therefore does not come within the exception to the rule that parol evidence may be introduced when it establishes an agreement additional to but consistent with the written agreement. *Colhoun v. Wilson*, 27 Gratt. 639.

Same—Same—What Included in Lease.—If it cannot be ascertained by the written contract of lease whether a parcel of the demised premises is included therein, it is permissible to show this by extrinsic evidence. *Crawford v. Morr*, 5 Gratt. 90.

Same—Action on Covenant to Renew—Future Profits—Damages.—In an action for the breach of a covenant to renew a lease, evidence of the future profits to be made from the property, if a certain price can be obtained for the product thereof, is inadmissible on the question of damages. *Grubb v. Burford*, 98 Va. 553, 37 S. E. Rep. 4.

Same—Same—Parol Evidence to Modify Lease—Later Lease.—In an action of assumpsit for damages for failure to renew a lease, where the plaintiff had introduced evidence that a certain lease had been modified by a parol agreement, and it was denied by the defendant, it was error to refuse to admit a later lease between the parties, which provided that it should not conflict or interfere with the lease sued on, to rebut such evidence. *Grubb v. Burford*, 98 Va. 553, 37 S. E. Rep. 4.

622 *Dabney's Ex'ors v. Dabney's Adm'r.

February, 1844, Richmond.

[40 Am. Dec. 761.]

(Absent BROOKS and ALLEN, J.)

Presumption of Payment—Evidence to Repel—Endorsement on Bond.—An endorsement of credit on a bond, made by the obligee within the period that raises the legal presumption of payment, is evidence for him for the purpose of repelling that presumption.

***Presumption of Payment—Evidence to Repel—Endorsement on Bond.**—The principal case is cited in *Sadler v. Kennedy*, 11 W. Va. 193, for the proposition that an endorsement on a bond for payment on account of the principal or interest, written by the obligee, without the privity of the debtor, will not be sufficient evidence of an acknowledgment, that the bond was then due, so as to repel the presumption of payment, unless it be proved by other evidence than the endorsement itself, that the same was written at a time, when its operation was against the interest of the party making it; that is to say, before the presumption of payment attached. See *Coles v. Ballard*, 78 Va. 139.

In *Sadler v. Kennedy*, 11 W. Va. 193, the court, in referring to the decision in the principal case, said: "In that case the endorsements on the bond were proven to have been made by the obligee; but there

Same—Same—Same—Case at Bar.—In an action of debt brought in 1837 by an administrator against an executor, upon a bond of the 10th of January 1833, payable the first of January 1834, the defendant offered as a setoff a bond of the plaintiff's intestate to the defendant's testator, dated the 5th of April 1820 and payable on demand, with two endorsements thereon, admitted by the plaintiff to be in the handwriting of the defendant's testator, one of which credited a sum paid in part on the first of June 1828, and the other credited another payment in part on the 5th of May 1829. The circuit court, at the instance of the plaintiff, instructed the jury, that after the lapse of 16 years from the date of said bond, the jury might, from this aided by other circumstances, presume it paid; and, at the instance of the defendant, instructed the jury, that such presumption of payment might be repelled by other circumstances. The defendant relying upon the endorsements aforesaid upon the bond, and there being no proof of the time at which they were made, except that it appeared the defendant's testator died in 1833, the circuit court, at the instance of the plaintiff, instructed the jury, that the said endorsements were not circumstances to be taken into consideration by the jury to repel the presumption. **Held**, as the endorsements must have been made within the period of about 18 years from the time the bond was due, the circuit court clearly erred in its last instruction.

The administrator of Jane Dabney, in the early part of 1837, brought an action of debt in the circuit court of Louisa against the executors of Charles Dabney, upon a bond for 140 dollars, made the 10th of January 1833 and payable on the first of January 1834. Issue was joined on the plea of payment.

was no evidence tending to show that the payments were actually made, other than the endorsements, nor at what time the endorsements were in fact made by the obligee; but the evidence showed, that the obligee in fact died about thirteen years after the bond was due."

Same—Same—Examples of Repelling Evidence.—The common-law rule of presumption of payment may be repelled by satisfactory evidence of any kind whatever to the contrary. For example: By the obligor's express admissions, within the twenty years, that the debt was unpaid; by his implied admissions to that effect, from paying interest, or part of the principal, which fact is proved by extrinsic evidence, or even by cotemporaneous endorsement by the obligee himself; or by showing the obligor's inability to pay during the period; or by suspension of power of collection by stay-law, or by war, or even by the near relationship of the parties. *Udike v. Lane*, 78 Va. 133, citing *Carll v. Hart*, 15 Barbour 567; *Dabney v. Dabney*, 2 Rob. 650; 2 Min. Inst. 758; 4 Min. Inst. 502; 1 Rob. Pr. (2d Ed.) 622; *Hutsonpiller v. Stover*, 13 Gratt. 579; *Erskine v. North*, 14 Gratt. 60. Those rules obtained as well in courts of equity as at law.

The principal case is cited in this connection in *Norvell v. Little*, 79 Va. 144, and in *foot-note* to *Erskine v. North*, 14 Gratt. 61. See *Criss v. Criss*, 28 W. Va. 338; *Hale v. Pack*, 10 W. Va. 145; *Eustace v. Gaskins*, 1 Wash 188; *Bowle v. Poor School Soc.*, 75 Va. 300; *McCleary v. Grantham*, 29 W. Va. 301, 11 S. E. Rep. 949.

623 *At the trial in September 1839, the defendants offered in evidence, as a setoff, a bond of Jane Dabney to C. W. Dabney, dated the 5th of April 1820, for 130 dollars 33 cents payable on demand, with the following endorsements on it: "June 1st 1828. Received in part this note 26 dollars 78 cents. Cha. Dabney jr." "May 5, 1829. Rec'd 45 dollars in part this note. C. Dabney jr." These endorsements were admitted by the plaintiff to be in the handwriting of the testator of the defendants, and the defendants proved by a witness that their testator died in 1833, previous to the 11th of November in that year; but there was no other evidence of the time at which the said endorsements were made, and it did not appear that they were made with the knowledge or assent of the plaintiff's intestate. The court, at the instance of the counsel for the plaintiff, instructed the jury, that after the lapse of 16 years from the date of said bond, the jury, from this aided by other circumstances, might presume it paid. At the instance of the counsel for the defendants, the court also instructed the jury, that such presumption of payment might be repelled by other circumstances. In this state of the case, the counsel for the plaintiff moved the court to instruct the jury, that the endorsements aforesaid upon the bond were not circumstances to be taken into consideration by the jury to repel such presumption; and the court gave this instruction, to which the defendants excepted.

A verdict was found for the plaintiff for 106 dollars 98 cents, with interest from the first of January 1834; and judgment was rendered thereupon.

To this judgment a supersedeas was awarded.

The cause was argued by Grattan for the plaintiffs in error, and C. and G. N. Johnson for defendant in error.

624 *BALDWIN, J. An endorsement of credit on a bond, made by the obligee within the period that raises the legal presumption of payment, is evidence for him for the purpose of repelling that presumption. This exception from the general rule that a man's declarations shall not be evidence in his own behalf is justified by peculiar considerations. The evidence is used not to establish an original demand, but merely to rebut a presumption. The presumption thus met arises out of the imputed conduct of the obligee, to wit, his forbearing to assert his demand for many years; and the fact that he obtained a partial payment during the time goes to shew that the imputation is unfounded. The evidence of the fact, it is true, is furnished by the party himself; but it proceeded from him at a time when the disclosure was against his own interest. It is evidence, too, which he had authority at the time to establish, and which it was his duty to establish, for the protection of the obligor; and after a considerable lapse of time, it is usually the only available

means of shewing the negative of nonpayment, by the affirmative of partial payment. Upon the whole, therefore, such evidence is just, reasonable and expedient, unless attended with too much danger of fraud; and that is sufficiently guarded against by requiring proof that the endorsement was made within the period of presumption, and consequently when it was against the interest of the obligee to make it. Ingenuity, it is true, may still suggest a complexity of circumstances rendering such a fraud advantageous to the obligee; but that is a mere possibility, and the rules of evidence must deal with probabilities.

The first decision we have upon this subject is that of *Searle v. Lord Barrington*, of which there are several reports; 2 Str. 826; 2 Ld. Raym. 1370; 8 Mod. 278; 3 Bro. P. C. (old ed.) 535. In that case, which was an action upon a bond due in 1697, the defendant *pleaded solvit ad diem, and relied upon the presumption, it being after twenty years; to encounter which, the plaintiff offered to give in evidence an endorsement of interest under the hand of the obligee in the year 1707, which evidence was objected to, but received, and a verdict and judgment rendered for the plaintiff; which judgment was affirmed in parliament. It seems, from the reports of the case, that the endorsement bore date in 1707, but none of them state that there was proof of its having been actually made at that time. Whether in point of fact there was such proof, is a matter about which there has been a contrariety of opinion: 1 Starkie on Evid. pt. 2, p. 311, note (f.); 1 Phill. on Evid. 5th american from 8th Lond. ed. [349]; *Turner v. Crisp*, 2 Str. 827; *Glyn v. Bank of England*, 2 Ves. sen. 43; *Roseboom v. Billington*, 17 Johns. R. 182. That, however, I regard now as mere matter of curious speculation; for it is unimportant whether the decision in *Searle v. Lord Barrington* is to be considered as so restrained by the facts before the court in that cause, as to require proof that the endorsement was actually made within the period of presumption; or whether its authority is to be regarded as so limited by subsequent adjudications. It is certain that the principle of the case, so restricted, has been since uniformly recognized: see the authorities above cited, and *Rose v. Bryant*, 2 Camp. 321.

There can be no difficulty in the application of this doctrine to the case before us. The endorsements in question are in the handwriting of the obligee, who died in the year 1833. The bond is dated in 1820, and payable on demand. Of course the endorsements were made within the period of about thirteen years from the time when the bond was due. The general rule is therefore applicable, unless there be something in the peculiar circumstances of this case to constitute an exception.

626 *It has not been and cannot be supposed, that the aspect of the case is at all varied by the circumstances that

the bond in question was introduced as a setoff to the bond sued upon by the plaintiff, instead of having been made the foundation of a separate action. It is equally immaterial, as I conceive, that the bond sued upon is of a subsequent period to the one in question, having been executed in January 1833, and payable in January 1834. This, I think, will be obvious by attending to the precise proposition we are called upon to determine.

The court, at the instance of the plaintiff, instructed the jury, that after the lapse of sixteen years from the date of the bond in question, aided by other circumstances, the jury might presume it paid. Then, at the instance of the defendants, the court instructed the jury, that such presumption of payment might be repelled by other circumstances. Thereupon the plaintiff moved the court for a further instruction, that the endorsements on the bond were not to be taken into consideration by the jury to repel such presumption; which instruction the court gave. And it is upon the propriety of this last instruction that we are called upon to decide.

It will be observed, that the plaintiff relied upon circumstances not as distinct and substantive evidence, but merely to eke out a lapse of time inadequate in itself to raise the presumption of payment; the whole to constitute a substitute for the complete legal presumption presented by the lapse of twenty years. It was therefore a mere presumption which the defendants had to meet, and whether a presumption arising exclusively from the lapse of time, or from the lapse of time aided by circumstances, I regard as wholly immaterial. Besides, if this were not so, it is impossible to say that the defendants had a right to rely upon the endorsements to encounter a lapse of twenty years, *but not of only sixteen years; and if the right be the same in both instances, then it cannot be objected, in regard to the latter, that the effect would be to leave the subsidiary circumstances to their own intrinsic and independent weight.

The circumstances that the bond sued upon is posterior in date to the one introduced as a setoff, furnished no legal presumption of the payments of the latter; though it was evidence which the plaintiff had a right to rely upon, in connexion with other evidence, to prove the fact of payment, or, in connexion with the lapse of time, to raise the presumption of payment. If used at the trial in the latter point of view, as it probably was, it did not warrant the court in withholding the endorsements from the consideration of the jury, as evidence to repel the presumption of payment. Though there may have been a presumption to repel at the time of the trial, there was none when the endorsements were made. It must be taken, therefore, that they were made when it was against the obligee's own interest to make them, unless we admit the gratuitous supposition that they were fraudulently contrived to be used

at some future period, when a presumption of payment might arise. Such a fraud is the proper subject of proof, not of conjecture; and the plaintiff was at liberty to prove it, if he could, before the jury.

My opinion therefore is, that the circuit court erred in its last instruction to the jury; for which error the judgment should be reversed, and a new trial awarded, with a direction that upon such new trial the instruction is not to be repeated.

STANARD, J., and CABELL, P., concurring, judgment accordingly reversed, and new trial awarded, with a direction that the last instruction was not to be repeated.

628 *Hickerson's Adm'r v. Helm.

February, 1844, Richmond.

(Absent CABELL, P., and BROOKS, J.)

Executors and Administrators*—Set-Off of Distributee's Share against Purchases.—The rule laid down in *Pulliam v. Winston &c.*, 5 Leigh 334, that a distributee purchasing at an administrator's sale cannot injoin the collection of the bond for his purchases until his distributive share is ascertained and set off against the bond, approved as a general one; but an exception to it recognized.

Same—Injunction by Distributee's Donee of a Slave to Sale under Execution for Debt of Distributee of Estate—Set-Off of Distributable Share against Judgment—Parties—Case at Bar.—In November 1815, at a sale by an executor on 12 months credit, a distributee was one of the purchasers. The person requested to be her surety manifesting some reluctance to become such, the executor assured him that there was no danger of his having any thing to pay, as the purchases by the distributee were not so much as her portion of the estate. Whereupon the bond was executed. The executor died in 1831, and there was immediate administration on his estate, and on that of the first testator; but no suit was brought on the bond till 1837. Judgment was then obtained on it: and in the same year some of the legatees brought a suit for a settlement of the executorship account. In 1833, the distributee acquired slaves by the death of her father, and made a voluntary conveyance of them. One of them was sold under execution upon the judgment, and purchased by the administrator *de bonis non* at the sheriff's sale. Two others being afterwards levied on, the donee filed a bill in 1838 against the judgment creditor, to restrain the sale. During all this time there was no settlement of the executorship account: and none took place until the administrator of the executor was coerced to settle, by attachments for his contempt in disobeying the orders of the court in the suit of the legatees. **Held.** 1. On the donee's bill, an injunction may be awarded to restrain the sale of the two slaves levied on, until the amount of the distributee's claim is ascertained; and when ascertained, the same may be set off against the judgment. 2. The distributee is an indispensable party to the donee's

*See monographic note on "Executors and Administrators" appended to *Rosser v. Depriest*, 5 Gratt. 4.

suit. 3. As a suit is pending in which all the other distributees are parties, there is no necessity to make them parties in the donee's suit, but the proper course is to retain the injunction until, by the adjustment of the account in the other suit, the amount of the distributee's claim is finally liquidated, and then to apply that amount as a setoff against the judgment. 4. It being ascertained that after allowing *credit for the entire claim of the distributee, she was indebted, at the time of the sale of the slaves first levied on, more than the amount for which he sold, the credit in respect to that slave cannot be enlarged to what is estimated as his value at the time of the sale, but must be limited to the amount made on the execution by the sale of him: *dissentiente* BALDWIN, J., on the last point.

Same—Settlement of Accounts—Widow's Interest as Distributee—Case at Bar.—A testator dies possessed of slaves, to a third of which his widow, who renounces his will, is entitled during her life. In a settlement of the executors' account after the death of the executor, and after the widow's death, it appears by the appraisement that the slaves were seven in number. Two were specifically bequeathed by the testator, and the presumption is that they were delivered over to the legatees. Two were sold under execution of a creditor of the testator, before the executor had other assets in hand to pay the execution, and were purchased by the executor at the sheriff's sale. And two others were sold by the executor, though the payment of debts did not require the sale of them if the widow had paid up a sum of 792 dollars 48 cents, due from her for purchases of the testator's goods. When or for what prices these two were sold, did not appear. The record furnished no information of the disposition of the seventh slave; but the probability is that he was old and of little or no value. *Held*, the charge for the widow's interest in the slaves, instead of being measured by their estimated hires, should be an annual sum from the death of her husband until her death, equal to the annual interest of one third of the gross amount of the sales or the value of the slaves: *dissentiente* BALDWIN, J., who was of opinion that the widow was entitled to credit for one third annually of the estimated hires.

In 1815 Joseph Hickerson died, leaving a will by which he gave legacies to his children, and leaving a widow Elizabeth, who renounced the provision made for her by the will. His son Marshall Hickerson qualified as executor, and on the 9th and 10th of November 1816, made sale, on a credit of 12 months, of the perishable goods of his testator, and of some of the other personalty. Elizabeth Hickerson made purchases at this sale to the amount of 792 dollars 48 cents, and gave bond for the same with Daniel Hickerson as her surety. Marshall

Hickerson died on the 3d of July 1821 (while away from home) in Augusta in Georgia. In August of that year his brother Hosea qualified as his administrator, and as administrator de bonis non with the will annexed of Joseph Hickerson. In March 1827, the legatees of Joseph Hickerson brought a suit against the said Hosea (to which the said Elizabeth

was made a party) for a settlement of the executorial accounts, and a distribution of the said Joseph's estate. About the same time an action appears to have been brought by the said Hosea, as administrator de bonis non, against mrs. Hickerson and her surety, upon the bond before mentioned: for, in June 1827, an office judgment was rendered against them. An execution on this judgment was returned by the sheriff without any part being made; and then no other execution issued for about five years.

In the mean time, proceedings were going on in the suit of the legatees, the style of which was Shumate &c. v. Hickerson &c. In that suit, on the 19th of May 1828, the defendant Hosea Hickerson was ordered to render an account of his administration on the estate of Marshall Hickerson; and on the 21st of September 1829, he was ordered to render, in addition, an account of his transactions as administrator de bonis non of Joseph Hickerson, and an account of Marshall Hickerson's transactions on the same estate. In May 1830, a rule was made upon the said Hosea to shew cause why he should not be attached for his contempt in failing to render the said accounts; which rule was made absolute on the 2d of October 1830: but on the 11th of the same month, upon an affidavit of the said Hosea, stating (among other things) that he had rendered an account to the commissioner as far as he was enabled to do so, the order making the rule absolute was set aside. Again, however, on the 16th of October 1830, an attachment was awarded, with a proviso that it was to be discharged upon the 631 said Hosea's appearing before *the commissioner, and answering interrogatories upon oath in relation to the said accounts.

On the 26th of March 1832, the will of James Parr was proved, whereby he gave to his daughter Elizabeth Hickerson a third of his slaves and a share of his other estate. A few days afterwards the following deed was made:

"Know all men by these presents, that I, Elizabeth Hickerson of the county of Fauquier and state of Virginia, for and in consideration of the several expenses and troubles that my son in law mr. Lina Helm has been at, and which may hereafter accrue, together with the natural love I bear towards his wife Jinsey Helm, have given and by these presents do give to my said son in law Lina Helm all right, title and claim that I have coming to me by a legacy from my father James Parr deceased. In testimony whereof I have hereunto set my hand and seal this 29th day of March 1832.

Elizabeth Hickerson ^{her} X [Seal.]
cross.

"Signed, sealed and delivered }
in presence of }
"Wm. Gungin, James B. Lyn,
Thomas Helm."

On the 6th of April 1832, under an order

made at March term, the slaves of James Parr were divided by commissioners among his legatees; upon which division there were allotted to Mrs. Hickerson, King valued at 300 dollars, Lucinda at 260 dollars, Hannah at 50 dollars, John at 80 dollars, and Dick at 25 cents. The division was returned to court the 28th of May 1832, and ordered to be recorded; and on the 23d of November 1832, the deed to Helm was acknowledged in the clerk's office, and admitted to record.

On the 19th of January 1833, an execution issued in favour of Hosea Hickerson, 632 as administrator, against *Mrs.

Hickerson and Daniel Hickerson her surety; but the county court quashed it, because Daniel Hickerson was dead at the time it was issued. A new execution was issued the 12th of April 1833, against Mrs. Hickerson alone, which was levied on the slave King. Hosea Hickerson gave an indemnifying bond to the sheriff, and the slave was sold for 325 dollars, the said Hosea becoming the purchaser. The sheriff returned that this was all the property he could find. But some time afterwards a new execution was sued out, which was levied upon two other slaves Lucinda and John.

Whereupon, to wit, on the 22d of July 1833, Lina Helm exhibited a bill to the judge of the circuit court of Fauquier, asserting that under the deed from Mrs. Hickerson he became entitled to certain property, part whereof consisted of Lucinda and John, who were delivered up by the executor of Parr in March 1832, and from that time until lately had been in the complainant's possession. The consideration of the deed, he alleged, was not only good but valuable; and he made the following statement concerning it. "The said Elizabeth, at the time of its execution, and for a length of time previously, was an inmate in your orator's family, and has been and is so living up to this moment. In maintaining, supporting and providing for the said Elizabeth, your orator had, prior to the execution of the said conveyance, encountered considerable expense, and has since encountered more. As some remuneration to your orator for the expenses thus incurred by him, as well as some indemnity for expected future expenses, the aforesaid conveyance was executed." The bill insisted that the deed invested the complainant with a good title against any creditors of the said Elizabeth (even if she had any). But the ground was further taken, that the said Hosea Hickerson was not entitled to enforce his judgment, even against the said Elizabeth.

For, it was alleged, her interest 633 *in the estate of Joseph Hickerson was more than her bond, and had been so stated by Marshall Hickerson. The bill, after detailing some circumstances in regard to the levy upon Lucinda and John, mentioned (in aggravation, as it would seem, of Hickerson's conduct) his course in regard to King; stating, that on

the day of sale an injunction was granted to restrain the sale, but before the injunction bond could be executed and the process perfected, and after the sheriff was apprized of the injunction, the sale took place, at a price much below the actual value of the slave. "Thus then," the bill proceeded, "has your orator been deprived of one of the negroes already which he obtained under the aforesaid conveyance, and an attempt is now making to deprive him of the other two." The prayer was for an injunction to restrain Hickerson from selling the slaves, and for general relief.

The injunction was awarded.

Elizabeth Hickerson was no party to this bill. The defendant Hosea Hickerson answered, denying that the deed to Helm was upon valuable consideration, insisting that it was upon a consideration merely voluntary, and that the deed was in fact fraudulent, and made with the express intention of defeating the recovery of the debt due him. Marshall Hickerson, he said, had died suddenly while on a visit to a distant part of the union, and left his papers in great confusion, and the respondent had to encounter almost insuperable difficulties in the settlement of said estate. It was impossible, he thought, for any person, in the present state of the suit brought by the legatees, to form any thing like a correct estimate of the final result of that case. The whole amount of the debt due from the said Elizabeth might, and in all probability would, be required for the payment of debts. And he insisted that the regular collection of the assets of Joseph Hickerson's estate ought not to be inter-

634 *ferred with. What was said in the bill in relation to King was noticed in the answer, and the defendant's conduct explained.

The deposition of Joseph Thompson was taken in 1835, to prove the understanding with Mrs. Hickerson at the time the bond was given. He recollected, he said, "that she was called on by the executor for security, and that Daniel Hickerson was applied to, to unite with Mrs. Hickerson in the bond. Mr. Hickerson seemed rather to decline binding himself, saying that there might be some difficulty; but the difficulty was overcome by the assurance given him by the executor, that there was no sort of danger of his having any thing to pay for the widow, that the purchases made by her would not amount to any thing like the portion of the estate she was entitled to."

Rodham Eskridge and Meredith Eskridge deposed, that after the injunction, Helm made sale of Lucinda and John.

There were many depositions in regard to the consideration of the deed to Helm, and evidence also as to the value of King at the time he was sold by the sheriff; some of the witnesses for the plaintiff considering him worth 500 dollars, and others for the defendant not placing him at a higher value than 325 dollars.

The suit of the legatees, which was originally brought in the superior court of chancery at Fredericksburg, and afterwards transferred to the circuit court of Spotsylvania, was removed by consent, in 1837, to the circuit court of Fauquier; and in February 1839, Mrs. Hickerson having died, the same was revived against Lina Helm as her administrator.

In this suit there were filed as exhibits, the appraisement of the estate of Joseph Hickerson on the 9th of November 1815, amounting to 3136 dollars 64 cents, and the account of sales made on that and the next day, amounting to 1830 dollars 5 635 cents. This account *of sales did not include the slaves, the names and values of which were stated in the appraisement as follows: negro man Admiral 60 dollars, negro man Jack 450 dollars, negro boy Willis 400 dollars, negro woman Flora 300 dollars, negro girl Nelly 250 dollars, negro boy Landon 300 dollars, negro boy Alexander 300 dollars. Of these, Flora and Landon were specifically bequeathed by the testator. Nelly and Alexander were sold in April 1816 by the sheriff of Fauquier, under an execution against the estate of Joseph Hickerson, and purchased at the price of 544 dollars 50 cents by Marshall Hickerson. Jack and Willis were sold by Marshall Hickerson as executor, but the prices for which he sold them did not appear by any thing before the commissioner. And the commissioner, in stating the account of the said executor, charged him in 1816 with the sum for which Nelly and Alexander were sold, and with the appraised value of Jack and Willis.

So stating the account, the commissioner reported a balance due from Marshall Hickerson as executor of 4483 dollars 12 cents, with interest on 1909 dollars 71 cents part thereof from the first of January 1839, chargeable with the payment of a balance found due to Hosea Hickerson as administrator de bonis non of Joseph Hickerson (on the settlement of his administration account) of 652 dollars 65 cents, with interest on 537 dollars 2 cents part thereof from the first of January 1839 till paid, and chargeable also with a balance of a debt of Basil Gordon. The commissioner also settled the account of Hosea Hickerson as administrator of Marshall Hickerson, and reported a balance due from the said Hosea on this account. The commissioner's report was returned on the 2d of May 1839; and on the 10th of that month Hosea Hickerson paid to Basil Gordon the balance due him, amounting to 460 dollars 33 cents.

636 *There was an exception by Hosea Hickerson to the report, upon the ground that the execution under which Nelly and Alexander were sold was for more than the amount of sales. And the court, on the 20th of May 1839, recommitted the report to the commissioner, for him to make a statement shewing how the account would stand if Hosea Hickerson should now pay

the balance due on the said execution. This was the last order in the case of *Shumate v. Hickerson*.

On the same 20th of May 1839, the court made an order in the case of *Helm v. Hickerson*, directing the commissioner to ascertain Mrs. Hickerson's share of the perishable estate of Joseph Hickerson, and add thereto interest on one third of the value of his slaves. The court also directed the said commissioner to credit her distributive share with the execution enjoined, and to credit the execution with 500 dollars, which, in the opinion of the court, was the value of King at the time of sale.

The commissioner made a report whereby it appeared, that omitting the slaves, and charging Marshall Hickerson with the proceeds of all the other personality (including Mrs. Hickerson's own purchases) as if the amount had been received by the executor, the sum in his hands, as of the first of January 1839, was 1358 dollars 8 cents; and then deducting what was due to Hosea Hickerson, and the sum paid by him to Basil Gordon, the balance was only 254 dollars 93 cents, of which Mrs. Hickerson's third was 84 dollars 98 cents on the said first of January 1839. Then, after stating the slaves to be of the value of 1994 dollars 50 cents, one third whereof was 664 dollars 83 cents, and the annual interest on that third 39 dollars 89 cents, he made a statement whereby it appeared, that charging Mrs. Hickerson with 1588 dollars 72 cents the amount of the judgment with interest to the 27th of May 1833, when King was sold, and crediting her on account of

637 *King with 500 dollars, less 15 dollars 50 cents the sheriff's commissions on 325 dollars, and also crediting her with the said annual interest of 39 dollars 89 cents from the first of January 1816 to the 17th of February 1838, when she died, and likewise crediting the said 84 dollars 98 cents, a balance still remained due upon the judgment of 261 dollars 88 cents with interest from the 1st of January 1839. The plaintiff excepted to this report, and at his instance the commissioner made a special statement, upon the principle of allowing, in lieu of interest on one third of the value of the slaves, an annual hire of 50 dollars. The first sum of 50 dollars was credited on the first of January 1817, and thereafter annually, whereby, the principal of the judgment on which interest was calculated was annually diminished; and on the first of January 1837, there was, according to this statement, a balance due Mrs. Hickerson of 16 dollars and 90 cents. The statement was continued to the first of January 1839, and shewed on that day a balance due her of 163 dollars 15 cents, with interest on 158 dollars 13 cents part thereof from that day till paid. In the statement so continued, Mrs. Hickerson was credited with 2 dollars and 2 cents for interest on the 16 dollars and 90 cents on the 1st of January 1839, and 3 dollars for interest on the hires of 1837 to the same time, making 5 dollars and 2 cents as the amount of in-

terest on conjectural hires during the last two years. As bearing upon this statement, it is proper to mention that according to the report of the commissioner in *Shumate v. Hickerson*, the executor had not, at the time of the sale of the two slaves under execution, other assets with which he could have satisfied that execution.

On the 19th of October 1839 the case of *Helm v. Hickerson* came on to be heard upon the commissioner's report in that case, and the record in the case of *Shumate v. Hickerson*. Whereupon the 638 court, approving of *that statement in the report wherein hires were allowed, confirmed the same, and decreed that the injunction be made perpetual, and that the defendant pay to the plaintiff 163 dollars 15 cents, with interest on 158 dollars 13 cents part thereof from the 1st of January 1839 till paid, and the costs.

From this decree, on the petition of the defendant Hosea Hickerson, an appeal was allowed.

The cause was argued by Howard and Robinson for the appellant, and by Seddon and Morson for the appellee. The question most elaborately discussed was whether the deed from Mrs. Hickerson to Lina Helm was made with intent to defraud creditors: but upon this, and indeed upon some other points, a report of the argument is deemed unnecessary. The following notice is confined to the principles of law more particularly involved in the decision.

Howard for appellant. The enquiry which devolved upon the court below was whether the slaves Lucinda and John could properly be sold under the execution. And when the court ascertained that the deed was upon a consideration merely voluntary, it followed that the deed was void as to creditors, and that the slaves might legally be sold.

Under the decision in *Pulliam v. Winston &c.*, 5 Leigh 324, even Mrs. Hickerson herself would not be allowed to tie up the judgment against her, until complicated accounts of administration should be settled, in order to discover whether there would be a distributable surplus. But here the debtor against whom the judgment is rendered asks no injunction to it, and in no way alleges that the debt is not due. The objection to enforcing the judgment is raised by one who, after the rendition of the judgment, received a conveyance from the judgment debtor of a party 639 of her property. Surely *this enquiry cannot be gone into in a suit standing merely between the judgment creditor and the voluntary grantee. The claim of the judgment debtor as distributee can never be used as a setoff against the judgment, in a suit to which the judgment debtor is no party. Nor can the extent of such setoff be ascertained, except by a settlement of the administration account in a suit to which all the distributees are parties.

If, however, it were competent in this suit to set off Mrs. Hickerson's claim as distributee against the judgment, the mode in which this has been done is altogether erroneous. The obvious course was to consider the judgment creditor as entitled to the amount of his judgment, deducting the 325 dollars for which the slave King was sold under the execution, less 15 dollars and 50 cents for commissions. If damage resulted from the seizure and sale of King, the remedy for that damage is by an action on the indemnifying bond; for, the sale having taken place, it is not the province of equity to assess damages. *Robertson v. Hogsheads*, 3 Leigh 667; *Mayo v. Winfree*, 2 Leigh 370. But no claim to such damages is asserted by the bill; and there is, in truth, no right to recover damages either at law or in equity. Regarding the plaintiff as a claimant under a voluntary deed, he can have no greater right in this respect than his grantor; and she clearly can claim credit only for the net proceeds of the slave.

The special statement is wholly unsustained by evidence, and the hires entirely conjectural. If it had been right to allow the conjectural sum of 50 dollars a year, it would have been wrong to allow interest upon such conjectural hires. *Shields adm'r &c. v. Anderson &c.*, 3 Leigh 729; *Roper &c. v. Wren &c.*, 6 Leigh 38. Here the slaves had been disposed of, and no hires could have been received. [Stanard, J. It has been settled as a general rule, that the widow is to have the use for life of one third of the money for which the slaves 640 sold. **Godwin's adm'r v. Godwin's adm'r &c.*, 4 Leigh 410.] The special statement is wrong not only as to the interest but as to the principal. And in using it as sufficient ground for perpetuating the injunction, the court manifestly erred.

Then there is a decree in favour of the plaintiff for the balance appearing by that special statement. In a suit between Lina Helm plaintiff and Hosea Hickerson defendant, that balance is stated specially as due to Mrs. Hickerson, and the money thus specially stated to be due to her is decreed to be paid to Lina Helm.

Seddon and Morson for appellee. The matter in regard to King is set forth in the bill, and comes within the scope of the general prayer. The defendant has answered the allegations as to this matter. *Smith &c. v. Smith &c.*, 4 Rand. 95; 2 Rob. Pract. 293. And testimony has been taken in regard to it. Under such circumstances the act of February 27, 1828 forbids a reversal of the decree for any informality in the bill. *Sess. Acts of 1827-8*, p. 20, ch. 25, § 1; *Suppl. to Rev. Code* p. 125. In the court below, no objection was made that the matter was not put in issue: and the appellant is deprived of the right to make the objection, by failing to urge it at the proper time. 2 Rob. Pract. 434. No party is allowed to surprise or mislead his adversary. Had the objection been earlier made, the appellee

might have brought an action at law. But if an action were now brought, the statute of limitations might be pleaded; and the defendant would thus take advantage of his own wrong.

Then as to the jurisdiction. This is a suit, not for damages, but for King or his value. It is on the ground that the sale had been made in an oppressive manner, and ought to be set aside. But even if viewed as a suit for damages, yet as the plaintiff has been obliged to come into

equity to injoin the sale of two other
641 slaves *claimed under the same deed, the court, on the principle of preventing multiplicity of suits, will take jurisdiction of the whole case, and decide it as to King as well as the two other slaves. Where the same right which entitles a party to an injunction against future waste entitles him to compensation for past waste, the court of equity will give relief as to both. The court, having jurisdiction of the suit for one purpose, goes on and ends the controversy between the parties. This principle is acted on in many cases. 1 Story's Equity, § 64 a., p. 82-86. The existence of a legal remedy does not, under all circumstances, prevent redress in equity. *Randolph v. Randolph &c.*, 3 Munf. 99; *Wilson & Trent v. Butler &c.*, 3 Munf. 559. Here it was necessary to take notice of the value of the slave, in determining the amount of the credit on account of his being sold.

The case of *Pulliam v. Winston &c.* is very different from this case, in which there had been a failure for 11 years to settle the executorial accounts on Joseph Hickerson's estate before suit was brought by the legatees, and then every thing was done to delay a settlement, that the process of the court would allow. But even in *Pulliam v. Winston &c.* it is admitted that the offset will be allowed if the executor agreed to allow it. And here the fact of such agreement is deposed to by a witness whose evidence is sustained by all the circumstances. In that case, too, the objection was taken in the court below, and the injunction dissolved on motion; while here, the case having been proceeded in to a decree, and the account taken, the objection is stripped of its force. *Scott & wife v. Halliday &c.*, 5 Munf. 103; *Sampson v. Mitchell's ex'or*, 5 Munf. 175. On these grounds, *mrs. Hickerson* herself might insist on the setoff. But even if she could not, still *Helm* may insist on its being allowed. It is always competent for the volunteer to require the

642 creditor to shew *that he has a debt.

He may have an account to ascertain its amount,—to ascertain how much is liable to be setoff by a fund in the creditor's hands, and amongst other things the amount to be credited on the judgment.

The rule settled in *Godwin's adm'r v. Godwin's adm'r &c.* may be a general one, but it is not inflexible. It would not be applied in a case of fraud. Here the executor has been guilty of such negligence that every presumption ought to be made

against him. His conduct makes it necessary to resort to conjecture of price or conjecture of hire. And his representative can have no right to insist on the former instead of the latter. The interest allowed on conjectural hires amounts only to a few dollars, and there is a blunder of 15 dollars and 50 cents the other way in regard to commissions.

It is objected, however, that *mrs. Hickerson* is not a party to this suit. Though the debt could not be ascertained so as to bind her, it could be ascertained so as to bind the parties to this suit. There are various cases in which parties may sue singly; for example, creditors may sue singly to get a fund out of an executor's hands. The case of *Moore's adm'r v. George's adm'r*, 10 Leigh 228, shews that this court will not extend the objection for want of parties. Besides, the objection was not taken in the court below, and the authorities shew that such objection may be waived. Opinion of *Tucker, P.*, in *S. C. Mayo v. Murchie*, 3 Munf. 358. The question is not one of jurisdiction, but a matter growing out of a rule of convenience. *Calvert on Parties*, p. 19, 20, note. The personal representative of a decedent, not party to the suit, is sometimes brought before the master on taking accounts. *Story's Eq. Pl.* p. 96, § 96, note 1. *Mrs. Hickerson* was a party in the case of *Shumate v. Hickerson*, and the accounts have been taken in a case to which all the distributees are parties. Why

643 make her *a party in this? The record of that case also shews that she died while the case was pending, and that it was revived against *Lina Helm* as her administrator. The decree then in this case is substantially right, and the informality, if any, arising out of the fact that *mrs. Hickerson's* administrator was not a party to the suit as such, is cured by the act of February 27, 1828, Sess. Acts of 1827-8, p. 20, ch. 25, § 1; Suppl. to Rev. Code p. 125.

Robinson in reply. The bill, fairly understood, makes no case in respect to King. And if it had sought relief in respect to him, there is no ground on which the jurisdiction could be sustained. Is it to be maintained that merely because an injunction was awarded on the former bill, the sale was not to be made at the time appointed by law, but was to be postponed in order that the injunction bond might be given? If a court of equity could interfere on any such ground, the interference would properly be under that bill on which the injunction was awarded: and that case is not before this court. But the sale could not be treated as improperly made, either on that bill or on this. *Clarke v. Hoome's ex'ors &c.*, 2 Hen. & Munf. 23; *Stratford v. Twynam*, Jacob 418; 4 Cond. Eng. Ch. Rep. 193. If the plaintiff sought, by force of his deed to recover the value of the slave, his remedy was by an action on the indemnifying bond: if he sought to recover the specific property, his proper course was to bring an action of detinue against the pur-

chaser. A legal title being claimed on the one hand under execution against the debtor, and a paramount title on the other under the debtor's deed, a court of law was obviously the proper tribunal to determine which of these titles was the best.

Is it clear that it was proper for a court of equity to exercise jurisdiction as to Lucinda and John? As to them, the court had no jurisdiction to injoin the sale

644 *except upon the ground that slaves are considered prima facie of peculiar value to their owners. *Allen v. Freeland*, 3 Rand. 170; *Randolph v. Randolph*, 6 Rand. 194. Does that presumption exist here, or is it repelled? In *Allen v. Freeland*, judge Carr takes the distinction between family slaves and those recently purchased by the plaintiff; and judge Green said, the appellant there did not appear to have seen the slaves before he purchased them. In *Randolph v. Randolph*, the judges cite, on the one hand, cases of peculiar attachment, and, on the other, cases of large slaveholders, where the slave is not even personally known, or cases in which the slave is a subject of traffic. What are the circumstances here? The complainant never had the slaves till the spring of 1832. He obtained them then, not by a purchase of specific slaves on account of any peculiar qualities, but by a transfer from Mrs. Hickerson of her interest in a particular estate, in the division of which these slaves were afterwards allotted as her portion. To him it was the same whether he obtained these or other slaves, or other property of equal value. There was no peculiar affection between the master and these particular slaves, such as made him desire to retain them in specie. This is evidence from the fact deposed to by Meredith and Rodham Eskridge, that immediately upon his being restored to possession by the injunction, he endeavoured to sell them, and as soon as practicable did sell them.

On the other side it is contended, that though the deed shall be held to be voluntary, the judgment is to be reduced by whatever amount may be due Mrs. Hickerson as a distributee of her husband's estate. This ground is taken in a suit to which she is no party, and in which, no matter what the view of the court may be upon the accounts, it can make no decree perpetuating the injunction to the judgment, either in whole or in part. But suppose her 645 grantee may require all *that she could have required, if she had made no assignment, and were the plaintiff in the bill; *Pulliam v. Winston &c.*, 5 Leigh 324, settles that she cannot be received in equity to make any setoff of this nature. It is however insisted that this case is an exception to the general rule, because here the executor agreed that any claim which Mrs. Hickerson had against the estate might be discounted. To establish such agreement, an expression of the executor is deposed to by a witness 20 years after the transaction. The act of the executor in taking the bond and security is far stronger

than such words as are here deposed to. If he was satisfied that her portion of the estate would be equal to the amount of the bond, and agreed that the one should be set off against the other, why take bond and security at all? His taking it is at least evidence that it was not certain her portion would be sufficient. It would be contrary to well established principles to allow the force of the bond to be destroyed by parol evidence of this uncertain character. Where an agreement to set off is relied on, it should be an agreement at a subsequent time, after there has been opportunity to clear up the doubt existing at the time of taking the bond. The decree directing an enquiry to ascertain Mrs. Hickerson's share as distributee was then improper.

But if it was proper to go into any such account, the principle upon which it was directed to be stated in regard to King is clearly erroneous. The report made under the court's direction establishes the impropriety of its direction. At the time of the sale of King, the amount of the judgment was 1588 dollars 72 cents, and if from this there be deducted 678 dollars 13 cents for the annual interest from the first of January 1816 to the first of January 1833 on one third of the value of the slaves sold, there was yet due on the judgment, when King was sold, more than 900 dollars. If

646 *credit be also given for a third of the amount of sales to Mrs. Hickerson herself (though remaining unpaid), as well as of all other personal estate, there was still due upon the judgment at that time more than 300 dollars. Under these circumstances, what conceivable reason can there be for giving credit on account of the sale of King, for more than he produced at the sheriff's sale?

Then as to the question whether interest on a third of the value of the slaves sold shall be allowed, or conjectural hires. Neither in the bill of the legatees nor in this bill is there any allegation that the slaves of Joseph Hickerson were sold improperly. Nor is there any thing whatever to take this case out of the general principle established in *Godwin's adm'r v. Godwin's adm'r &c.*, 4 Leigh 410. Charging Marshall Hickerson with the amount of Mrs. Hickerson's bond, and leaving out the sales of slaves, his account was about even. He had then either to remain in advance to the estate the amount of the debt due by Mrs. Hickerson, or to get from her that debt, or to sell slaves. He was under no obligation to remain in advance: she did not pay the debt; and he sold slaves. When it has been settled as a general rule, that though a widow's share of slaves be unnecessarily sold to pay debts, she is to be compensated by interest on one third of the slaves, what is there in this case to authorize a departure from that rule? So far from being a stronger case in favour of the widow than the case generally is, it is a weaker one. For it was necessary to sell the slaves unless she paid her debt. And

it is not for her whose default has been the cause of this, to say that the burthen of the executor shall be increased, because he has done that which her default made necessary.

But the error did not stop here. Having settled the principle, it was at least proper, when there was no sort of evidence to shew what hire would be fair, to
647 *refer it to a commissioner to report on this subject. All enquiry of this sort was passed by, and the special statement acted upon, although that statement was not the view of the commissioner upon the evidence, but the mere *ex parte* suggestion of counsel.

That *ex parte* statement is not only without evidence to shew that 50 dollars a year was a fair hire, but is wrong upon its face in allowing interest on such conjectural hires. It may appear as if the interest so allowed were only 5 dollars 2 cents, but it is in fact much more. If the interest on the judgment had been calculated to 1839, and then a deduction made, as of that date, of the conjectural hires from 1816 to 1839, there would be no interest on such hires. But the conjectural hires are credited at the end of each year from 1816 to 1839, and the effect is to allow interest to the extent to which the creditor loses interest by having his principal diminished before 1839.

BALDWIN, J. The merits of this cause turn upon the question whether the interest of *Mrs. Hickerson* in the personal estate of her husband *Joseph Hickerson* deceased (with the credit to which she is entitled for her property sold under execution) is sufficient, and properly applicable, to extinguish the debt contracted by her for purchases at the sale made by *Marshall Hickerson* his executor. This involves an enquiry into the principles upon which the accounts have been settled by the master commissioner, under the order of the circuit court. The basis of the settlement is a report made by the same master commissioner, in another suit of *Shumate &c. v. Hickerson &c.* then depending in the same court, of several accounts directed by interlocutory decrees in that suit; to wit, an account of the administration of *Marshall Hickerson* upon the estate of *Joseph Hickerson* deceased; another, of the administration *de bonis non* of *Hosea Hickerson* upon the estate
648 of * *Joseph Hickerson* deceased; and a third, of the administration of *Hosea Hickerson* upon the estate of *Marshall Hickerson* deceased. The result of that report is a balance against *Marshall Hickerson* as executor of *Joseph Hickerson*; a balance in favour of *Hosea Hickerson* as administrator *de bonis non* of *Joseph Hickerson*; and a balance against him as administrator of *Marshall Hickerson*. It was upon the basis of the accounts thus reported, that the master commissioner proceeded in the present cause to ascertain the aforesaid interest of *Mrs. Hickerson*, who was a party in the case of *Shumate &c. v. Hickerson &c.* but not in the present suit. *Mrs. Hickerson* being entitled absolutely to

a distributive share of one third in the residue of her husband's personal estate exclusive of the slaves, after payment of his debts, and to one third of the slaves as her dower for life only, the commissioner restated the accounts, so as to show in the first place a balance against *Marshall Hickerson* executor of *Joseph Hickerson*, exclusive of the slaves, of 254 dollars 93 cents, after deducting the balance due to *Hosea Hickerson* as administrator *de bonis non* of *Joseph Hickerson*; the one third of which balance, to wit, 84 dollars 98 cents, he reported in favour of *Mrs. Hickerson*. He then went on to ascertain what she was further entitled to, on account of her interest in the slaves. None of these were forthcoming. It appears from the appraisement that there were seven. Two of them were sold under execution: two were specifically bequeathed by the testator, and the presumption is were delivered over to the legatees: two others were sold by the executor *Marshall Hickerson*, but when, or for what prices, does not appear: the record furnishes no information of the disposition made of the seventh, and the probability is that he was old and of little or no value. The widow, for whom no provision was made by the will, claimed that made for her by law. Her dower in the slaves being one third for life, and she
649 *having been deprived thereof by the conduct of the executor, compensation could be made to her therefor in but one of two modes; to wit, by allowing her the annual interest during her life on one third of the value of the slaves, or by allowing one third of the annual estimated hires. The commissioner made statements in both ways, debiting the widow with the judgment against her for purchases at the sale, and crediting her, in the first, with one third annually of the interest on the value of the slaves, and in the second, with one third annually of the estimated hires; and in both, with her distributive share of the other personal estate, and with the actual value of the slave *King* (acquired from her father's estate and sold under the first execution upon said judgment) minus the sheriff's commission upon the sale. The result of the first statement was a balance against the widow, of 261 dollars 88 cents with interest from the 1st of January 1839; and of the second a balance in her favour, of 163 dollars 15 cents with interest on 158 dollars 13 cents thereof from the same date. This last statement was adopted by the circuit court, and the decree rendered against the defendant *Hosea Hickerson* individually; doubtless because there were ample assets in his hands as administrator of *Marshall Hickerson*'s estate, for payment of the amount thus ascertained to be due to the widow and chargeable against that estate, after the extinguishment of the judgment by the application of her credits.

If this adjustment of the accounts between *Elizabeth Hickerson* and the estate of her deceased husband be correct, it relieves us from the necessity of considering

the questions so elaborately discussed at the bar, arising out of the allegation of the defendant that the conveyance to the plaintiff Helm, by Elizabeth Hickerson, of her interest in her father's estate, was voluntary and fraudulent as regards her 650 creditors; inasmuch as it will thus appear that the defendant has no right in a court of equity to occupy that relation towards her. And this brings us to the consideration of the objections to that adjustment urged on the part of the appellant.

In the first place, it is contended that the whole adjustment is wrong, on the ground that a court of equity ought not to interpose by way of injunction, to ascertain and set off a distributive interest in an estate, against a debt contracted by the distributee for purchases from the executor of property belonging to the estate. This is certainly correct as a general proposition, and is well established by the authorities cited for the appellant. Such a practice would occasion much confusion and injustice, by obstructing and perplexing the executor in the administration of the assets, exposing him to the danger of devastavit, and subjecting creditors of the estate to injurious delays. The rule however is not free from exception, and the reasons upon which it is founded are inapplicable to the case before us. All the difficulties which have occurred in the administration and distribution of this estate are attributable to the misconduct of Marshall Hickerson the executor, and the defendant Hosea Hickerson, his administrator and successor. There has been the most unreasonable delay in the settlement of the administration accounts. No step towards it was taken during the six years which elapsed from the time of the executor's qualification in 1815 until his death in 1821. In August 1821, the defendant Hosea Hickerson qualified as administrator of Marshall Hickerson, and as administrator de bonis non with the will annexed of Joseph Hickerson; but instead of settling up the administration accounts of himself and his predecessor in a reasonable time, he failed to do so for a period of nearly twelve years prior to the institution of this suit in July 1833. Nor could he

651 be brought to such settlement, *in the suit instituted against him for that purpose in 1827, by Shumate and other distributees of Joseph Hickerson, until coerced by attachments for his contempt in disobeying orders of the court in that suit. Thus a period of eighteen years prior to the institution of this suit was suffered by the personal representatives of the estate in question to elapse without a settlement of their administration accounts. This delay, connected with the representation made by Marshall Hickerson at the time of the executorial sale, that there was no danger in becoming the widow's surety for the amount of the purchases made by her, inasmuch as it would fall far short of her distributive interest in the estate, was well calculated to lull her into security, and inspire the

belief that payment of her bond would not be exacted, unless shewn to be necessary by a settlement of the administration accounts. And if the judgment recovered against her in 1827 had a tendency to remove this impression, it could not have suggested the necessity of a suit on her part for the recovery of her distributive share; inasmuch as the suit of Shumate &c. v. Hickerson &c. brought by the other distributees in 1827, to which she was a party, would have accomplished that object, but for the continued default of the defendant Hosea Hickerson; whose conduct was extremely unjust and oppressive in suing out execution against her, in 1833, upon the judgment, while in contempt of the orders of court requiring a settlement of the administration accounts. I think, under the circumstances, it was entirely proper that he should be restrained by injunction from proceeding upon the execution, until he should shew, by a full and fair settlement of the estate, that the purposes of justice required it: that if he could have been subjected at that late period to any inconvenience or hazard, it was far from arising out of the due discharge of his duties: and that any creditors who 652 *had so long postponed the prosecution of their demands against the estate would more probably be benefited than injured by the aid of the court in sifting the accounts of the delinquent fiduciaries.

In the next place, it is urged that the compensation to the widow for her dower right in the slaves ought to have been the interest on the value, instead of estimated hires. I am at a loss to perceive any principle upon which that pretension can be sustained. The widow was entitled to her dower interest in kind; an important privilege, of which she could not be lawfully deprived, unless by a sale of the slaves rendered necessary for payment of the debts by the inadequacy of the other personal assets. In regard to the slaves specifically bequeathed, and supposed to have been surrendered to the legatees, there is not a shadow of apology for disregarding the dower interest of the widow. As to those sold by the executor, it has not been shewn when, or for what amount, or under what circumstances they were sold; and on the other hand it is apparent from the master commissioner's report, that there was no deficiency of the other personal assets, a balance having been reported against him on that account. The only colour for a sale of slaves is as respects those sold under execution in April 1816, when it may be supposed that the fund arising from the executorial sale of the perishable property belonging to the estate was not available, the bonds therefore not falling due until November following. It certainly would be unreasonable to charge an executor with the injurious consequences arising from a forced sale of slaves under execution, before it was in his power to obtain from the assets the means of payment: but that is not the question here. The slaves were purchased in by the ex-

it is not for her whose default has been the cause of this, to say that the burthen of the executor shall be increased, because he has done that which her default made necessary.

But the error did not stop here. Having settled the principle, it was at least proper, when there was no sort of evidence to shew what hire would be fair, to
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the questions so elaborately discussed at the bar, arising out of the allegation of the defendant that the conveyance to the plaintiff Helm, by Elizabeth Hickerson, of her interest in her father's estate, was voluntary and fraudulent as regards her
650 creditors; inasmuch as it *will thus appear that the defendant has no right in a court of equity to occupy that relation towards her. And this brings us to the consideration of the objections to that adjustment urged on the part of the appellant.

In the first place, it is contended that the whole adjustment is wrong, on the ground that a court of equity ought not to interpose by way of injunction, to ascertain and set off a distributive interest in an estate, against a debt contracted by the distributee for purchases from the executor of property belonging to the estate. This is certainly correct as a general proposition, and is well established by the authorities cited for the appellant. Such a practice would occasion much confusion and injustice, by obstructing and perplexing the executor in the administration of the assets, exposing him to the danger of devastavit, and subjecting creditors of the estate to injurious delays. The rule however is not free from exception, and the reasons upon which it is founded are inapplicable to the case before us. All the difficulties which have occurred in the administration and distribution of this estate are attributable to the misconduct of Marshall Hickerson the executor, and the defendant Hosea Hickerson, his administrator and successor. There has been the most unreasonable delay in the settlement of the administration accounts. No step towards it was taken during the six years which elapsed from the time of the executor's qualification in 1815 until his death in 1821. In August 1821, the defendant Hosea Hickerson qualified as administrator of Marshall Hickerson, and as administrator de bonis non with the will annexed of Joseph Hickerson; but instead of settling up the administration accounts of himself and his predecessor in a reasonable time, he failed to do so for a period of nearly twelve years prior to the institution
of this suit in July 1833. Nor could he

651 be brought to such settlement, *in the suit instituted against him for that purpose in 1827, by Shumate and other distributees of Joseph Hickerson, until coerced by attachments for his contempt in disobeying orders of the court in that suit. Thus a period of eighteen years prior to the institution of this suit was suffered by the personal representatives of the estate in question to elapse without a settlement of their administration accounts. This delay, connected with the representation made by Marshall Hickerson at the time of the executorial sale, that there was no danger in becoming the widow's surety for the amount of the purchases made by her, inasmuch as it would fall far short of her distributive interest in the estate, was well calculated to lull her into security, and inspire the

belief that payment of her bond would not be exacted, unless shewn to be necessary by a settlement of the administration accounts. And if the judgment recovered against her in 1827 had a tendency to remove this impression, it could not have suggested the necessity of a suit on her part for the recovery of her distributive share; inasmuch as the suit of Shumate &c. v. Hickerson &c. brought by the other distributees in 1827, to which she was a party, would have accomplished that object, but for the continued default of the defendant Hosea Hickerson; whose conduct was extremely unjust and oppressive in suing out execution against her, in 1833, upon the judgment, while in contempt of the orders of court requiring a settlement of the administration accounts. I think, under the circumstances, it was entirely proper that he should be restrained by injunction from proceeding upon the execution, until he should shew, by a full and fair settlement of the estate, that the purposes of justice required it: that if he could have been subjected at that late period to any inconvenience or hazard, it was far from arising out of the due discharge of his duties: and that any creditors who
652 *had so long postponed the prosecution of their demands against the estate would more probably be benefited than injured by the aid of the court in sifting the accounts of the delinquent fiduciaries.

In the next place, it is urged that the compensation to the widow for her dower right in the slaves ought to have been the interest on the value, instead of estimated hires. I am at a loss to perceive any principle upon which that pretension can be sustained. The widow was entitled to her dower interest in kind; an important privilege, of which she could not be lawfully deprived, unless by a sale of the slaves rendered necessary for payment of the debts by the inadequacy of the other personal assets. In regard to the slaves specifically bequeathed, and supposed to have been surrendered to the legatees, there is not a shadow of apology for disregarding the dower interest of the widow. As to those sold by the executor, it has not been shewn when, or for what amount, or under what circumstances they were sold; and on the other hand it is apparent from the master commissioner's report, that there was no deficiency of the other personal assets, a balance having been reported against him on that account. The only colour for a sale of slaves is as respects those sold under execution in April 1816, when it may be supposed that the fund arising from the executorial sale of the perishable property belonging to the estate was not available, the bonds therefore not falling due until November following. It certainly would be unreasonable to charge an executor with the injurious consequences arising from a forced sale of slaves under execution, before it was in his power to obtain from the assets the means of payment: but that is not the question here. The slaves were purchased in by the ex-

ecutor himself; and, under the circumstances, he ought to be treated in relation thereto as the trustee of the estate. The sale moneys of the personal estate
653 were to fall due at *no distant period.

It was the duty of the executor to do the best he could for the preservation of the interests confided to his care; and the plea of an inevitable prejudice cannot avail him, when we find that he had the means of becoming the purchaser. It ought to be presumed that he raised the money upon the credit of the estate, or that he advanced it himself upon that security; a presumption working no injustice; for if he gave the full value, he is reimbursed by a credit for the purchase money, and if he did not, it would be of dangerous consequence to permit him so to speculate upon the temporary necessities of the estate.

The credit therefore for hires, instead of interest, is correct in principle, and is not in conflict, as supposed, with the decision of this court in *Godwin's adm'r v. Godwin's adm'x &c.*, 4 Leigh 410. The question there was as to the prospective allowance to be made to a widow out of the proceeds of slaves, sold by the executor under an innocent misapprehension that the situation of the estate required the sale for the payment of debts; and it was held that she should receive one third of the purchase money, to be enjoyed by her during her life, and then returned to the estate; an allowance considered by the court more equitable than a commutation for a gross sum, the proper amount of which it would be difficult to ascertain by calculations, involving, as they must, an estimate of complicated hazards. But in the case before us, the question is in regard to the retributive compensation to be made for a dower right, from the enjoyment of which the widow was debarred during her life by the gross injustice of the executor. That the allowance is of estimated hires, from imperfect materials, is the fault of the executor himself, who has furnished no account or evidence in relation to the slaves, whether of hires or sales; in consequence of which the commissioner has
654 been compelled to found his estimate chiefly upon the appraised *value of the slaves, most probably to the detriment of the widow; and upon that basis, if he has committed an error, it is obviously not to the prejudice of the executor. His allowance of interest on estimated hires was for but a brief period and on a small balance, and not excepted to by the defendant.* Such minute errors in a commissioner's report, however obvious, especially when unexcepted to, are not proper for the consideration of an appellate court; as

they would require, from its repugnance to the reversal of the decree for a small matter, a reexamination, and it may be a re-statement of the whole account, in order to ascertain whether there may not be errors to an equal or greater amount on the other side.

Again, the appellant insists that the proper credit to the widow on account of the slave King, sold under the first execution against her, is the net proceeds of the sale, and nothing more; that if his actual value at the time was 500 dollars, (which is denied, though I think proved) still the credit for that sum, minus the sheriff's commission on the price obtained, is wrong in principle; and that to allow it, is in effect to assess damages in a court of equity for proceeding at law under process of execution. This objection would, I think, be well founded if the result of the credit were an actual loss to the defendant, as would be the case if the property had been purchased by a stranger. But the defendant, having become the purchaser himself, is in fact subjected to no loss. He is merely denied an unrighteous gain, arising out of a sacrifice of the property occasioned by his own iniquitous and oppressive conduct. The question necessarily arose,

655 upon the *facts stated in the bill, in the adjustment of the matters of account involved in the controversy; and was not at all cognizable at law. The defendant had an undoubted legal right to enforce his judgment by process of execution; but his exercise of it under the circumstances, not only to the prejudice of his adversary but to his own individual profit, could not be countenanced in a court of equity. The mode of relief was the only one that could be adopted, unless the defendant had been required to surrender the property, which it does not appear that he offered, nor that it was still in his power to do. The question was merely as to the measure of relief, that is to say, the proper amount of the credit; and that fell within the province and discretion of the court, in the exercise of its equitable jurisdiction over the whole subject, of which it was an inseparable incident.

There is much plausibility in the argument founded upon the master commissioner's report, that at the time the defendant's execution was levied upon King, the widow was still in arrear on account of her purchases at the executorial sale, to a greater amount than the value of the property levied on. I think it not improbable that such would be the result of a statement based upon the materials furnished by the report, though none has been made by the commissioner with a view to that enquiry. But its concession does not relieve the defendant from the impropriety and injustice of proceeding to enforce the whole amount of his judgment, without giving the widow the smallest credit on account of her interest in the estate, every particle of which had been withheld from her for a period of eighteen years, unless

*Note by the reporter. It is believed to be unnecessary to except to what is not reported by the commissioner as his view of the case. A party may contend for a particular mode of stating the account, and having a special statement in that mode, but it is unnecessary to except to his statement, and indeed as irregular as it would except to his argument.

upon the supposition of an agreement that the payment of her bond was to await a settlement of the estate. After the assurance given by his predecessor at the time of the widow's purchases, and the great laches of both in regard to their administration "accounts, it was not for him to decide, without a settlement, and in contempt of the orders of court requiring a settlement, upon the question of the widow's indebtedness. Nor can the materials furnished by the report be relied upon as shewing the balance due, on one side or the other, at any given period of time prior to the final adjustment; for they do not consist of accounts actually kept, but of substitutes therefor, resorted to for the purpose of preventing a failure of justice.

Thus it seems to me, that the decree of the circuit court was founded upon a correct adjustment of the matters of account involved in the controversy, and that Mrs. Hickerson, under the circumstances, was entitled to the interposition of the court to restrain the defendant from further proceeding upon his judgment at law. I can perceive no good reason why the actual plaintiff, as her grantee or donee, should be excluded from the benefit of her equity, so far as to prevent the slaves embraced in her conveyance to him from being subjected to the defendant's process of execution against her. But I think it clear that she ought to have been made a party in the cause, inasmuch as she was directly interested in the settlement of the accounts, and the plaintiff Helm had no interest therein, except for the purpose of shewing that the defendant's demand was extinguished. She died however in the progress of the suit, and Helm became her administrator, and as such the proper representative of her interests. If she had been a defendant in the cause, he could not have revived it against himself as her administrator. Her death and his administration were judicially known to the court, being disclosed by the record in the case of *Shumate v. Hickerson*, made part of the record in the present suit, and referred to in the decrees. The omission to state these facts on the order book, or by a supplemental bill, was a mere informality, for which it would be improper to reverse the decree, especially since the statute of the 27th of February 1828, Suppl. to Rev. Code, p. 125, which declares that no "decree of a court of equity shall be reversed for informality in the proceedings, where the parties have proceeded to take their depositions, and it appears to the court that there has been a full and fair hearing upon the merits, and that substantial justice has been done between the parties." And this gives the proper answer to the appellant's objection that the balance found due to the widow is decreed to be paid to the plaintiff Helm. It will not be improper, however, for preventing any possible future misconstruction, to amend the decree in this particular, by directing the

payment to be made to Helm in his character of administrator. A further amendment of the decree will also be proper, to supply its omission to require a refunding bond in regard to any future demands against the estate.

STANARD, J. The appellee sought the aid of a court of equity by injunction to the sale of slaves on which an execution had been levied as the property of Elizabeth Hickerson, on the ground that the slaves were his property in virtue of a conveyance from the said Elizabeth. He claims that under that conveyance he became the owner of the slaves, either as a bona fide purchaser for valuable consideration, or as a donee. If he sustained his title as bona fide purchaser for valuable consideration, the only question that would arise is that respecting the jurisdiction of the court of equity to interpose its protection by way of injunction to the sale. The question of jurisdiction must, I think, have been resolved, on the authority of many decisions of this court, in favour of the appellee; and being so resolved, the relief that a court of equity should give would be the perpetuation of the injunction to the sale of the slaves which were under execution at the time the injunction was awarded.

Such relief would be granted, irrespective of any question concerning the fact or amount of indebtedness from Elizabeth Hickerson to the claimant under the execution, and consequently all enquiry into that matter would be superfluous, and foreign to the question of the relief to which the appellee was entitled. Viewing the case under this aspect, the indebtedness of Elizabeth Hickerson to the claimant under the execution would not restrict, nor would the absence of such indebtedness enlarge the relief proper to be given the appellee. Under this aspect of the case the appellee, would have no colour of right to resort to a court of equity to recover the slave that had been taken and sold under a previous execution. That taking and sale would be an invasion of his right of property for which he would have a plain and adequate remedy at law, and for which he could no more obtain redress in equity, than he could for any other trespass on or dispossession of his personal property, for which the law had provided the remedy of an action of trespass, trover or detinue.

In the relief that has been given by the decree in this case, the court below has not regarded the appellee as a bona fide purchaser for valuable consideration, but has (and I think properly) regarded the conveyance to him from Elizabeth Hickerson as voluntary: and with this element in the case many questions arise as to the propriety of granting in equity any relief, and if any, the nature and extent of that relief.

Viewing the conveyance from Elizabeth Hickerson to the appellee as voluntary, the questions are, Ought the enforcement of the judgment at law against Elizabeth Hickerson to be enjoined until the extent

of her interests as distributee and doweress in the estate of her deceased husband, for which Marshall Hickerson was responsible, should be liquidated and adjusted, with a view to a setoff of the amount thereof
 659 against the *judgment? And has the appellee a right to have those interests applied in reduction of the judgment, for the protection of the property he claims under the voluntary conveyance?

I concur with my brother Baldwin in the opinion, that under the circumstances of this case, it was proper to make it an exception to the rule (which, as a general one, has my hearty approbation) that denies to a creditor or distributee the aid of a court of equity to intercept by injunction the collection of the assets by the executor or administrator, especially those arising from the sales of the executor or administrator, until the administration accounts are adjusted, with the view that the debt or distributive share may be set off; unless the title to such setoff be founded on the express agreement of the executor or administrator. There is evidence, direct and inferential, tending strongly to prove that such agreement was made in this case. This, coupled with the long continued delinquency of the executor and his representative to settle the administration account of the estate of Joseph Hickerson, and the delays to which the suit brought by the distributees of Joseph Hickerson to have that account settled has been subjected, mainly by the neglect and contumacy of the appellant the representative of the executor, justify the court in making this case an exception to the general rule. If Elizabeth Hickerson had not conveyed to the appellee, but still retained title to the slaves on which the execution was levied, she would be entitled to protection by injunction until the amount of her claim on Marshall Hickerson as the executor of her husband should be ascertained, and when ascertained, to set off the same against the judgment. The appellee, claiming under her conveyance, had as strong a claim to this equitable protection of the slaves conveyed to him by her, as she herself would have had if no such conveyance had been made; at least so
 660 far as *that protection operated on the interests of the appellant. But from the very nature of this claim, Elizabeth Hickerson was an indispensable party to a suit in equity asserting it. The necessity of making her a party in such a suit is evinced by the consideration that it involved the adjustment and appropriation of her claim on the representative of her husband, and that unless she were a party thereto, the adjustment and appropriation that might be made of that claim by the decree would not bind her, and the representative of the executor would still be exposed to her suit, unprotected by such adjustment and appropriation. What, in my opinion, is the effect of the omission to make her or her representative a party to this suit, and what the proper mode of supplying that omission, will be stated in the sequel.

While I think the court below was right in maintaining the title of the appellee to its interposition in this case, I cannot approve of its decree. That, in my opinion, is in many respects erroneous.

The account by which the amount of the setoff to the judgment was to be liquidated could not have been properly settled but in a suit in which all the unsatisfied distributees of Joseph Hickerson should be parties. Such a suit had been brought many years before, and was pending at the institution of this. That and other considerations rendered it improper to make those distributees parties in this suit. In this predicament, the proper course was to retain the injunction in this suit until, by the adjustment of the account in the other, the amount of Elizabeth Hickerson's claim on the executor of her husband was finally liquidated; and then to apply this liquidated claim as a setoff against the judgment. It was therefore premature to render in this case a final decree giving to the appellee the benefit of the entire claim of Elizabeth Hickerson on the executor, while the suit in which

only it could be properly liquidated
 661 *remained undecided. Furthermore, as has been before stated, Elizabeth Hickerson or her representative was a necessary party, and no decree should have been rendered until that omission was supplied.

In my opinion it was wrong, in adjusting the relief to which the appellee was entitled against the appellant, to subject the appellant to a charge for the estimated value of the slave that had been taken and sold under the appellant's execution before the institution of this suit. Had the appellee been a bona fide purchaser for value from Elizabeth Hickerson, he would have had no title to relief in equity in respect to that slave after the levy and sale. I cannot understand how his title to relief, and the measure of such relief, can be extended by reducing his right in the slave to that of a claimant under a voluntary conveyance. Where there are contested mutual claims, and one claimant has his judgment at law, against an execution on which his antagonist might have obtained an injunction, but does not, and such execution issues, is levied, and the property is sold, the plaintiff in the execution has never been held chargeable in equity for the estimated value of the property sold, though it should be ascertained by that court, on the adjustment of the mutual claim, that he was indebted as much as or more than the amount of the execution, to the party against whom it issued. A fortiori such responsibility could not attach, when, on the adjustment of the claim, the judgment claimant is creditor to an amount above the mutual claim, equal to that levied under the execution. In this case it was ascertained, that after allowing credit for the entire claim of Elizabeth Hickerson on the executor of her husband, she was indebted, when the slave King was taken and sold, more than the amount for which he sold. The credit

in respect to that slave should have been limited to the amount made on the execution by the sale of him.

662 *My opinion is that an undue allowance was made for the dower interest of mrs. Hickerson in the slaves of her husband, by charging in her favour the estimated hires of her dower interest in all the slaves of which her husband died possessed. In respect to the two sold under execution before the executor had other assets with which he could satisfy the judgment, it is perfectly clear that if they had been purchased by a stranger, the executor could not have been made responsible for hires. I cannot perceive that the purchase of them by the executor himself would leave him exposed to such responsibility. The sale was made without culpable default in him, and at the sheriff's sale he, though executor, might purchase, as any other might; and a purchase by him, without fraud, as effectually withdrew those slaves from the dower claim on them specifically, as if the purchase had been by another. And yet the decree has subjected him to a charge for hires which he has not received, as though there had been no sale, and such hires had been received by him. In respect to the four other slaves, while I do not question that a case may exist of such gross misconduct of an executor, as to render him justly chargeable to the widow for hires of slaves that he ought to allot as her dower, but which he has wantonly sold, I think that, having regard to all the circumstances of this case, the dower interest in these four slaves should be adjusted (as I am satisfied it ought to be in respect to the other two) upon the principle adopted by this court in the case of Godwin's adm'r v. Godwin's adm'r &c., 4 Leigh 410. Furthermore, in a case in which the estimated hires would properly be chargeable to the executor, the amount of that charge, where it was impossible to trace the slaves and ascertain how long they lived, should be fixed by making a due allowance for the risk of life, and abating the amount thereof from the estimate of hires. The

663 *slaves may have died shortly after the sale, and the widow claiming hires would be entitled to them for so long only as the slaves lived. To make the dower right in a slave equivalent to a certain estate for life of the widow, an insurance of his life during that of the widow must be made; and the amount of such insurance would be the proper measure of abatement from the estimate of hires during the life of the widow.

ALLEN, J., concurring in the opinion of Stanard, J., the decree of the court of appeals was entered in the following terms:

The court is of opinion that the court below prematurely decreed final relief in this case, while the suit of Shumate &c. v. Hickerson, in which alone the accounts necessary to the final decision of this could be regularly adjusted, remained undecided, and while neither Elizabeth Hickerson nor

her representative was a party: that, instead of a final decree, the court below ought to have required the representative of Elizabeth Hickerson to be made a party, and continued the injunction in this case until, by the decision in the case of Shumate &c. v. Hickerson, the claim of Elizabeth Hickerson on the executor of her husband had been adjusted: and that in the adjustment of that claim, and the account between Elizabeth Hickerson, or the appellee holding her place, and the estate of Marshall Hickerson the executor of her deceased husband, the charge to the representative of Marshall Hickerson for the slave sold under execution should be limited to the net proceeds of that sale, and the charge for the dower interest of Elizabeth Hickerson in the slaves left by her husband, instead of being measured by the estimated hires of the slaves, should have been an annual sum from the death of her husband until her death, equal to the annual interest of one third of the gross amount of the sales

664 or the value *of the slaves. Therefore it is considered that the said decree be reversed with costs. And it is ordered that the cause be remanded to the circuit superior court, for further proceedings according to the principles before declared; in which further proceedings, should it appear that the said case of Shumate &c. v. Hickerson has been disposed of in respect to the other distributees of Joseph Hickerson, the court will proceed with this cause to a final decree, as it would have done, had it been originally proper so to proceed while the said suit of Shumate &c. v. Hickerson was pending undetermined.

Davis and Others v. Newman.

February, 1844, Richmond.

[40 Am. Dec. 764.]

(Absent CABELL, P., and STANARD, * J.)

Legatees—Payment of Legacies by Executor—Refunding.†—The rule of the english courts, that where an executor voluntarily pays a legacy, he cannot afterwards maintain a bill to compel the legatee to refund, unless it becomes necessary for the discharge of debts, recognized and acted on.

Same—Same—Same—Case at Bar.—A testator owing no debts and having bequeathed legacies, his executor voluntarily made considerable payments to

*He had been counsel for the appellants.

†**Legatees—Over-Payment—Refunding to Executor—Admission of Assets.**—If an executor voluntarily pays a legacy, he cannot afterwards maintain a bill to compel a legatee to refund, unless it becomes necessary for the discharge of debts, even though the executor has made such over-payment under the impression that he can collect a large debt supposed to be due the estate, and without his fault it was never collected. But such over-payment of one legatee will not be regarded as an admission of assets in his hands, so as to require him to pay to others more than what is coming to them of the amount actually received by him. *Anderson v. Piercy*, 20 W. Va. 323, citing the principal case. See

the legatees, under an impression that a bond for a large amount, executed by a debtor of the testator to the latter in his lifetime, was good and would be collected. The bond turned out to be unavailing, and the other assets were less than what was paid the legatees. **Held**, though the

executor may not have been culpably negligent in respect to the bond, and therefore not chargeable with its whole amount, yet he cannot recover back from the legatees any part of what he had paid them.

This was a case in the circuit court of Orange, between Reuben Newman the executor of James Newman, plaintiff, and

also, the principal case cited in *Kyles v. Kyle*, 25 W. Va. 280.

Same—Same—Same—Mistake of Law.—Where an administrator voluntarily pays money to a distributee of his intestate, with full knowledge of the facts, but under a mistake of law, he cannot recover it unless the same be necessary for the payment of the debts of the intestate. *Shriver v. Garrison*, 30 W. Va. 476, 4 S. E. Rep. 671, citing the principal case. See the principal case cited in *Scott v. Ashlin*, 86 Va. 588, 10 S. E. Rep. 751.

In *Dunn v. Renick*, 40 W. Va. 356, 23 S. E. Rep. 60, the court said: "An executor cannot recover a voluntary payment to a legatee when deficiency appears. *Davis v. Newman*, 2 Rob. 664; 2 Lomax Ex'r's 178; 1 Rep. Leg. 456."

In *Anderson v. Piercy*, 20 W. Va. 342, the court said: "As these payments were made by the executor to these legatees voluntarily, and the refunding of these sums were not necessary for the discharge of debts, on the principle which we have laid down and the authority of *Davis v. Newman*, 2 Rob. 664, it was error for the court to decree the repayment to the executor by the legatees of the sums, which they had received in excess of what was coming to them."

Same—Same—Same—Principal Case Distinguished.—Where an administrator, out of the intestate's assets, voluntarily pays debts of inferior class in preference to debts of higher class, and there is a deficiency of assets, he is not entitled to have the creditors so paid refund. The case has no analogy to the case of an executor paying legacies before paying the debts, where the executor is entitled to be substituted to the creditors' right to have the legatees refund. *Findlay v. Trigg*, 83 Va. 546, 3 S. E. Rep. 142, citing the principal case; *Lewis v. Overby*, 81 Gratt. 601. The principal case is cited in this connection in *Leake v. Leake*, 75 Va. 807. See *Gallego v. Atty. Gen.*, 3 Leigh 451.

In *Claycomb v. Claycomb*, 10 Gratt. 502, it is said: "In the balance reported to be due, and decreed to be paid, to the executor, some small payments of debts and expenses of administration are included. But these payments were made after the residuary estate had been paid and delivered to the legatees. So that the doctrine recognized in *Davis v. Newman*, 2 Rob. 664, can have no application to this case. We mean, however, to indicate no opinion upon the question whether that doctrine would apply to the case if the facts were otherwise."

Same—Same—Same—Principal Case Not Overruled.—In *Nelson v. Page*, 7 Gratt. 160, the court below decreed that legatees whom the executor had voluntarily overpaid should refund, but the question whether an executor can recover of a legatee a surplus paid him on his legacy was not before the court of appeals, and therefore this case cannot be considered as overruling the principal case. The principal case is cited and discussed on this point in *Anderson v. Piercy*, 20 W. Va. 328, 329.

Same—Same—Same—Extent of Relaxation of English Rule in Virginia and West Virginia.—In *Hurst v. Morgan*, 31 W. Va. 532, 8 S. E. Rep. 291, the court said: "In England it seems to be settled, by the

authorities, that a legatee is not bound to refund at the suit of the executor, unless the payment by him was compulsory, or unless the deficiency was created by debts which did not appear until after the payment of the legacy, in either of which cases the executor might compel the legatee to refund the excess paid on the legacy. See *Toll. Ex'r's* 341; 2 Fonbl. Eq. 376; *Coppin v. Coppin*, 2 P. Wms. 296; *Orr v. Kaines*, 2 Ves. Sr. 194. But the general spirit of the decision in Virginia and West Virginia has relaxed much of the severity of the ancient English cases when no fraud or misconduct is imputed to the executor. See *Jones' Ex'r v. Williams*, 2 Call 103, top. p. 86, and *Burnley v. Lambert*, 1 Wash. (Va.) 313; *Gallego's Ex'r's v. Lambert* (Tucker's opinion), 3 Leigh 465. I am therefore of the opinion that there is no inflexible rule which refuses to an executor, under any circumstances, the right to recover back from a legatee an excess of advancements which may have been made to him, even when the deficiency was created by debts which appeared before the payment of the legacy, and the payment was voluntary; but in such case the executor will have to make out a very strong case to rebut the almost conclusive presumption that he had a sufficiency of assets to justify the payment of the legacy, which arises from the mere fact that he has paid the legacy. As an instance where the law would permit an executor to recover, I may put the case where the assets were apparently abundant when the legacy was paid, but were subsequently rendered deficient by a general and destructive fire. See *Miller v. Rice*, 1 Rand. (Va.) 438. The general rule is as laid down in English cases quoted above, and, to justify a departure from this general rule, the executor must show that in the execution of the will he has done everything which a prudent man ought to have done, and has done nothing that a cautious man ought not to have done; and it will not suffice to show that he has been guilty of no fraud, but has acted *bona fide* and with honest intentions. That the English rule has not been relaxed in Virginia or West Virginia beyond what is above stated, abundantly appears from the cases of *Davis v. Newman*, 2 Rob. (Va.) 664; *Nelson v. Page*, 7 Gratt. 160; *Anderson v. Piercy*, 20 W. Va. 282, and *Shriver v. Garrison*, 30 W. Va. 456, 4 S. E. Rep. 668." See monographic note on "Executors and Administrators" appended to *Rosser v. Depriest*, 5 Gratt. 6.

Executors—Right to Grant Indulgence.—Where a debt is due to the testator from a perfectly solvent party and is in no way risked by the indulgence of the executor, he has a large discretion in granting indulgence on such debt, as under many circumstances such a debt, if collected, could not be at once paid out, and the executor knows best the needs of the estate for money, the court would not hold him responsible for the not collecting of such a debt promptly, provided it remained a perfectly good debt. *Anderson v. Piercy*, 20 W. Va. 326, citing the principal case.

665 Thomas Davis and other legatees of the *testator, defendants, wherein the legatees sought to charge the executor with a debt due to the testator from Thomas Macon, which had been lost, and the executor sought to recover back money which he had paid the legatees under an impression that the debt due from Macon would be collected. The decree of the circuit court of Orange was in favour of the executor, discharging him from liability for the debt, and decreeing over in his favour against the legatees for the money overpaid. Upon an appeal from this decree, the cause was elaborately argued by Stanard for the appellants, and by G. N. Johnson and Patton for the appellee, as well in regard to the facts, as upon several principles of law. In the following opinion there is a statement of the facts, so far as is material to understand the point adjudged, and a review also of such of the authorities cited on either side as are applicable to that point.

ALLEN, J. The testator, after making large specific bequests, directed the residue of his estate to be divided into six parts, of which the executor was to have one, and the remaining five were divided among his children and grandchildren. He owed no debts, and the executor proceeded to make sundry payments to the five legatees. The payments were voluntary; but, as it is alleged, were made under a mistake of fact as to the value of the assets. When the money was paid, all parties supposed that a bond given by Thomas Macon to the testator in his lifetime for a large amount, was good and would be collected; and the executor, in settling with the legatees, acted under that impression. The bond has turned out to be unavailing. Macon, though in the possession of an immense estate at the testator's death, was in truth greatly embarrassed, and subsequently gave deeds of trust which exhausted all his property. There being no creditors of 666 the testator *the executor now seeks to recover back for his own benefit the sums overpaid to the legatees.

In 1 Roper on Legacies 315, it is said to be a rule in equity, to presume, when an executor voluntarily pays one or more legacies, that he has received sufficient assets to discharge the rest; and although the fact be otherwise, not to admit evidence to that effect. In such cases, therefore, the executor will be under the necessity to make up the deficiency with his own money, since he will not be permitted to institute proceedings (except in particular instances) against the legatees so paid, to oblige them to refund. See also 2 Lomax's Digest 173; 2 Williams on Ex'ors 892; 1 Eq. Ca. Abr. 239. The cases referred to by Roper, of Noel v. Robinson, 1 Vern. 94, Newman v. Barton, 2 Vern. 205, Coppin v. Coppin, 2 P. Wms. 292, and Orr v. Kaines, 2 Ves. sen. 194, seem to me fully to sustain the position that in England, where the executor has made a voluntary payment, he can-

not compel the legatee to refund: though there may be good reason to doubt whether they fully justify the position that such payment is an admission of assets sufficient to pay all the rest of the legatees, and that, though the fact may be otherwise, equity will not admit evidence to that effect. The authority for this proposition is the opinion of sir John Strange, master of the rolls, in 2 Ves. sen. 194. That opinion has been reviewed by president Tucker in Gallego's ex'ors v. Attorney General, 3 Leigh 488, and he there shews, that sir John Strange merely says such payment furnishes a presumption of the sufficiency of assets to pay the rest of the legacies, but does not say the presumption is conclusive. In the opinion of president Tucker, such presumptions, like all others, are liable to be rebutted, and although an executor may have been willing to encounter the hazard of paying one, it furnishes no reason for being compelled to pay the rest out of his own pocket.

667 *I should not consider such a payment to one as conclusively establishing the executor's liability to all the rest, although the assets were deficient originally; because that would conflict with the spirit of our laws and adjudications. In England, the executor is personally bound if he fails to plead. A judgment against him on any plea except plene administravit, or a plea admitting assets to a sum certain and riens ultra, is conclusive on him that he has assets to satisfy such judgment. Our Statute (1 R. C. p. 384, ch. 104, § 36,) has altered the law in this respect, and a failure to plead, or mispleading, subjects him to no personal responsibility. To hold that a voluntary payment to one legatee is an implied admission of assets sufficient to pay all, would be giving to such implied admission in pais an effect to which the statute has declared an admission on record shall not be entitled. For, by any other than the plea of plene administravit, he was held to admit assets. 1 Wms. Saund. 335, note 10.

But as between the executor and the legatee who has been paid, the cases are decisive that he shall not recover back the payment if voluntarily made. And no case has been cited which shews that such a bill has ever been sustained in England. It is certainly not shewn by those cited from 1 P. Wms. 495, and 2 P. Wms. 447. In Virginia the question has never arisen. Burnley v. Lambert, 1 Wash. 308, was a suit by the legatee to recover slaves bequeathed to him, and which had been seized and sold on an execution against the executor after he had assented to the legacy. Judge Pendleton, after deciding that the assent of the executor to the legacy vested the legal title in the legatee, which could not be divested at law by the creditor, remarks that the creditor is not without remedy; he may follow the assets in the hands of the legatee, or proceed against the executors, in which case the executors have their 668 remedy in equity to compel *the lega-

tee to refund. It does not appear from the report, whether the debt was one of which the executor had no previous notice; and it was unnecessary for the court to enquire into that matter. If it was a debt of which he had no notice before paying away the assets to legatees, he had a right to compel the legatees to refund. *Nelthrop v. Biscoe*, 1 Ch. Cas. 135.* And as the assets are always bound to the creditor, and he may pursue them in the hands of the legatee even though the testator's effects would have been sufficient to pay both debts and legacies, (1 Vern. 162,) there might be good reason for holding that where the executor paid a legacy with notice of a debt, believing the assets to be sufficient, and they proved insufficient to pay both, he should be permitted to compel the legatee to refund. The legatee takes subject to the liability of being compelled to refund at the suit of a creditor. And where the executor has not been culpable, and is compelled to pay the debt, it seems to me he should be substituted to the rights of the creditor he has paid. So far the strict rule of the english courts might properly be relaxed in conformity with the more liberal spirit of our legislation in regard to executors, and with the principles which led the court to give relief in *Miller's ex'ors v. Rice &c.*, 1 Rand. 438.

Jones v. Williams, 2 Call 102, was a controversy about accounts, and the question could not have arisen; for the money advanced to the distributee was advanced as a loan, to be returned if on a settlement he was not entitled to it; and for that reason the executor was allowed interest on the sum decreed to him.

669 **Bowers's ex'or v. Glendening &c.*, 4 Munf. 219, decides merely that an executor against whom a creditor obtains a decree may compel the legatee to refund.

In *Gallego's ex'ors v. Attorney General*, 3 Leigh 450, it was decided that where the estate proved deficient by an unexpected depreciation of the property after some of the legatees were fully paid, the unpaid legatees have a right to look to the executors for their ratable proportions of the fund, and are not bound to have recourse to the legatees who were fully paid to compel them to refund. In England, the unsatisfied legatee cannot maintain a suit against the legatee fully paid to compel him to refund, if the executor is solvent. Such judge Tucker lays down to be the rule; and therefore, though he was of opinion in *Gallego's ex'ors v. Attorney General* that the executors were liable only for the

ratable proportion of the legacy, and not for the whole, upon the ground that payment in full to one was an admission of assets sufficient to pay all, he still held, that as the executors were quite solvent, the legatees had no right to call upon those paid to refund. The case did not call for a decision on this point, and the other judges did not notice it. If, as I conceive, the executor who has been made liable at the suit of the creditor can only be permitted to compel the legatee, whom he has voluntarily paid, to refund, by substituting him to the rights of the creditor, who could have proceeded in the first instance against the assets; where it is shewn that no such original right to charge the assets exists, there is no right to which the executor can be substituted.

But even if, in a case where there was an original deficiency of assets, (as in *Gallego's ex'ors v. Attorney General*) it should be held that the executor, having through mistake paid one legatee in full, and having afterwards been compelled to pay the proportions of the others out of his own pocket, might compel the legatee overpaid to refund; the case would still fall short of that under consideration. Here the executor has not been called upon by a creditor to make good assets improperly paid away, or by an unpaid legatee to pay him a ratable proportion of his legacy out of his own pocket: he is seeking to recover for his own benefit alone. To sustain his claim to such a recovery would be against the whole series of authorities in England, commencing at an early period, and without the support of a single authority or dictum in our own courts.

It is the duty of the executor to make himself acquainted with the condition of the estate. The means are in his own hands, and if he neglects to avail himself of them it is his own fault. He is not compelled to pay the legatees until the debts are discharged, and until he has ascertained the precise extent of the assets. He can decline paying except under the decree of a court, and then he is entitled to call upon the legatee to refund if the estate was originally deficient; and he may with us always require a refunding bond. If, without using any of these precautions, he voluntarily pays the legatee, the latter has a right to consider the money as his own; subject, it is true, to be called upon to refund at the suit of creditors, or of an unpaid legatee if the assets were originally deficient. But these are contingencies too remote in his apprehension, when a payment has been made to him under such circumstances, to have any influence on his conduct. The hardship of the case is greater upon the legatee than the executor. He has been in no default. No duty was imposed upon him to examine into the state and condition of the assets. He receives what a payment under such circumstances has impressed him with a conviction he will never be called upon to refund. Such unex-

*Note by the reporter.—In the late case of *March v. Russell*, 8 Mylne & Craig 81, 14 Cond. Eng. Ch. Rep. p. 40, the point was made, "that assets cannot be followed in the hands of legatees to whom they have been handed over by the personal representative in ignorance of the demands of creditors which existed at the time;" but lord Cottenham said, the proposition could not be maintained; it was contrary to the established rule of the court from the earliest period.

pected additions to men's fortunes are frequently spent without much consideration; wasted in the gratification of some
 671 want to which the *legacy has given birth, or released to some more nearly relative. It would be the grossest injustice, under such circumstances, to permit the executor, who had thus misled him by his negligence or inattention to his duties, to compel him at some distant day to refund the money. The case of a legatee, and as between him and the executor, seems to me much stronger than the cases of *Brisbane v. Dacres*, 5 Taunt. 144, 1 Eng. C. L. Rep. 43, and *Skyring v. Greenwood*, 4 Barn. & Cress. 281, 10 Eng. C. L. Rep. 335, in the first of which cases *Gibbs, J.*, remarked, that he who receives money so paid "has a right to consider it as his without dispute: he spends it in confidence that it is his; and it would be most mischievous and unjust, if he who has acquiesced in the right by such voluntary payment, should be at liberty, at any time within the statute of limitations, to rip up the matter and recover back the money."

The only modifications of the general rule which our laws seem to call for, are those already indicated. A payment to one in full shall not be construed into an admission of assets sufficient to pay all: it merely furnishes a strong presumption, which may be rebutted by proof of an original deficiency. And in all cases where the executor is compelled to pay a creditor, he shall, upon the principle of substitution, have the right to compel the legatee to refund, and this although he had notice of the debt at the time of payment; unless he has been guilty of culpable neglect of his duty to inform himself of the condition of the estate. But where he has not been subjected to liability at the suit of a creditor, he shall not be permitted to recover back, for his own benefit, what he has voluntarily paid to the legatee.

On the particular circumstances attending this payment, the case, it seems to me, is still stronger against the executor. The testator died in March 1816. The
 672 *will was proved in a short time thereafter, and the executor qualified in October following: but he took possession of the estate, and acted as executor, immediately after the death of the testator, managing the estate according to the directions of the will. In November 1816, the executor filed the bill in the present cause. The object contemplated in filing it was clearly nothing more than a division of the slaves. I should not consider this as affecting the validity of the settlement and decree, if free from other objections. The bill made the will an exhibit; there was a prayer for general relief; the answers consented to a division of whatever property was by the will directed to be divided; and all parties at a subsequent period proceeded to the account, without any exception or objection to the propriety of such settlement under the pleadings in the cause. After this, it seems to me to be too late to

start the objection here. On the coming in of the answers, commissioners were appointed to divide the slaves, who made the division in January 1817. This being done, no farther proceedings were had in the cause until August 1825, when it was ordered (on whose motion does not appear) that the report of the division should be confirmed, and that the commissioners should settle the executorial account. In the meantime, and as early as September 1817, an informal statement and settlement of the accounts was made at the instance of the executor. At this time the executor had fully informed himself of the condition of the estate. There were no debts to pay; nothing to do but to ascertain the amount and pay the legatees their proportions. Charging the bond due from Macon to the testator as part of the available assets, these proportions were ascertained, and the executor proceeded to make payments. That the condition of the estate was fully known to the executor at that time, is manifest from a comparison of the state-

673 ment made in 1817, with the *settlement returned and the cause under the order of 1825. The items correspond throughout; and the only difference between them arises out of the Macon bond, which was not estimated as part of the assets at the last settlement. Excluding this bond, the executor had overpaid; and this overpayment he seeks to recover back, because the bond was estimated as part of the available assets under a mistaken impression that Macon was perfectly solvent; an opinion entertained as well by the legatees as the executor. Conceding this to be the fact, how does it benefit the executor? He had control of the bond, and it was his duty to satisfy himself of the solvency of the obligor. The legatees were passive. They made no misrepresentation. It does not appear that they were even urgent for the payment of their legacies. The estate being entirely free from debt, it was the duty of the executor (and his interest too, he being entitled to much the largest portion) to settle up and pay the legatees in the course of the year. This bond constituted a large portion of the assets. He could not have been charged with it until he had collected it. If he did not intend to risk the solvency of the obligor, he should have instituted suit upon it, or at least excluded it from the statement on the faith of which the legatees received the payments. Under these circumstances, and after having held it up for eighteen months from the probat of the will, and then brought it into the account, his conduct was tantamount to a representation to the legatees that the bond was good, and that he as executor was willing to take it. The defendants insist in their answers that there was an express agreement to that effect; and the evidence, if it does not establish it, tends to prove it. But the transaction speaks for itself. He charged himself with the bond; and the legatees, on the faith of this act, voluntary on his part, and after full time to satisfy

himself of the solvency of the
674 *obligor, received what he thus induced them to believe was their own. Supposing he made an innocent mistake, does that give him a right, not only to discharge himself, but to charge others who were misled by him?

Though I should not consider him guilty of such laches in failing to collect the bond as to render him responsible for its whole amount, yet the question assumes a very different aspect when he seeks to recover back, for his own benefit, what he has paid on account of it. The obligor, at the death of the testator, and when the executor qualified, was in possession of a very large estate; his embarrassments were unknown in the neighbourhood. Who can say, that if the executor had proceeded promptly to enforce payment, the bond would not have been secured or paid? In December 1817 the deed of trust from Macon was recorded, having been executed by him in June previous. But at what time the debts were all contracted does not distinctly appear. Some of them may have been, and probably were, incurred after the death of the testator and the qualification of the executor. It clearly appears that he was solicitous to maintain his credit. The debt due the testator was but a trifle in comparison with the immense estate in his possession and to all appearance unincumbered. If the executor had insisted on payment within the year when he was bound to settle up, can any one undertake to say that the debt would not have been paid or secured? All that the record shews him to have done was to make an application to the debtor. In the exercise of a proper discretion, the executor may abstain from calling in debts well secured. Where, from the condition of the estate, it cannot be distributed or paid out in consequence of controverted claims, much latitude of discretion may be allowed; and if without any culpable default of the executor, loss should result from the
675 insolvency *of debtors supposed to

be good, the circumstances may exempt him from liability. Here the general impression of the solvency of the debtor may be a sufficient defence against the charge of culpable negligence, and relieve the executor from the payment of the whole amount, but does not, as it seems to me, furnish any claim to recover back what he has paid.

It has been contended that this was a compulsory payment, in which case the executor may recover back. *Newman v. Barton*, 2 Vern. 205. There is nothing in the record to justify this position. There was a suit instituted by himself, in which, for the reasons already given, it was competent to go on and settle the estate. But he paid before any settlement was made in that suit, when in fact no settlement was contemplated, and upon a statement voluntarily furnished by himself.

Upon the whole, without considering the effect of the statute of limitations on the claim of the executor, (though the great

delay furnishes another strong circumstance against this pretension) it seems to me that both the rules of law and the particular circumstances of this case should preclude his recovery.

BROOKE and BALDWIN, J., concurring, decree reversed.

676 **Pettit v. Jennings and Others.*

March, 1844, Richmond.

(Absent STANARD,* J.)

Evidence—Admissions.†—The general rule, that the admission of one person cannot be given in evidence against another, adverted to by BALDWIN, J. **Same—Codefendants—Answer of One No Evidence against Another—Cases Approved.**—It is a general rule, that the answer of one defendant in chancery is not evidence against his codefendant. From this rule there is no exception of the answer of an assignor; not even though the bond assigned be alleged to have been given on a gaming consideration. The fact of its being on such consideration cannot be established against a defendant who is the assignee, by the answer of his codefendant the obligee and assignor. *Accord. Hoomes v. Smock*, 1 Wash. 389; *Dade's adm'r v. Madison*, 5 Leigh 401.

Equity Practice—Gaming—Liability of Obligor in Gaming Bond to Assignee—Cases Approved.‡—Though upon a bill in equity by an obligor against the obligee and his assignee, it be fully proved that the bond was given for a gaming consideration, still the obligor will not be discharged from

*He had been counsel for the appellant.

†**Evidence—Assignor—Declarations.**—The declarations of an assignor of a chose in action cannot be given in evidence against the party who had previously acquired his title by assignment from him. It would be vicious and dangerous to permit the assignor to defeat the right or title which he had conveyed or assigned to another. *Ginter v. Breeden*, 90 Va. 570, 19 S. E. Rep. 656, citing *Pettit v. Jennings*, 2 Rob. 676. See, in accord, *Willcox v. Pearman*, 9 Leigh 146.

‡**Equity Practice—Codefendants—Answer of One is No Evidence against Another—Assignment—Liability of Obligor in Gaming Bond to Assignee.**—For the proposition that the answer of one defendant in chancery is not evidence against his codefendant and this though upon a bill in equity by the obligor in a bond against the obligee and his assignee it is fully proved that the bond was given for a gaming consideration, still the obligor will not be discharged from liability to the assignee, if the assignee had not knowledge before the bond was assigned of its having been executed for money won at cards, and was induced to purchase the same by the assurance of the obligor that there was no objection to it, the principal case is cited and approved in *Wilson v. Lazler*, 11 Gratt. 485, 486; *Smith v. Betty*, 11 Gratt. 763; *Poague v. Spriggs*, 21 Gratt. 294; *Septoe v. Pollard*, 30 Gratt. 701; *Frank v. Lillienfeld*, 33 Gratt. 381; *Stebbins v. Bruce*, 80 Va. 408; *Cardwell v. Kelly*, 95 Va. 576, 28 S. E. Rep. 923; *foot-note to Bank of Washington v. Arthur*, 3 Gratt. 174. See monographic note on "Assignments" appended to *Ragdale v. Hagy*, 9 Gratt. 409; monographic note on "Bonds" appended to *Ward v. Churn*, 18 Gratt. 381.

liability to the assignee, if the assignee had no knowledge before the bond was assigned of its having been executed for money won at play, and was induced to purchase the same by the assurances of the obligor that there was no objection to it and that it would be paid. *Per* BALDWIN, J. *Accord.* *Buckner &c. v. Smith &c.*, 1 Wash. 296; *Hoomes v. Smock*, 1 Wash. 889; *Davis's adm'r v. Thomas &c.*, 5 Leigh 1. Under such circumstances, the only question is as to the amount of the obligor's liability to the assignee. Is it the whole amount of the bond, or is it the sum paid by the assignee to the assignor for the assignment? *Per* BALDWIN, J., it is the former; *per* ALLEN, J., the latter.

Same—Decree Over for Obligor in Gaming Bond against Oblige.—In an injunction suit by the obligor in a gaming security against the obligee and assignee, if the gaming consideration be admitted by the obligee's answer, but not proved by any competent evidence against the assignee, the injunction will be dissolved and the bill dismissed as to the assignee, but not as to the obligee. As to him the cause will be retained until payment by the obligor to the assignee of the money due the latter. In order that a decree may then be rendered therefor in favour of the obligor against the obligee.

677 *A bond of Hugh Pettit to James F. Jennings for 1000 dollars, dated the 5th of October 1833 and payable 12 months after date, having been assigned to Richmond Terrell, Pettit, on the 27th of January 1834, made a deed of trust conveying a tract of land in Fluvanna to Abraham Shepherd, in trust for the purpose of securing the payment of the bond to Terrell. Default being made in paying the bond, the land was immediately advertised under the deed. Whereupon, to wit, in October 1834, Pettit exhibited a bill of injunction against Jennings, Shepherd and Terrell, alleging that the whole consideration of the bond was for money won of him by Jennings at cards, and that William Overton, who acted for Terrell in procuring the deed of trust, was told by him (Pettit) and by others that such was the consideration. The bill prayed for a discovery by Jennings of the consideration, an injunction to restrain a sale under the deed, and a decree cancelling the bond and deed.

Terrell answered, that in January 1834 he put into the hands of Overton the sum of 1000 dollars, with a request that he would employ the same for his (Terrell's) benefit; and in a month or two afterwards he was informed by Overton of his purchase of the bond from Pettit to Jennings, the assignment thereof to him (Terrell), and the deed of trust to secure the same.

Jennings answered that the bond was given for a gaming consideration, but that Overton, so far as he knew, was not informed as to the consideration of the bond; that Overton refused to purchase the bond until he could see Pettit; that the bond was not executed till the day of its transfer; that the sale to Overton as agent of Terrell was made at the solicitation of Pettit, on an agreement between him (Jennings)

and Pettit, that he (Pettit) should receive a part of the money obtained for the bond; that before the transfer was made, 678 Pettit told *Overton, in the presence of him (Jennings), that the bond was given for money borrowed, and he would pay it without offset, and secure it by deed of trust; and that Pettit did actually receive 600 dollars of the amount received for the bond.

There were depositions to prove that Pettit actually receive the 600 dollars, or about that amount; and it seemed from the testimony of one witness, that a bond had been given therefor by Pettit to Jennings, as for money borrowed by the former from the latter. In the opinion of the court of appeals, the evidence contained in the depositions was not sufficient to establish that the bond of 1000 dollars from Pettit to Jennings was given on a gaming consideration. One witness deposed that he had seen Jennings and Pettit play cards; another, that he suspected the bond was on a gaming consideration, and admonished Overton to be on his guard in purchasing it. Overton himself deposed, that in his first conversation with Pettit, Pettit told him to be cautious how he purchased any claim of Jennings, as they had been gambling, and Jennings had cheated him and won money of him; at any rate to see him (Pettit) before he made the purchase. In consequence of this conversation, Overton, on the day the bond was transferred, wrote a paper which Pettit signed, in these words: "I acknowledge that my bond held by James F. Jennings for 1000 dollars, dated the 5th day of October 1833, payable 12 months after date, is justly due, and if Richmond Terrell should buy the said bond, I will pay it without offset. Hugh Pettit jr. 27 January 1834."

The circuit court of Fluvanna, on the 9th of September 1835, decreed that the injunction be dissolved and the bill dismissed, and that the plaintiff should pay Terrell his costs.

From this decree, on the petition of Pettit, an appeal was allowed.

679 *The cause was elaborately argued by Stanard for the appellant, by Steger and G. N. Johnson for Terrell, and by Lyons for Jennings. But the points made and the authorities cited are so fully examined in the following opinions, that it is thought not proper to take up the space that would be occupied in an attempt to report the argument.

BALDWIN, J. It is unquestionable as a general rule, that the admission of one person cannot be given in evidence against another. There are various exceptions to the rule, of which I need notice here only such as arise out of a connexion of interest between the person making the admission and him against whom it is offered. In solving a question as to the admissibility of such evidence, regard must be had to the nature of the connecting interest, and the time of making the admission. The

nature of the connecting interest may be that of a joint ownership or liability, or that of a derivation of title of one several owner from or through another. In the former case, the ownership or liability must be strictly joint, as that of joint tenants or copartners; and there the admission of one is treated as the admission of both: a mere community of interests, as that of tenants in common, is not sufficient. *Dan &c. v. Brown*, 4 Cowen 483, 493. But there is this difference between a joint and a derivative interest: in the former, the joint interest to be affected must be a subsisting one at the time of the admission; in the latter, the derivative interest to be affected must be acquired subsequently to the admission.

Whether the person making the admission, and the party against whom it is offered, be connected by a joint ownership or liability, or by the transmission of a several title from the former to the latter, the interest of the former must be a subsisting one at the time of the admission. If

at the time of making it he has
680 *parted from his interest, his admission is not legal evidence against him to whom it has passed. Upon this point the authorities are clear and numerous; and as respects the vendor of property, real or personal, or the assignor of a chose in action, there has been no case, so far as my information extends, allowing his declarations to be given in evidence against a party who had previously acquired his title. Indeed the propriety of rejecting such evidence would seem too obvious to require the support of authority. It would be manifestly of dangerous tendency to permit the vendor or assignor thus to defeat the right or title which he had conveyed or transferred to another; and unreasonable to deprive the latter of the protection to be derived from cross examination. Nor is this rule of exclusion varied by the circumstance that the vendor or assignor is bound by a warranty, express or implied, to assure the title or interest which he has conveyed or transferred. Such contingent liability does not furnish a sufficient security against indiscretion or fraud, to the prejudice of the derivative owner; there not being a complete identity of interest, and the former owner being divested, in a great measure, of the vigilance, circumspection and forethought incidental to the immediate ownership, enjoyment and control of the subject. It is from this consideration, doubtless, that we find the exclusion of admissions by a vendor or assignor, made after his sale or assignment, laid down in the books without exception or qualification; and that the rule has been applied in various cases notwithstanding the contingent liability of the vendor or assignor. *Wilcox v. Pearman*, 9 Leigh 144; *Packer v. Gonsalus*, 1 Serg. & Rawle 536; *Babb v. Clemson*, 12 Serg. & Rawle 328.

What I have said has reference to admissions in pais, whether verbal or written;

or in a former suit, by answer or otherwise, to which the person against whom the evidence is offered was not a party. The same *principles must govern an admission in the answer of one defendant in a pending suit, offered as evidence against his codefendant. Where there is a connexion of interest between the two defendants arising out of the relation of vendor and vendee, or assignor and assignee, the admission in the answer must necessarily have been made after the vendor or assignor has parted from his interest. There is no consideration of justice or policy which requires the reception of such evidence. Accordingly, we find it laid down in the books, in the strongest terms, that the answer of one defendant is not evidence against his codefendant; and I am aware of no authority which makes the answer of a vendor or assignor an exception from the general rule. On the contrary, in *Phoenix v. The assignees of Ingraham*, 5 Johns. R. 426, and other cases, such an admission is placed upon the same footing as an admission in pais; and in that case it was held that no declarations, in whatever form, of a party to a sale or transfer, going to destroy and take away the vested rights of another, can ex post facto work that consequence, or be regarded as evidence against the vendee or assignee. No authority to the contrary has been produced by the appellant's counsel, except a passage in *Greenleaf's Law of Evidence*, p. 210, § 178, where it is said: "In general the answer of one defendant in chancery cannot be read in evidence against his codefendant, the reason being, that as there is no issue between them, there can have been no opportunity for cross examination. But this rule does not apply to cases where the defendant claims through him whose answer is offered in evidence; nor to cases where they have a joint interest, either as partners or otherwise, in the transaction." For the propositions in this last sentence, the learned author refers to *Field &c. v. Holland &c.*, 6 Cranch 8, 24, and *Clark's ex'ors v. Van Riemsdyk*, 9 Cranch 153, 156. The latter case relates only to the *last proposition; and *Field &c. v. Holland &c.* it will be found, does not sustain the first. The marginal note of the reporter is so, but it is wrong; no such doctrine is asserted in that case.

The case of *Field &c. v. Holland &c.* was briefly this: The plaintiffs *Field &c.* filed their bill in equity to set aside a sale of a tract of land in Georgia, made by the sheriff under executions which issued upon judgments recovered by *Holland* against *Cox*; which tract of land, after the judgments, but before the levy of the executions, was sold by *Cox* to the plaintiffs. The equity in the bill was, that the judgments were discharged before the levy of the executions, by certain dealings and transactions between *Holland* and *Cox*; who, together with *Milton* and others, the purchasers at the sheriff's sale, were made

defendants: and the merits of the case turned upon the truth of that allegation, which the bill expressly required Holland to answer, and as to which it called upon him for a discovery. Holland answered denying the allegation; and the question was as to the effect of his answer. The court, in its opinion delivered by chief justice Marshall, held that the answer of Holland responsive to the bill was evidence against the plaintiffs, and upon that and the other evidence in the cause dismissed the bill, not only as to Holland, but also as to Milton and others, the purchasers under the executions, who of course claimed under Holland.

The principle of this decision is not that the answer of a defendant is evidence for the plaintiff against a codefendant, but that, when responsive to the bill, it is evidence against the plaintiff for the responding defendant, and enures to the benefit of his codefendant claiming under him, when it destroys the foundation of the plaintiff's claim. The language of the court is as follows: "Neither is it be admitted that the answer of Holland is not testimony against the plaintiffs. He is the party

683 against whom the fact that the judgments *were discharged is to be established, and against whom it is to operate. This fact when established, it is true, affects the purchasers also; but it affects them consequentially, and through him. It affects them as representing him. Consequently, when the fact is established against or for him, it binds them. The plaintiffs themselves call upon Holland for a discovery. They aver that the judgments were discharged, and expressly require him to answer this allegation. They cannot now be allowed to say that this answer is no testimony." It will be seen that the reasoning of the court is at first somewhat indefinite; I presume, for the purpose of avoiding the very inference which has been erroneously drawn from it. Its object was to shew, in the first place, that the fact of the payment or nonpayment of the judgments, when properly established, would not only be evidence for or against the plaintiff therein, but would operate for or against the purchasers under the authority thereof; at the same time avoiding the designation of the mode by which the fact, whether affirmative or negative, was to be established; and then to shew that in the case before the court it was established negatively, by the responsive answer of the defendant Holland. There could be no propriety in intimating any opinion as to what would be the effect of a directly opposite state of facts, to wit, an admission by the defendant Holland, in his answer, of the allegation in the bill; and in fact no such opinion was intimated.

A plaintiff is put to no disadvantage by not being allowed to read the answer of one defendant against another, where they are not identified in interest. He is placed upon fair ground when permitted to encounter each with the appropriate pleadings

and proofs. It is not his having associated them as parties that deprives him of the testimony of one against the other as a witness; but because the one called on is incompetent or privileged by reason of his interest. If such be not the

684 *fact, the plaintiff may examine him as a witness: and if it be the fact, then his testimony can avail the plaintiff nothing, unless he has admitted in his answer the allegation sought to be proved. When he has so admitted it, he is no longer privileged, for he has already given evidence against himself; and where his codefendant is a mere claimant under him, an objection to his competency can come only from the plaintiff. No failure of justice, therefore, results from rejecting the answer of one defendant as evidence against his codefendant; and if received, it would be evidence in the most objectionable form. An admission in an answer is something more than evidence: it is a concession in pleading, which requires no corroborating, and allows of no countervailing proofs. If received against a codefendant, it ought to be with the same force and effect as against the respondent; otherwise it operates as a deposition, but a deposition of an anomalous character, one which denies the important privilege of cross examination. Either way, whether operating as a pleading or a deposition, it would place an assignee or vendee completely in the power of his assignor or vendor, and subject him to the danger of being made the helpless victim of a fraudulent collusion.

There is nothing in the provisions or policy of the statute against gaming which can affect this question. That statute, it is true, gives a discovery against the party who has a knowledge of the material facts; but it does not make the discovery, when obtained, evidence against others, nor alter the rules of pleading and evidence beyond its express enactments. It is enough that it avoids the security in the hands of an innocent assignee, when the fact is ascertained: it would be too much to prevent him from putting the fact in issue, and requiring its proof, so far as it affects him, by legal testimony.

685 *It is clear, therefore, to my mind, that the answer of the defendant Jennings cannot be read against his assignee and codefendant Terrell, to prove that the bond of the plaintiff Pettit was executed for a gaming consideration. If the question were even doubtful upon principle, I would consider it as settled by authority.

In the case of Dade's adm'r v. Madison, 5 Leigh 401, Madison filed his bill against Dade and Tankersley, to be relieved against a judgment on an accepted order, drawn by Dade in favour of Tankersley, and accepted by Madison. The bill alleged that the order was drawn for money won by Dade from Madison at unlawful gaming; which allegation was admitted by Dade, but put in issue by Tankersley. And the court, after full consideration, held that

the answer of the defendant Dade was not evidence against his codefendant Tankersley, to prove the unlawful consideration of Madison's acceptance. The case cannot be distinguished in principle for the one before us. Madison's acceptance was a security for a debt due from him to Dade, which debt Dade by his order assigned to Tankersley. Dade by his answer admitted the unlawful consideration of the debt, and that admission was not permitted to affect his assignee and codefendant Tankersley. In the case of *Hoomes v. Smock*, 1 Wash. 389, this court had previously held that the answer of the obligee in a bond, admitting the bond to have been executed for money won at unlawful gaming, was improper evidence against his assignee and codefendant. In accordance with these decisions is the case of *Bartlett v. Marshall*, 2 Bibb 470.

If, however, it had been fully proved, by evidence unobjectionable on the part of the defendant Terrell, that the bond of the plaintiff was given for a gaming consideration, still it is clear that he would not be entitled to the relief which he seeks against that defendant. The evidence is entirely satisfactory to prove that neither Terrell nor his agent, previous to the assignment of the bond, had any knowledge of its having been executed for money won at play; and that the agent was induced to purchase it by the plaintiff's assurances that there was no objection to its payment, and that it would be duly paid. Under these circumstances, it is impossible that the plaintiff can be exonerated from his indebtedness to the innocent assignee: and the only question he can be permitted to make is as to the amount of that indebtedness. Is it the whole sum for which he is bound, or is it the sum paid by the assignee to the assignor for the assignment?

At law, there could be no difficulty in this question. There the assignee would recover the whole amount evidenced by the obligation, or nothing. The obligor could not plead that he was not indebted the full amount of the bond, because the assignee had paid a less sum for it to the assignor; nor could he obtain a credit, upon the plea of payment or setoff, for the discount allowed by the assignor to the assignee. How is it in a court of equity? The plaintiff has not presented the question, either by his bill or his proofs. He has neither charged nor proved, that the consideration for the assignment was less than that for which he bound himself in the obligation. But suppose he had done both; and suppose further that he had set forth the whole case in his bill, stating that the bond was given for money lost at unlawful gaming; that the assignee was ignorant of the fact, but had been induced by the wilful misrepresentations of him the plaintiff, as to the true nature of the consideration, to lay out his money in the purchase of it at a certain discount; that he the plaintiff had conveyed property to a

trustee to secure the payment of the debt; and praying an injunction to restrain proceedings for the recovery of more than the sum paid by the assignee to the assignor for the assignment: would such a case be proper for relief in equity? Or, 687 *to make it stronger for the obligor, suppose (contrary to the fact) that he were defendant, instead of plaintiff, in the case before us; that the assignee had come in, upon some ground of equitable jurisdiction, to coerce payment of the debt; and that the obligor had defended himself by setting forth the whole case, as above suggested: would a court of conscience sustain such a defence?

The principle upon which courts of equity act in such cases is not that of compensation in damages to the party deceived and injured, nor of restoring him by retribution to the condition in which he stood previously. They proceed upon the principle that the perpetrator of the fraud shall not be permitted to deny the truth of his own statement, but shall be compelled to make good that which he had represented to be so. Take the familiar example of the owner of an estate standing by and encouraging the purchase of it by another from a third person; the doctrine in regard to which is thus briefly and comprehensively stated by judge Story: "If a man having a title to an estate which is offered for sale, and knowing his title, stands by and encourages the sale, or does not forbid it, and thereby another person is induced to purchase the estate under the supposition that the title is good, the former so standing by and being silent will be bound by the sale, and neither he nor his privies will be at liberty to dispute the validity of the purchase." 1 Story's Eq. 376, § 385. The learned author adds, that "courts of law now act upon the same enlightened principles in regard to personal property; in the transfer of which no technical formalities usually intervene to prevent the application of them. Thus, where it appeared that certain goods of the plaintiff were seized on an execution against a third person (in whose possession they were) and sold to the defendant, and the plaintiff made no objection to the sale though he had 688 *full notice of it, it was held that the facts ought to be left to the jury to consider whether he had not assented to the sale and ceased to be the owner of the property. On this occasion lord Denman, in delivering the opinion of the court, said: 'The rule of law is clear, that where one by his words or conduct wilfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time.' *Picard v. Sears*, 6 Adolph. & Ellis 474."

I can perceive no good reason why a gaming security should form an exception to the general rule on this subject; which rests upon principles of justice equally ap-

plicable, whether the debt be void in its inception, or be avoided by payment or release, or by any other matter *ex post facto*. It is true that a contract or security which is void, either by positive law or upon principles of public policy, is deemed incapable of confirmation; but the doctrine we are considering is not based upon the idea of confirmation, which excludes the supposition of fraud, but upon the fact of fraud in the original representation or subsequent denial, which, to prevent iniquity, is made to operate as an estoppel. Admissions which have been acted upon by others are conclusive upon the party making them, in all cases between him and the person whose conduct he has thus influenced; and the party is estopped, on grounds of public policy and good faith, from repudiating his own representations. *Greenleaf on Evid.* 240, 241.

If this were not so, then the deluded assignee could recover nothing in an action upon the bond at common law, but would be driven to his action for the deceit; for he would be defeated by a plea of the unlawful consideration of the bond, unless he were permitted to reply the fraudulent conduct of the obligor. That *such a replication would be good, appears from the case of *Davis's adm'r v. Thomas &c.*, 5 Leigh 1. That was an action of debt on a promissory note, brought for the benefit of the holder, in the name of the payee, against the maker, and was tried upon the plea of nil debet. The defendant offered proof that he had paid the contents of the note to the payee, before the transfer thereof to the holder; and to repel that defence, the holder offered proof that he was induced to take the transfer of the note for a valuable consideration, by the maker's previous promise to make payment thereof to him. And this court held, that this evidence to repel the defence of payment was admissible, and that the maker's promise to pay the debt to the holder estopped him from alleging payment to the payee before assignment. Judge Tucker in his opinion, in which the other judges concurred, placed the case expressly upon the same footing as if the security had been "void in its inception, as for gaming, usury, and the like;" and shewed that the matter of estoppel might be replied to a plea in bar, or given in evidence upon the general issue.

The same principle, a fortiori, prevails in equity; for the estoppel, if it may be there so called, is not narrow and technical, but of a liberal and beneficial nature. It works exact justice between the obligor and the assignee, between whom the debt ought to be regarded as free from all objection. In that point of view, the assignee became entitled to the subject itself, and not to the return of the money he invested in it. He has a right, both legal and equitable, to any profit made from the investment, and the obligor has no shadow of equity against him in any degree whatever.

This view of the subject in no wise contravenes the spirit and policy of the statute

against gaming, which was intended, so far as it avoids the security, to relieve a party guilty of an immoral act, and the public through him, from the injurious consequences of his own indiscretion,

690 *but not to enable him to practise frauds upon others. And so far as regards the mere measure of recovery between the deluded assignee and the fraudulent obligor, though it may be a matter of some importance between them, it can have no influence, as it affects the public, in suppressing the vice of gambling.

The only case cited to prove that the innocent assignee, who has been deluded into the transaction by the misrepresentations of the obligor, is to be restricted in his recovery to the sum paid by him to the assignor, is that of *Davison v. Franklin*, 1 Barn. & Adolph. 142, 20 Eng. C. L. Rep. 363. There, judgment was confessed upon an obligation, under a warrant of attorney, and a motion subsequently made by the defendant to vacate it, on the ground that the obligation was for a gaming debt; which motion was resisted by the assignee, for whose benefit the judgment had been entered up in the name of the obligee, on the ground that he had been induced to take the assignment by the representations of the obligor that the debt was just and would be paid. And the court referred the case to a master to ascertain the facts, in order, if the allegations on both sides should turn out to be true, to a vacation of the judgment, on condition of payment by the obligor of the sum paid by the assignee to the assignor, with interest thereon. The judgment, it will be observed, was not in a regular action, but according to a practice which prevails in England of taking a warrant of attorney for confession of judgment as a security for money, and entering up the judgment without the necessity of an application to the court or the judge. Over such judgments the court exercises a controlling power, and will vacate them for fraud, or irregularity, or unlawfulness in the consideration, but upon such terms as its discretion may dictate. The decision, therefore, does not indicate what would have been the judgment of the court in a regular action, upon the proper pleadings

691 *in the cause. But we know, upon common law principles, that if the defendant had pleaded the unlawfulness of the consideration, and the plaintiff had replied by way of estoppel, or any matter of confession and avoidance, a judgment either way must have gone to the whole cause of action. Nor does the decision indicate what ought to be the decree of a court of equity under the circumstances of the case, but merely the mode in which the court of law thought proper to exercise its discretion in regard to such securities, of which the court is silently made the organ of the parties. At most, it is a single interlocutory decision of a court of common law, upon its own notion of equitable principles, which is only of persuasive authority here; and which, after a respectful consideration,

seems to me to be without just foundation.

That case is moreover open to the observation, that in England bonds are not assignable, and must be sued in the name of the obligee; whereas with us the assignee may acquire the legal right, with the privilege of suing in his own name. But a more important consideration is, that, giving to the decision in that case the utmost weight due to the authority of a foreign tribunal, when directly upon a question before us, still it is contrary to the course of adjudication in Virginia. *Buckner &c. v. Smith &c.*, 1 Wash. 296; *Hoomes v. Smock*, 1 Wash. 389; *Davis's adm'r v. Thomas &c.*, 5 Leigh 1. The principle of these cases, as will be seen from an inspection of them, is to allow the deluded assignee to enforce payment against the fraudulent obligor for the whole amount of the gaming debt, whether the question arises in a court of law or in a court of equity. They cannot be shaken by the argument that the statute avoids the security in the hands of an innocent assignee for a valuable consideration without notice. So it does, where the case rests upon the original transaction, and the assignee, stepping into the shoes of 692 the obligee, merely *succeeds to his rights: but so it does not, where the assignee is drawn into that relation by the misconduct of the obligor. If it did, then there would be no indebtedness to the amount of a single farthing, and the bond would be a mere blank both at law and in equity.

This distinction is recognized by the cases last cited, and by Kent, C. J., delivering the opinion of the court in *Jackson v. Henry*, 10 Johns. R. 204, 205. It is also adverted to in *Woodson &c. v. Barrett & Co.*, 2 Hen. & Munf. 88, by Tucker, J., who significantly remarks, that where any instrument is absolutely void in its creation, it cannot be made valid by any subsequent transaction immediately arising out of it; that in the cases of *Buckner &c. v. Smith &c.* and *Hoomes v. Smock*, the court relied on particular circumstances in the conduct of the defendants respectively, which distinguished those cases from the general principle; and that there were no such circumstances in the case then before the court, the naked question being, whether the mere want of notice that a bond or other security was given for money won at gaming, entitled the assignee without notice to recover in an action brought upon the bond.

The statute 16 Car. 2, ch. 7, § 3, 7 Bac. Abr. Gaming B., is quite as comprehensive as ours in preventing the recovery of gaming debts of a certain amount. It avoids not only all securities, including bonds, bills, judgments, mortgages &c. for money won at play, but all contracts. Not long after this statute the following case arose. A man wins £100 of another at play. The winner owed Sharp £100 who demanded his debt. The winner brought him to the other of whom he won the money

at play, who acknowledged the debt, and gave Sharp a bond for the £100; who, not being privy to the matter, or knowing that it was won at play, accepted the said bond, and for default of payment puts it in suit. The obligor pleads the statute of gaming; and upon a replication of the special 693 matter, and demurrer thereto, *the plaintiff had judgment. *Anon.*, 2 Mod. 279. So in *Hussey v. Jacob*, 1 Salk. 344, lord Holt said, "If A. wins £100 of B., and, for a debt which A. owes C., he appoints B. to give C. a bond, it is good; C. is an innocent person; and it will be the same thing if A. be bound with him." *Stone v. Ware & Smith*, 6 Munf. 541, is a like case upon the statute of usury. And in *Stewart v. Eden*, 2 Caines's R. 150, it was held that a promissory note, given as collateral security for payment of an unsatisfied judgment on a note for a larger amount, tainted with usury, of which the plaintiffs were bona fide holders, could not be impeached on account of the usury.

My opinion therefore is, that the plaintiff has shewn no equity whatever against the defendant Terrell, and consequently that there is no error in the decree of the circuit court, in dissolving the plaintiff's injunction and dismissing his bill as to that defendant. But I think the court erred in dismissing the bill as to the defendant Jennings.

The policy of the statute will be best subserved by treating the obligation, as between the obligor and obligee, as a mere nullity under all circumstances, and preventing the latter from deriving any benefit from it whatever, directly or indirectly. I need not go into the question whether, if the obligor makes a voluntary payment of the money, he can afterwards recover it back by an action at law or a bill in equity, unless upon the terms and within the limitations prescribed by the statute. It is certain that, as between the original parties, a court of law will never enforce, and a court of equity will always relieve against, the unlawful security. When a failure of proof as to the assignee, or a supervening equity between him and the obligor, induces a court of equity to enforce the security in behalf of the assignee, or, what is in effect

694 the same, to suffer it to be enforced; then the court ought *to proceed, if the subject and the parties be properly before it, to administer the justice of the case as between the obligor and the obligee. The latter having, by his contract of assignment, appropriated to himself the avails of the security, and being enabled to retain them by the act of the court, which relieves him incidentally from all responsibility to his assignee, the result is, when the security shall have been enforced against the obligor, that the obligee has obtained from him, in substance though not in form, by means of a compulsory proceeding, satisfaction of a debt destitute of consideration and denounced by the law: but the subject and the parties are still before the court, and I am at a loss to perceive

upon what principle the court can refuse redress to the obligor against the obligee.

In *Dade's adm'r v. Madison*, 5 Leigh 401, already in part stated, the plaintiff Madison having no proof, that could affect the defendant Tankersley, of the unlawful consideration of the security, the injunction was dissolved, and Tankersley allowed to execute his judgment at law against Madison; but the court decreed, that upon Madison's paying the amount of the debt to Tankersley, the other defendant Dade should pay the same amount to Madison: and the decree was affirmed by this court. That case is an authority to prove, as a general proposition, that in an injunction suit by the obligor in a gaming security against the obligee and assignee, if the plaintiff fails to sustain his injunction against the assignee, whereby he is compelled to pay the money, he is entitled to a decree against the obligee; and that not merely for the sum paid by the assignee to the obligee for the assignment, but for the whole amount of the debt. And if there be any difficulty in the part of the case of which I am now speaking, it arises out of two considerations.

In the first place, the evidence in the cause proves that the assignee was induced to take the bond by the
695 *obligor's assurances that the debt was just and would be paid. Does this circumstance oppose any obstacle to giving relief to the obligor against the obligee? I think not. The plaintiff's consent to the assignment, coupled with his subsequent refusal to pay, was, under the circumstances, a wrong to the assignee, but none to the obligee. The assignment was the obligee's own act, and promoted his own views; and how can he complain that it received the consent of the obligor? Between them, such consent can only be treated as the confirmation of a debt which by law is incapable of confirmation. If it were to have the effect of absolving the obligee from responsibility, he could always evade the statute before a rupture with the obligor (whose execution of the bond shews his willingness at first to pay), by prevailing upon him to consent to its assignment. It is the broad locus penitentiae given by law, in some respects, to the imprudent and necessitous, that affords them in a great measure the contemplated protection.

In the next place, it appears from the evidence that about 600 dollars of the money received by the defendant Jennings for the assignment has passed into the hands of the plaintiff. Hence it has been urged, that there was a combination between them to defraud the defendant Terrell, which ought to repel the plaintiff from the equitable forum. But this is mere matter of suspicion; nor is it probable that the successful gambler would not only so surrender the greater part of his gains, but at the same time incur a liability to his assignee for the whole. It is not certainly ascertained whether the 600 dollars was received by the plaintiff from Jennings without accounta-

bility, or, as is more probable, to be accounted for as a loan. In either case, Jennings, in a decree against him for the plaintiff, ought to be credited with the money thus in the plaintiff's own hands; and in the latter, should be compelled

696 *to surrender his claim and assurances for the loan. In both, Jennings ought to be debited with the whole amount which the plaintiff will be compelled to pay to Terrell, after such payment shall have been made (as in the case of *Dade's adm'r v. Madison*); unless in the further proceedings some better reason should appear to the contrary, than the plaintiff's having been involved, to the extent disclosed by the record, in the affair of the assignment; such entanglements of the loser being usually attributable to a sense of shame, or a controlling influence of the winner. The loss to Pettit, and not merely the gain to Jennings, ought to be the measure of redress; because such would have been the preventive justice of the court, if Jennings had not been induced, from a regard to his own convenience, to make the assignment; and because the circulation of such instruments will be best restrained by throwing the consequent sacrifice or loss upon the obligee, instead of the obligor.

I think, therefore, that so much of the decree of the circuit court as dismisses the plaintiff's bill as to the defendant Jennings ought to be reversed, and a reference made to a commissioner, to ascertain what amount of the money received by Jennings from Terrell came to the plaintiff's hands, and what is the accountability, if any, of the plaintiff to Jennings therefor, and what the assurances held by the latter for the same; with leave to those parties, if requested by either, to amend their pleadings, in order that the court may be better enabled to render a final decree between them.

ALLEN, J. The evidence in the record, so far as contained in the depositions of witnesses, does not prove that the bond was given on a gaming consideration. Unless therefore the answer of Jennings can be read as evidence against his code-
697 fendant, the bond in the hands *of the latter is unimpeached. That it cannot be so used, has been more than once decided by this court in cases arising under the statute against gaming. The question was directly presented and determined in *Hoomes v. Smock*, 1 Wash. 389, and *Dade's adm'r v. Madison*, 5 Leigh 401. In the first case, Beverly the assignor, who was made a defendant, stated in his answer that the bond was given in part for a gaming consideration; and there was moreover proof of the fact by one witness. Judge Lyons, in delivering the opinion of the court, remarks upon this, that the answer was contradicted* by one witness only, without circumstances to strengthen his testimony; for the answer of the other defendant, as it could not benefit his codefendant, could not injure him. It is somewhat remarkable that after this deci-

sion, judge Carr, in *Skipwith v. Strother &c.*, 3 Rand. 214, should have considered the question as still open, and worthy of grave and careful consideration when it should be necessary to decide it. In *Dade's adm'r v. Madison* the proposition again arose. There the only evidence of the gaming consideration was contained in the answer of *Dade*. He occupied the precise position of the assignor here. *Madison* owed him money won at gaming: by his draft in favour of *Tankersley*, he directed the payment to *Tankersley*: and *Madison* accepted the draft. The form which the transaction assumed cannot vary the real nature of it. It was a transfer by *Dade* to *Tankersley* of his demand on *Madison*, which the latter by his acceptance bound himself to pay. Both the judges who gave opinions held that the answer could not be read against the codefendant.

The rule itself dates from the earliest history of chancery proceedings, is founded on the plainest principles of natural justice, and is liable to but few exceptions. In *Mitchell v. Webb*, *Tothill* 10, decided in the time of *Elizabeth*, it was declared that where the defendant by answer accuseth himself and fellow defendant, he is
698 *believed against himself but not against his fellow. It is usually said, that the answer cannot be used against another defendant because he has had no opportunity for cross examination. For this reason, and because the disclosures in an answer are usually made upon searching and leading interrogatories, the answers to which would not be evidence in a deposition, it cannot be used.

This case does not fall within any exception which has been allowed to the general rule. There is no joint interest of the codefendants in the subject, and the admissions were made after the assignor had parted with his interest. Neither did this court, in the cases of *Dade's adm'r v. Madison* and *Hoomes v. Smock*, consider that the gaming consideration of the note constituted any exception.

But it has been contended, with much ingenuity, that the necessity of the case should make this an exception: that here the defendant, being interested, could not be examined as a witness; and as the answer is excluded because there is no opportunity of cross examination, that where the party could never be examined as a witness, the principle on which the rule rests does not apply, and the reason ceasing, the rule should also cease.

If the principle is founded in natural justice, the converse of the proposition would seem to be more legitimate. If the right to cross-examine is so essential to the fair and equal administration of justice, then wherever it is shewn that such right cannot be exercised, the evidence should be deemed inadmissible.

This precise objection to the application of the rule excluding the answer of one defendant when offered as evidence against the other, was urged in the case of *Morse*

v. Royal, 12 Ves. 355. It was argued there, as it has been here, that as the defendant whose answer the plaintiff desired to read was interested and could not be examined as a witness, his answer was necessary; *and that a person appointing as his executor the only witness to the case to be made against him, should not thereby deprive the plaintiff of all his evidence. But the chancellor did not consider that as sufficient to take the case out of the general rule.

There being no proof, therefore, as against *Terrell*, that the bond was on a gaming consideration, the transaction, as far as he is concerned, stands fair, and the injunction must be dissolved for the whole amount.

This view of the case, if correct, supercedes the necessity of enquiring what is the proper measure of relief in the case of a fair assignee, where the gaming consideration is established by proof. In *Hoomes v. Smock* and *Dade's adm'r v. Madison* the question did not arise, because the gaming consideration was not made out by proof as against the assignee. In *Buckner &c. v. Smith &c.*, 1 Wash. 296, there was proof of the consideration; but the point was not noticed. In each of the cases in 1 Wash. a decree over, upon the principle established in *Dade's adm'r v. Madison*, would have been proper; but it was not asked for: and the court, in *Dade's adm'r v. Madison*, did not consider this circumstance as an authority against such a decree. The question therefore is still an open one in Virginia. Judge *Tucker*, in *Dade's adm'r v. Madison*, remarked, that as every thing stood fair so far as *Tankersley* was concerned, he was entitled to recover the whole amount of the draft, whatever he might have paid for it. What would have been his opinion if the vice in the consideration had been proved by competent evidence as against *Tankersley*, does not appear. I do not understand the court, in any of the cases, as affirming the proposition that a security, declared by express law to be void to all intents and purposes whatever, can be held valid in equity to any intent. In both the cases from *Washington's Reports*, the particular circumstances in the conduct

of the defendants rendered them responsible. *There was, previous to the assignment, a promise to pay, upon the faith of which the assignee parted with his money. This new promise was the foundation of the recovery; and as, in the absence of proof to the contrary, the face of the bond gives the measure of the consideration paid, the court was bound to give the assignee the whole amount.

An instrument void, by express enactment, in its creation, cannot be made valid by any subsequent transaction arising out of it: *Tucker, J.*, in *Woodson &c. v. Barrett & Co.*, 2 Hen. & Munf. 88. And this constitutes the distinction between such an instrument and a voidable security, as of an infant, which may be confirmed; or a security which, though in its origin

neither void nor voidable, has been subsequently discharged. In such cases the subsequent confirmation or assurance given, upon the faith of which another has advanced his money, may be relied upon even at law, and in some cases as an estoppel in pais, to repel the defence, whether made by way of plea or adduced in evidence. *Davis's adm'r v. Thomas &c.*, 5 Leigh 1, was a case of the latter description. The assignee of the promissory note had been induced to purchase by the maker's promising to pay; and he was permitted to shew this, in order to repel the defence of payment to the payee before assignment. The maker, as against such an assignee, had waived his defence, and the instrument being valid, the assignee was entitled to recover the amount. But can this reasoning apply to the case of a security void in its origin? The assignee stands in the position of the assignor: the instrument is equally void in the hands of both, and no subsequent agreement in relation to it can give it validity. In the case of an assignee for value without notice, but to whom no promise or assurance had been made to induce him to purchase, even though a judgment had been confessed, the whole transaction would be avoided. *If this be so, how can it be pretended that a mere promise in pais should have a greater effect than a judgment? that in the one case an estoppel should be worked, so as in effect to repeal the statute, or at least utterly to defeat its policy, whilst in the other the solemn judgment of a court of record shall not preclude an enquiry into the truth?

An anonymous case reported in 2 Mod. 279, and referred to in *Buckner &c. v. Smith &c.*, 1 Wash. 300, would indeed seem to have decided that a promise to pay could be replied. There the winner owed a debt to a third person, and the loser executed to this third person his bond. To a plea of gaming, the plaintiff was permitted to reply that the debt was fairly due to him, and that he was not privy to the gaming. This case arose under the statute of 16 Car. 2, ch. 7, § 3. The statute of 9 Anne, ch. 14, though not so broad as ours, since it omits the word contracts, avoids all securities given for a gaming consideration. Under this statute it is settled that all securities given for money won at play are absolutely void, even in the hands of third persons, though they have paid a valuable consideration for them, and had no notice of their being won at play. *Bowyer v. Bampton*, 2 Strange 1155; *Lowe v. Waller*, Dougl. 736; *Robinson v. Bland*, 2 Burr. 1077; *Woodson &c. v. Barrett & Co.*, 2 Hen. & Munf. 80. In principle what difference is there between those cases and the question under discussion? Is not the loser's promise, under his hand and seal, to pay a fair debt to a third person who has no notice of the gaming, equivalent to his promise in pais made to the assignee? In the one case the third person discharges his immediate debtor in consideration of the bond, or pays his

money for a negotiable security: in the other, the assignee parts with his money upon the faith of the promise. In the first case the bond or negotiable instrument is to be held void: in the second it is treated as valid: for *that is the necessary effect of the doctrine that the defendant is estopped from shewing the truth.

It seems to me that at law the defence of gaming could not be met by a replication of a promise to pay. The court must declare the instrument void; and the remedy of the party would be on the promise, in which the measure of damages would be the sum paid upon the faith of it. Where the case occurs in equity, it must be disposed of in conformity with the established rules of that forum. He who asks equity must do it. If another has been induced to part with his money by a false and fraudulent representation, it will reinstate him in the position he occupied before he purchased. This is done by the repayment of what he has advanced, with interest. I think, therefore, that the rule is correctly laid down in the case of *Davison v. Franklin*, 1 Barn. & Adolph. 142, 20 Eng. C. l. Rep. 363. Though the case was decided in a court of law, it was an application to set aside a judgment confessed under a warrant of attorney, and was addressed to the sound discretion of the court; a discretion to be exercised on equitable principles, so as best to effectuate the ends of justice. Governed by those principles, the court directed the bond and judgment to be given up on repayment of the sum really paid, with interest.

As to the liability of Jennings, the case of *Dade's adm'r v. Madison* is decisive, and Pettit should have had a decree over against him for the whole amount which he shall be compelled to pay, and shall actually pay, to Terrell in consequence of the assignment. Whether Pettit received a portion of the sum raised by the sale of his bond, or merely borrowed it and executed a new bond for the amount, is left uncertain by the testimony; and an enquiry should have been directed to ascertain how this matter stood.

703 *I think, therefore, as there is no evidence as against Terrell of the gaming consideration, that so much of the decree as dissolves the injunction should be affirmed, and that Terrell should have his costs, as the party substantially prevailing; that the decree should be reversed as to the residue; and that the cause should be remanded in order to a final decree as between Pettit and Jennings.

BROOKE, J. I concur with judge Baldwin in dismissing the bill as to Terrell; and I go farther; I think the bill ought to be dismissed as to Jennings also. I am satisfied by the evidence in the record that Pettit combined with Jennings in misrepresenting to Overton the agent of Terrell the consideration of the bond. I think both joined in representing the bond as for

valuable consideration, and that Pettit is entitled to no relief against Jennings in a court of equity, but that if, after paying the amount of the debt to Terrell or his representatives, he has any redress against Jennings, it must be in a court of law, under the third section of the act against gaming. He prays for no relief against Jennings in his bill; nor is the case like that of *Dade's adm'r v. Madison*, 5 Leigh 401, in which the court decreed in favour of the loser against the winner. There was no combination in that case between the winner and loser to impose the note on Tankersley as a valid note. In the cases of *Buckner &c. v. Smith &c.*, 1 Wash. 296, and *Hoomes v. Smock*, 1 Wash. 389, no such relief was given. As to the question whether Terrell is to recover no more money than his agent Overton paid for the bond, in none of the cases referred to was such a proposition hinted. There is no evidence in the record of what was given for the bond, nor do the pleadings make any such issue. The presumption, until the contrary appears, is that Terrell gave full value for it.

704 *CABELL, P., expressed his concurrence in the opinion of Baldwin, J. The decree of the court of appeals was entered in the following terms:

The court is of opinion that the appellant has shewn no equity against the defendant Terrell, and consequently that there is no error in so much of the decree of the circuit court as dissolves his injunction and dismisses his bill as to that defendant. It is therefore ordered and decreed that so much of said decree as aforesaid be and the same is hereby affirmed, and that the appellant do pay to the appellee Terrell his costs by him expended in the defence of the appeal aforesaid here. But the court is further of opinion that said decree is erroneous in dismissing the appellant's bill as to the defendant Jennings, instead of retaining the same until payment by the appellant to the defendant Terrell of the principal money and interest in the proceedings mentioned, in order to the rendition then of a decree therefor in favour of the appellant against the defendant Jennings, subject to a credit for such amount of the consideration paid by Terrell to Jennings for the assignment of the appellant's bond, as has come to the hands of the appellant; and that, with a view to such a decree, there ought to have been a reference to a commissioner, to ascertain what amount of the money received by Jennings from Terrell for the assignment did come to the hands of the appellant, and whether it came to his hands as a loan from Jennings, or without accountability therefor, and in the former case what are the assurances held by Jennings for such loan; and that if it should appear to be a loan, Jennings should be compelled to surrender his claim and assurances therefor. It is therefore further ordered and decreed, that so much of said decree of the circuit court as conflicts with the opinion above declared be and the

705 same is *hereby reversed and annulled, and the appellant recover against the appellee Jennings his costs by him expended in the prosecution of his appeal aforesaid here. And the cause is remanded to the said circuit court, for further proceedings therein according to the principles above expressed; and leave is to be there given to the plaintiff and the defendant Jennings, if requested by either, to amend their pleadings, in order that the court may be better enabled to render a final decree between them.

Shirley v. Mutual Assurance Society &c.

March, 1844, Richmond.

(Absent CABELL, P.)

Mutual Assurance Society—Who Are Members.—Every owner of a present freehold estate in property which has been insured in the Mutual Assurance Society, becomes a member thereof, according to the true spirit of the law and the scheme of the institution.

Same—Lien on Dower Interest—Personal Liability of Widow.—Where a husband insures property in the Mutual Assurance Society and dies seized, his widow takes her dower interest subject to the lien of the society; but she incurs no personal responsibility until dower is assigned her, whereby she becomes a member, and then only for such quotas and premium as accrue while she remains owner of the dower estate, with interest and damages thereon.

Same—Personal Responsibility of Successive Tenants of Premises Insured.—Two tenements, which had been insured in the Mutual Assurance Society, descend upon the owner's death, to his heirs, and are assigned to his widow for her dower. The widow and her second husband sell and convey her life estate. And the society has a claim for quotas accrued after the death of the first husband; some before the assignment of dower; others afterwards and before the sale of the life estate; and the rest since that sale. It has also a claim for an additional premium accrued during the purchaser's ownership. **Held**, 1. The heirs of the first husband are personally

706 responsible for what accrued after *his death and before the assignment of dower. 2. The widow and her second husband are personally liable for what accrued after the assignment of dower and before their sale. 3. The purchaser is personally responsible for what has accrued since, and for no more. 4. The party liable for any principal money is liable for interest and damages thereon.

Same—Lien of—How Enforced.—The Mutual Assurance Society has a lien upon property insured therein for the principal and interest due the society, but not for damages. This lien is effectual not only against the original member, but against all persons deriving ownership from him, and the property may be sold to satisfy the same. Though one party has the estate for life and

***Mutual Assurance Society—Lien on Property.**—The principal case is cited in *West Rockingham Mut. F. Ins. Co. v. Sheets*, 26 Gratt. 873. See *Mutual Assurance Society v. Stone*, 3 Leigh 218.

another the reversion, the lien will be enforced against the tenement insured by selling the whole fee simple title thereof, and the whole of the tenement, unless from the nature of the property it be practicable and expedient to lay off a portion thereof for sale. Before directing such sale, however, the respective personal liabilities of the several parties chargeable will be ascertained. And if the tenant for life advance the amount chargeable to the reversioner, as well as what is chargeable to himself, there will be no sale of the reversion, but a lien established thereon for reimbursement of the amount so advanced, with interest, to be enforced upon the falling in of the life estate.

Same—Same—Same—Terms of Sale.—If a sale take place, what should be the terms as to cash and credit, and how the deferred instalments should be divided.

Same—Same—Same—Lien on Two Tenements.—Under what circumstances a lien upon two tenements insured may be satisfied by selling only one of them, and applying the proceeds in exoneration of the other.

This was a suit in the circuit court of Spotsylvania, brought by the Mutual Assurance Society against fire on buildings of the state of Virginia, against the heirs of Claiborne Wigglesworth, Lawrence Waugh and Lavinia W. his wife, who was the widow of Wigglesworth, and Thomas Shirley, a purchaser from Waugh and wife of her life estate in two tenements insured before the death of Wigglesworth in the Mutual Assurance Society, and assigned after his death to his widow for her dower in his real estate. The society claimed 174 dollars 97 cents to be due it for quotas and a small additional premium on revaluation of one of the tenements, amounting, with interest to the first of April

1842, to *239 dollars 2 cents. By the decree of the circuit court it was adjudged that Shirley should pay the 239 dollars 2 cents, with interest on the 174 dollars 97 cents from the first of April 1842, and damages at $1\frac{1}{2}$ per centum on the principal and interest. The defendants were ordered to pay the costs. And liberty was reserved to the complainants to apply to the court for further relief. Liberty was also reserved to Shirley to resort to the court for indemnity against the other defendants, or out of the tenements, for so much as the other defendants might be liable for.

From this decree, on the petition of Shirley, an appeal was allowed.

Patton argued the cause for the appellant. The points insisted on and the facts, so far as material, sufficiently appear from the following opinion.

BALDWIN, J. The Mutual Assurance Society is based upon the reciprocal pledges of associated owners, by which the insured property of each is bound to contribute to the security of all. The right to compensation in the event of loss, and the duty of contributing for losses of others, arise out of the fact of ownership. Without ownership there can be no membership,

and membership ceases upon the cessation of ownership. Property, however, once pledged continues to be so until destroyed or lawfully withdrawn; and gives to its successive owners the rights, powers and duties of membership. There is, it is true, a personal responsibility as well as a pledge; but the personal responsibility is only for contributions which accrue during ownership, and does not extend to those which accrue before or after.

The contributions of the members consist of premiums, quotas, and additional premiums.

708 *The premium was originally designed to raise a fund for making immediate compensation to owners as losses from fire should occur. The original act of assembly, passed in December 1794, establishing the society, contemplated that the premium should be paid at the time of insurance; but yet, in case of default, authorized the recovery thereof with interest, and the sale of the property therefor. There have been questions as to the liability of a purchaser from a subscriber, and of the property in his hands, for payment of the premium; (*Greenhow & c. v. Barton*, 1 Munf. 590; *Mut. Ass. Soc. v. Stone & c.*, 3 Leigh 218;) but these need not be further noticed here; there being no claim in the case before us for the original premium, nor any room for such a claim; the regulations of the society, existing at the time of the insurances in question, providing that a declaration for insurance shall not be binding on either party till payment of the premium. Constitution, Rules and Regulations of the Mutual Assurance Society, p. 18, art. 11, § 3.

The quotas were intended to supply any deficiency in the fund raised by the premiums, and were authorized by the same act of 1794, by what is there called a repartition; and also in effect, though not in name, by the acts of February 1809, § 6, 7, and March 1819, § 1. They were substantially additional assessments upon the property insured, and designed to enable the society to keep up a fund the interest of which would be deemed sufficient to pay the annual losses and expenses. A lien for the quotas was given by the original act of 1794, § 6, 8, upon the property insured, and the same was rendered liable to be sold therefor, not only in the hands of the subscriber, his representatives and assigns, but also when sold or mortgaged; and the purchaser or mortgagee was constituted a member in the room of the original owner. The clauses creating this lien, as indeed most of the legislation on the subject

709 of this corporation, *are extremely awkward; but there can be no doubt of the intent of the legislature to give a valid and effectual lien, not only against the original member, but against all persons deriving any ownership of the property from him. And this lien was held by this court, in the case of *Mut. Ass. Soc. v. Stone & c.*, 3 Leigh 218, to attach to and

follow the property in the hands of a subsequent bona fide purchaser without notice of the lien or of the insurance.

The additional premium is for the increase of value or hazard shewn by a revaluation, whether the periodical revaluation directed by law and the regulations of the society, or made at any other time, at the instance either of the society or of the insured member. The revaluation does not affect, nor is it requisite for, the validity of the original insurance; except so far as it serves to cure defects therein, or to increase or diminish the sum secured. In other respects the original insurance continues in full force, whether a revaluation be made or not. The member may concur in the revaluation, in which case he executes a declaration of revaluation; but it is not necessary that he should concur, nor that he should have any notice thereof. In case of the death, absence or refusal of a member, the special agent proceeds, with the appraisers, in the revaluation; and if that shews an increase of value, the former value still governs, unless otherwise directed by the owner. Act of Assembly of 1805, § 7, Constitution, Rules and Regulations, p. 19, 20, 21, 22, § 13, p. 22, § 14. The additional premium is a lien upon the property in like manner as the quotas. *Mut. Ass. Soc. v. Stone &c.*, 3 Leigh 218.

In the present case, the property insured consisted of two tenements in the town of Fredericksburg, which were owned by Claiborne Wigglesworth, and at his death descended to his heirs. One of them was declared for insurance by Wigglesworth, and the other by Wright, a
710 *former proprietor; and both were several times revalued after Wigglesworth's death. These tenements were assigned to Wigglesworth's widow for her dower in his real estate: she afterwards intermarried with Waugh, and they sold and conveyed her life estate therein to Shirley the appellant. The claim of the Mutual Assurance Society is for quotas which accrued after Wigglesworth's death, some before the assignment of dower, others afterwards and before Shirley's purchase, and the rest since his purchase; and also for a small additional premium, which has accrued during Shirley's ownership.

It is contended for the appellant that the widow's right is paramount to the lien of the society; and if this be so, then it follows that the property cannot be subjected in his hands to the demand of the society; nor can he be made personally responsible, inasmuch as there can be no indebtedness on his part in the character of owner. This defence is founded upon the supposition of the fact that the insurances of the property were effected subsequently to the intermarriage of mr. and mrs. Wigglesworth. The fact is not asserted in Shirley's answer, nor does it appear from any part of the record. I deem it, however, wholly immaterial, as I consider the lien of the society equally valid in either aspect of the case.

It is true that a widow is dowerable of all the lands of which her husband was seized at any time during the coverture, and that his alienations and incumbrances are not good against her, unless she has united therein, and relinquished her right, on privy examination, in the manner prescribed by law. But the lien in question is not derived merely from the contract of the husband. It is established by the authority of the legislature, the competency of which cannot be questioned; and the extent of the lien depends upon the true construction of

the statute. It is therefore a matter
711 of *judicial interpretation whether the legislature intended that the lien on the property insured, given in the most comprehensive terms, should be subordinate to the inchoate and contingent dower interest of the wife. To hold the affirmative would be to uproot the whole institution. The effect of the widow's holding her dower discharged of its liability for contributions must inevitably be to abrogate the insurance. During her life estate, the assessments upon the property would be utterly nugatory, as they could not be enforced either against the subject or the owner; nor could there be any liability for previous arrears. In this state of things, there could be no responsibility of the society for destruction by fire: and the insurance, thus defeated during the tenancy for life, would be destroyed altogether; for the contract was to insure the whole fee simple, and not merely the remainder or reversion. If such had been the understanding of the law, the institution could never have had existence, or must have perished in its infancy, by reason of the inherent vice in its constitution, for which there is no remedy, inasmuch as the feme covert could not, if she would, relinquish her dower interest. This result would have been inevitable, unless insurances had been confined to spinsters and widows, bachelors and widowers: the insurances of married men would have been practically prohibited.

A construction so unreasonable and mischievous is impossible. Nothing could be more pernicious to the interests of the feme, or more repugnant to the principles of dower rights. The alienation of the husband by conveyance or mortgage is inoperative at his death as regards the wife, because otherwise the property would be converted, and the proceeds might be wasted. But a pledge by insurance is for the benefit of the feme, and tends not to the destruction but to the preservation of her estate; and to authorize it was a wise and benevolent exercise of legislative power.

712 *The widow, therefore, took her dower interest subject to the lien of the society; but she incurred no personal responsibility until the assignment of her dower, whereby she became a member, and then only for the contributions accruing during her ownership. That every owner of a present freehold estate in insured prop-

erty becomes a member, according to the true spirit of the law, and the scheme of the institution, I cannot doubt, whatever difficulty might be presented by the mere letter of the statute. As to those contributions which accrued during Wigglesworth's life, and for which, if still in arrear, the assets of his estate would be liable since his death, they seem to have been paid, and to form no part of the present demand: for those which accrued afterwards and before the assignment of dower, his heirs are personally responsible; for till then they succeeded to the membership of their ancestor, and it was their duty to assign the widow her dower. The widow and her second husband are personally liable for the contributions which accrued after the assignment of dower and before their sale to the appellant: and for those which have accrued since, the appellant is personally responsible, but for those only. If a regulation of the society (Constitution, Rules and Regulations, p. 16, 17, § 4), is to be understood as intended to make a purchaser or mortgagee personally liable for arrears prior to his title, it transcends the powers of the corporation, which has no authority except over its own members; and it is not until they acquire their title that such persons become members, and then only as regards their own rights and responsibilities.

The decree of the circuit court is consequently erroneous in subjecting the appellant personally to the whole arrears of contributions, with the interest and damages thereon. A personal decree against him for so much of the demand as has accrued 713 during his *ownership would not have been improper, but would have given only partial relief to the society. The plaintiffs are entitled to a lien upon the property for the whole principal and interest of their claim, but not for the damages. The damages, it is true, are not to be regarded as a penalty, being nothing more than a reasonable allowance, under the regulations of the society, for the expenses and trouble of collection. It is therefore quite proper that these liquidated damages should be embraced in a personal judgment or decree. But no lien therefor is given by the statute; and the effect of treating them as an incidental lien would often be to make one person liable for them in consequence not of his own default, but of the default of another.

When we next consider what decree ought to have been rendered, it appears to me that the lien of the society is to be treated as an entire thing; and not, as suggested by the appellant's counsel, to be broken into parts, and carried out separately against the estate for life and that in reversion. Such a mode of enforcing an incumbrance would, I think, be unprecedented, and inevitably tend to the sacrifice of the property, and the diminution of the security. There can be no objection, I admit, to ascertaining the several personal responsibilities; and that ought to be done, at the

most convenient stage of the cause, with the view of adjusting the equities amongst the defendants arising out of the proper relief to the plaintiffs, and, it may be, to the more perfect relief of the plaintiffs themselves. But in the adjustment of those equities, the appellant will not be entitled, as his counsel supposes, to an apportionment of the quotas between the estate for life and that in reversion.

No part of the quotas which have accrued since the assignment of dower, is, in my opinion, chargeable upon the reversion in case of the life estate. The argument for the appellant is, that the quotas are 714 for the *insurance of the whole fee simple, and inasmuch as that operates, in the event of loss, to the remuneration of the reversioner as well as of the tenant for life, it is but reasonable that the former should bear a due proportion of the burthen enuring to their benefit. There is much plausibility in this reasoning; but it keeps out of view the important consideration that the quotas, though a lien upon the capital, are a charge upon the profits. They detract by their amount from the income of the estate, but do not break in upon the principal; and the tenant for life, while enjoying the profits, ought to keep down such annual or occasional charges; as the reversioners will have to do when, upon the falling in of the life estate, they come to the perception of the profits. The tenant for life is directly responsible to the society for the quotas, and subject to an action at law for the recovery thereof: but it is otherwise as regards the reversioners, who cannot be called upon at all personally during the continuance of the life estate. And what reason can be given for this, other than the fact that the tenant for life is in the perception of the profits, and consequently alone responsible for the charges upon them? and what better right can there be to call upon the reversioner for contribution in regard to quotas, than in regard to taxes, or a ground rent, or a rent charge? The tenant for life, moreover, not only enjoys the profits, but also any income accruing from the insurance itself; for the dividend of any surplus interest arising from the capital funds of the society, directed by the act of 1803, § 12, would surely be payable to the tenant for life, and not to the reversioner or remainderman.

We must bear in mind that the assessment of quotas arises out of an insurance effected by the owner of the whole fee, to the enjoyment of whose estate in the property the tenant for life and the reversioners succeed successively. It is 715 upon these facts alone that the *claim to apportionment is founded, under the influence of the maxim of equity that he who shares the benefit must share the burthen. But here the reversioner shares no benefit, so far as the profits are concerned, during the continuance of the life estate, though the property should be destroyed by fire; for in that event the effect

of the insurance is to convert the estate from land into money, and to give the interest in lieu of profits to the tenant for life, and the principal, upon the falling in of the life estate, to the reversioner. And if there is a common benefit to the tenant for life, and the reversioner in securing the capital which yields the profits, it ought to be paid for out of those profits progressively, and in the same succession, with the original hazard. Nor is the claim of tenant for life against reversioner, for contribution on account of quotas during the life estate, stronger than would be that of reversioner against the estate of tenant for life, for quotas accruing during the reversion; for the insurance was of the whole estate, and the quotas are the consideration for the entire insurance.

The supposed analogy of fines for the renewal of leases throws no light upon the present question: for the renewal is in the nature of a new purchase, of which the fine is the consideration, and in cases to which the doctrine is applicable the tenants are treated as joint purchasers of successive interests; and that of course calls for an apportionment of the price according to the value of their respective interests, as much so as if the transaction were an original purchase. A joint declaration for insurance made by successive tenants would bear some resemblance to such renewal of leases: but here the insurance is a mere incumbrance, descending with the estate from the owner of the fee by whom it was created. The most obvious and striking analogy is that of a mortgage; and there

716 *the tenant for life is obliged to keep down the interest of the debt, and in case of redemption to contribute beyond the interest for whatever benefit he derives from the liquidation of the debt. 1 Story's Eq. 465. Of course if the reversioner or remainderman pays the interest to prevent a foreclosure, the tenant for life is bound to refund; and so it would be in regard to payment of insurance quotas made to prevent a sale under the lien. The certain benefit to the reversioner in the case of a mortgage, or his contingent benefit in the case of an insurance, arising from the payment of the interest in the former or of the quotas in the latter, does not relieve in any degree the tenant for life from the duty, imposed by his enjoyment of the profits, of keeping down the annual or occasional charges. And what, at most, is the substantial effect of the insurance, but a reparation of the property, made or paid for, if you please, by the tenant for life? and who ever heard of the costs of reparations by the tenant for life, whether partial or total, voluntary or compulsory, being thrown in any degree upon the remainderman or reversioner, however beneficial to him?

A claim like the present on the part of a dowress, or other person acquiring her title, has less colour of reason than that of any other tenant for life; for the assignment to her of one third of the real estate for

dower is based upon an estimate of the annual profits, which involves an allowance for charges thereupon; and so another contribution from the heirs on account of those charges would yield her a double compensation.

Upon the whole, my opinion is that the decree of the circuit court ought to be reversed, and the cause remanded for further proceedings, according to the principles above indicated, and such further directions as shall be given by the decree of this court.

717 *STANARD, J. I have grave doubts on several of the points embraced by the opinion just delivered by my brother Baldwin. But as the residue of my brethren have no hesitation in concurring in that opinion and the proposed decree of the court, so that whatever the result of any farther investigation on my part might be, the result of the decision would remain unaffected, I have not thought it proper to ask that the decision should be delayed for the purpose of enabling me to make up an opinion.

BROOKE and ALLEN, J., concurred in the opinion of Baldwin, J.

The decree of the court of appeals was entered in the following terms:

The court is of opinion that the decree of the circuit court is erroneous in charging the appellant personally with the whole amount of the appellees' demand; the appellant being liable personally only for the quotas and additional premium which accrued during his ownership of the property, with the interest and damages thereon: that the heirs of Claiborne Wigglesworth deceased are personally liable for the quotas which accrued after his death and before the assignment of dower to his widow, with the interest and damages thereon: and that the widow and her second husband Waugh are personally liable for the quotas which accrued after the assignment of dower and before their sale to the appellant, with the interest and damages thereon. The court is further of opinion that the appellees have a lien upon the tenements in the proceedings mentioned respectively, for the principal money and interest respectively due for the insurance thereof, but not for the damages; which lien is to be enforced, if necessary, against said tenements respectively, by sales of the whole fee simple title thereof, and of

718 the *whole of each tenement, unless from the nature of the property it be practicable and expedient to lay off portions thereof for such sales respectively. The court is further of opinion that such sales, under the circumstances of the case, ought to be upon credit, except for the charges of sale, which ought to be required in cash: that the amount due to the appellees of principal money and interest, at the times of the sales respectively, ought to constitute the first deferred instalment (which ought to bear interest) and the residue of

the purchase money the remaining instalments; the credit for the deferred instalments to be liberal, and the purchase money well secured. The court is further of opinion, that before directing such sales, the respective personal liabilities of the defendants for principal money, interest and damages ought to be ascertained; and that if the appellant, or any other person, should advance the amount chargeable to the heirs of Wigglesworth, and the personal responsibility of the appellant, and the life estate in the property, should be sufficient to insure payment of the residue due the appellees, then there should be no sale of the reversion, but a lien thereon established for reimbursement of the amount so advanced, with interest thereon; but such lien not to be enforced until the falling in of the life estate. The court is further of opinion, that in the event of such sales, the deferred instalments, except the first, ought to be divided between the appellant and the heirs of Wigglesworth, according to the value of their respective interests in the property; and that the respective shares ought to be subjected to the respective equities of the defendants amongst themselves. And the court is further of opinion, that if such sales should be necessary, and it shall appear that the common interest of the appellant and the heirs of Wigglesworth will be promoted by the sale of only one of said tenements, and the ap-

719 in exoneration *of the other, that course of proceeding ought to be adopted, if the relief of the appellees will not be impaired, nor the rights of others injuriously affected thereby. It is therefore ordered and decreed that the said decree of the circuit court be reversed with costs, and the cause remanded for further proceedings according to the principles above declared.

Thornton v. Gordon &c.

March, 1844, Richmond.

(Absent BROOKS and STANARD,* J.)

Answer—Weight as Evidence—Rule.†—It is a rule in equity that the answer of a defendant denying the allegations of the bill must be taken as true unless disproved by two witnesses, or by one witness and circumstances in his support: it is not in the power of a plaintiff to make his case an exception to this rule by stating in his bill that he expects to prove its allegations, and disclaiming a discovery from the defendant.

*He had been counsel for the appellee.

†**Answer—Weight as Evidence.**—Though a plaintiff in his bill may disclaim the benefit of a discovery, he cannot thereby deprive the defendant of the right to answer on oath, and have the advantage of such answer as evidence in his favor so far as it is responsive to the bill. For this proposition the principal case is cited in *Jones v. Abraham*, 75 Va. 469; *Fant v. Miller*, 17 Gratt. 206. The principal case is cited in this connection in *Davis v. Demming*, 12 W. Va. 276; *Powell v. Manson*, 22 Gratt. 190; *Wise v.*

Same—Same—Usury—Discovery Disclaimed;—Case at Bar.—A bill is filed to enjoin the sale of property conveyed to secure a debt alleged to be usurious, and the plaintiff avers that he expects to make full proof of his allegations, and disclaims all benefit of any discovery from the defendant. The injunction is awarded. But afterwards the defendant files an answer denying the allegations of the bill. And the plaintiff relies on the testimony of a single witness, unsustained by any corroborating circumstances. **Held**, the injunction must be dissolved and the bill dismissed.

On the 29th of March 1823, George W. S. Thornton executed an obligation to Basil Gordon for the payment of 3000 dollars on the first of January 1828, with interest from the date, to be paid on the first of January 1824, and annually thereafter. At the

720 time of giving *this obligation, Thornton also executed a deed of trust to James W. Ford, conveying a tract of land in trust, with power to sell the same if default should be made in the payment.

Thornton having died, leaving Jane W. A. Thornton an infant and only child his devisee, she, by her next friend, filed a bill in the superior court of chancery at Fredericksburg, in March 1831, against Gordon and Ford, alleging that the transaction was usurious. The bill, after setting forth the facts relied on to establish the usury, averred that the complainant expected to be able to make full proof of her allegations,

Lamb, 9 Gratt. 300, 306, 307. See the principal case cited in *Harris v. Harris*, 31 Gratt. 19. See foot-notes to *Fant v. Miller*, 17 Gratt. 187; and *Shurtz v. Johnson*, 28 Gratt. 667. See monographic note on "Answers in Equity Pleading" appended to *Tate v. Vance*, 37 Gratt. 571.

Same—Same.—The principal case is cited in *Latham v. Latham*, 30 Gratt. 313, for the proposition that the defendant, in every case, may respond in his answer to the charges in the bill; and he is entitled to the benefit of it. It is the law of the forum and all who apply to it for relief must submit to have their causes tried according to the established mode of procedure. See the principal case cited in *Powell v. Manson*, 22 Gratt. 190.

‡**Same—Same—Usury—Discovery Disclaimed.**—In *Davis v. Demming*, 12 W. Va. 269, the court, in the course of its discussion of the case of *Marks v. Morris*, 4 Hen. & Munf. 463, s. c. 2 Munf. 407, said: "In *Thornton v. Gordon*, 2 Rob. 719, the court unanimously decided, that upon a state of facts similar to those in *Marks v. Morris*, and on a bill framed in like manner, though plaintiff alleges that he expects to make full proof of his allegations of usury and expressly disclaims a discovery from the defendant, the defendant has nevertheless a right to file an answer denying the allegation of usury; and if he files such answer, it is entitled to the full weight of an answer in any other case; and if the usury is proved by one witness only, the injunction awarded must be dissolved and the bill dismissed."

In *Davis v. Demming*, 12 W. Va. 274, it was said: "In *Thornton v. Gordon*, 2 Rob. 719, decided in 1849, the court, while not disapproving the case of *Marks v. Morris*, decided a principle apparently not altogether consistent with that case." See monographic note on "Usury" appended to *Coffman & Bruffy v. Miller*, 26 Gratt. 698.

and disclaimed all benefit of any discovery from the defendants. It prayed, however, that the defendants might answer the premises, and that they might be restrained from proceeding on the deed of trust until its validity should be ascertained by a trial at law, and also for such other and further relief as to the court might seem reasonable. The injunction was awarded.

The defendants both filed answers under oath. That of Ford contained nothing material. In Gordon's, all the facts relied on as constituting the transaction usurious were clearly, positively, and explicitly denied.

On the part of the plaintiff it was attempted to be established, that though the obligation from Thornton to Gordon was for bank stock transferred to the former by the latter, the transaction was really a loan of money, and the particular form of a sale of stock merely adopted as a shift or device to evade the statute against usury. There was, however, but a single witness whose testimony tended to make out the plaintiff's case.

The circuit court of Spotsylvania, to which the case was by law transferred, made a decree, on the 30th of June 1832, dissolving the injunction and dismissing the bill with costs.

From that decree the plaintiff appealed to this court.

721 *The cause was elaborately argued by Harrison and C. Johnson for the appellant, and by Stanard, Patton and Leigh for the appellee, upon the question whether the facts deposed to constituted usury: but the notice of the argument will be confined to a point which was made after Harrison had opened the case, and was discussed between Johnson and the counsel for the appellee; the decision of the court being upon this alone.

Johnson. The answer of the defendant is entitled to no more weight than a plea of a defendant at law,—the plea of not guilty to an indictment, or any other plea which merely puts in issue the matter of charge. The denial of the answer merely counter-veils the allegation of the bill, and leaves the question of usury in equilibrio. Where the plaintiff calls for the testimony of his adversary upon oath, his answer is made evidence by this exercise of a right on the part of the plaintiff: otherwise where the plaintiff demands no discovery, no answer upon oath. In the latter case the answer, though upon oath (which it need not be), is no evidence against the plaintiff. The defendant cannot become a witness in his own favour without the requisition and against the will of the plaintiff. In support of these principles, 2 Story's Equity, p. 743-5, § 1528, 1529, and Taylor v. Moore, 2 Rand. 575, are relied on. The bill here not being filed under the third section of our statute, a call for a discovery might have been demurred to. As to any admissions in the answer, they may be used against the defendant precisely as any other

confessions of a party may be used against him, wherever or however made.

Stanard. Upon examination of the case of Marks v. Morris, 2 Munf. 407, the cases reviewed in Martin v. Lindsay's adm'r's and others, 1 Leigh 499, and the subsequent cases of Fitzhugh v. Gordon, 2 Leigh 626, and Turpin v. Povall &c., 8 Leigh 93, it will be found that the extent to which the decisions in Virginia have gone
722 *is only this,—that although the bill calls for a discovery and the defendant admits the usury, such admission, where the plaintiff can prove the usury otherwise, shall not deprive him of the opportunity of pleading and proving the usury at law. There is no case deciding that equity may interfere on the sole testimony of one witness, where the usury is denied by the answer. Gilliam v. Clay and others, 3 Leigh 590, certainly does not sustain any such proposition; it may, however, be invoked against it.

Patton. Suppose a plaintiff goes into equity disclaiming all benefit of discovery from the defendant's answer, and alleging that he is full-handed with proof; he fails to produce such proof, but the defendant admits the usury: in such a state of facts, would the court send the question of usury to be tried at law, though admitted by the defendant? or would it take the admission as proof of the usury, and give relief? Surely it would not do so idle a thing as to require the parties to litigate a question which had been settled by the admission of the defendant in his answer; nor so inequitable a thing as to send the parties to a court of law, when the consequence must be the forfeiture of the whole debt, upon proof of the usury by the defendant's admission in the court of chancery. The usury in such a case would be taken as proved, and relief given as provided for in the third section. Why, then, if the defendant denies the usury, shall his answer not be evidence for him? According to Mr. Johnson's view, though the bill here calls upon the defendant to answer all the allegations thereof, that is no call for a discovery—for an answer upon oath; it is merely a call on him to answer as in case of a legal demand he would be called on to answer the declaration; that is, by pleading to the action,—by putting in issue the plaintiff's claim, if he designs to contest it. This is a novel idea, wholly unwarranted by the principles of equity proceedings, or by author-
723 ity. It is the "defendant's privilege to answer, as well as the plaintiff's privilege to call upon him to do so; the defendant's right to have his answer weighed as evidence when it makes for him, as well as the plaintiff's right to avail himself of admissions made by the answer; the defendant's right to require that his denial of a fact alleged in the bill shall in all cases be equivalent to the testimony of two witnesses, or one witness and pregnant circumstances. By resorting to the court of chancery, by filing his bill, the plaintiff

submits himself to encounter the weight of the defendant's answer; and his disclaimer of benefit from it, his assertion that he is provided with proof aliunde, cannot amount to a retraction of that submission, and deprive the defendant of his rights in the forum of equity.

Leigh. The proposition of Mr. Johnson is wholly new; not to be found decided, or even expressly stated, in any case whatever. If the proposition be correct, the plaintiff in equity may in every case, by disclaiming any discovery from the defendant, entitle himself to equitable relief upon the testimony of a single witness, as well where such relief is to produce a forfeiture or the infliction of a penalty, as in any other case. If it be correct, it must go the length of changing the whole course of chancery proceeding, and the fundamental principles of chancery pleading and evidence, at least as they have been hitherto commonly and almost universally understood.

Johnson in reply. It is the privilege of a plaintiff to resort to the conscience of the defendant, or not to resort to it, as he pleases. If a defendant has a right to answer, and have his answer weighed as evidence, why does not this right extend to all matters pertinent to the issue, instead of being restricted, as it confessedly is, to those matters as to which his answer is specifically called for? In general, an answer upon oath is called for as to all the matters distinctly alleged by the bill, 724 *because generally the plaintiff expects some benefit from the answer of the defendant, some saving of trouble at least, as to all his allegations. And this is the reason, and a sufficient reason, why the elementary writers speak only of the weight of the answer in general. It is, in general, called for, and the defendant made a witness by the plaintiff as to the whole of the matters charged in the bill. The precise proposition now contended for, it is admitted, is not expressly stated, nor the question directly considered, in any of the elementary works. But the principle is a legitimate consequence from the case of *Marks v. Morris*, and is supported by the opinions of judges Coalter and Roane in *M'Pherrin & c. v. King & c.*, 1 Rand. 172. The case of *Kincheloe v. Kincheloe*, 11 Leigh 393, is strongly analogous to this, and the opinions there as to the weight of the answer are applicable here. [Patton. The ground of that decision appears in the late case of *Malone's adm'r and others v. Hobbs and others*, 1 Rob. 346, in which it was held that it is sufficient to aver in general terms that a writing admitted to probat is not the will of the decedent, and that without any proof of the avement the court is bound to direct an issue.] There was no question in *Malone & c. v. Hobbs & c.* as to the weight of the answer. It is not contended that the plaintiff here is entitled to the interposition of the court to give him a trial at law, without proof of his case,

upon a mere suggestion of usury; but that he is entitled to have the testimony of his witnesses weighed without prejudice from the defendant's answer.

ALLEN, J. As the witness relied on by the plaintiff stands alone, unsustained by any corroborating circumstance in the case, the question arises, to what weight is the answer in such circumstances entitled? In *Alam v. Jourdan*, 1 Vernon 161, one of the earliest cases, the rule which has always been recognized since is laid 725 *down, that where there is but one witness against the answer, the plaintiff cannot have a decree. In *Pember v. Mathers*, 1 Bro. Ch. R. 52, it is said, that where the defendant in express terms negatives the allegations of the bill, and the evidence is only of one person, there the court will neither make a decree nor send the case to a trial at law. In 2 Madd. Ch. Pract. 443, the rule is stated in these words: "If the defendant positively, plainly and precisely denies an assertion in the bill, and one witness only proves it as positively, clearly and precisely as it is denied, no decree for relief can be made." But it has been argued, that the rule giving to the answer the weight of evidence arises from the right of the plaintiff to call for a discovery; that this is the privilege of the plaintiff, and he may waive it: and a passage in *Story's Equity* (vol. 2, p. 744,) is relied on to sustain this proposition. The reason on which the rule stands is there stated to be this: "The plaintiff calls upon the defendant to answer an allegation of fact which he makes; and thereby he admits the answer to be evidence of that fact." If this were the sole foundation of the rule, it would seem to follow that if, by calling upon the defendant to answer, the answer when made is admitted to be evidence of the fact, the plaintiff would be concluded by it.

Perhaps the origin of the rule is to be found in the civil law, which required the evidence of two witnesses as the foundation of a decree. Judge Story, in page 745, refers to the rule of the civil law, and observes, that "these coincidences between the civil law and equity jurisprudence, if they do not demonstrate a common origin of the doctrines on this subject, serve at least to shew that they have a firm foundation in natural justice." To whatever source the rule is traced, it is firmly established as one of the fundamental principles of a court of equity. It is the law of the forum, and all who apply to it for 726 relief must submit to have *their causes tried according to its established modes of procedure. It would be as competent for this court to remodel the whole doctrine of a court of equity in regard to pleadings and evidence, as to declare that in this particular case the defendant should be deprived of the benefit of his answer. The cases do not confine this privilege to answers to bills seeking a discovery. In truth the rule has no appli-

cation to a mere technical bill of discovery, where no relief is prayed, but the discovery is required to be used in some trial at law; for there the plaintiff has his election to use the answer or not. The principle becomes of importance in those cases alone where an issue of fact is to be tried by the court. There are many cases, as of fraud, accident, and the like, where in truth the plaintiff may require no disclosure to make out his case, but equity alone has jurisdiction over the subject. In all such cases, according to the proposition now contended for, he may deprive the defendant of the advantage of his answer, by disclaiming the benefit of a discovery. Judge Story, in the same section to which reference has been made, states the rule, in conformity with the authorities before cited, in these words: "It is an invariable rule in equity, that where the defendant in express terms negatives the allegations of the bill, and the evidence is only of one person, affirming as a witness what has been so negatived, the court will neither make a decree nor send the case to be tried at law, but will simply dismiss the bill." The bill must disclose the plaintiff's case. The defendant, by the law of the court, may respond to these charges in his answer, and is entitled to the benefit of it. In the language of the lord chancellor in *Pember v. Mathers*, and of the rule as precisely laid down by the elementary writers, and by judge Story in the foregoing passage, where the defendant negatives the allegations of the bill, and the evidence is only of one person, the court will not make a

727 decree, nor send the case to a trial at law. The right to negative the allegations of the bill by his answer is his privilege, resulting from his position as defendant called on to answer and make up an issue, and the plaintiff cannot, by waiving a discovery, deprive him of it.

The case of *Marks v. Morris*, 2 Munf. 407, and the subsequent cases upon the same question, have decided nothing as to this point. The proposition now under consideration was not discussed or considered in any of them. But the case of *Gilliam v. Clay & others*, 3 Leigh 590, does in effect establish a principle which is decisive of this matter, if the general rule is what I have supposed it to be. That was a bill exhibited by the obligor against the assignee of a bond and his trustees, to injoin a sale under the trust deed, and praying for general relief, on the ground of usury. The deposition of the obligee and assignor of the bond was taken, to prove the usury between the obligor and assignee, as alleged in the bill. It was argued that an injunction might have been awarded only to stay the sale of the trust subject until the question of usury should be tried at law, and that the assignor could have no interest that a decree to that effect should be rendered for the obligor. The witness was held to be incompetent. Judge Carr, in delivering his opinion, in which the other judges concurred, remarked, that it made

no difference as to the competency of the witness, whether it was a bill for final relief or not: that it would be carrying the principle of *Marks v. Morris* to a fearful extent, if the usury was to be proved in that transaction by evidence which would not be heard on a bill for relief: that before a court of equity should injoin the trustee, and send the assignee to sue at law on his bond, for the express purpose of enabling the obligor to establish usury and thereby get clear of the whole debt, it should be well satisfied that usury had

728 *been practised; and that such conviction must be wrought by competent, disinterested testimony. This case, then, decides that the usury must be proved. The principle of *Marks v. Morris* was not permitted to control the rules of law as to the competency of the testimony, or to dispense with the necessity of proof. Proof being necessary, it can be offered but in the accustomed mode, upon an issue made up according to the forms of the court; and the weight of the testimony must be determined according to the rules applicable to other cases.

I think, therefore, that in this case, as there is but one witness against the answer, the decree dismissing the bill on that ground must be affirmed.

This renders it unnecessary to consider the other questions so elaborately argued. But for myself I may add, that the testimony does not, in my opinion, make out the usury; and that the case is not as strong as that of *Selby v. Morgan*, 3 Leigh 577, in which it was held that a transfer of bank stock, under the circumstances there detailed, was a fair sale, and not a device to cover a usurious loan of money.

BALDWIN, J., concurred.

CABELL, P., concurred in the opinion so far as relates to the necessity of two witnesses to disprove the answer; and also concurred in affirming the decree.

Decree affirmed.

729 **Johns v. Davis's Ex'or and Others.*

March, 1844, Richmond.

(Absent CABELL, P., and STANARD, *J.)

Equity Practice—Removal of Slave from State Pending Injunction—Contempt—Relief of Reversion.†—Upon a bill in equity by a reversioner of slaves against the husband of tenant for life, alleging a purpose to remove one of the slaves out of the commonwealth, an injunction is awarded, and bond given by the husband with surety, conditioned to abide by and perform the final decree of the court. Upon an amended bill against the surety as well as the husband, it appears that the surety, while bound as such, and of course with full knowledge of the plaintiff's claim, caused the slave to be removed and sold out of the common-

*He had been counsel for the appellant.

†The principal case is cited in *Brown v. Lambert*, 38 Gratt. 266.

wealth, through the instrumentality of an agent. **HOLD.** 1. That for such removal and sale in contempt and subversion of the court's authority, it is competent for the court to give redress and vindicate its jurisdiction by decreeing in favour of the plaintiff against both the obligors in the bond. 2. That the measure of relief is not for the value of the slave, but for the value of the plaintiff's reversionary estate in her, which should be ascertained by reference to a commissioner. 3. That the agent of the surety, by his agency in the removal and sale of the slave, would have subjected himself to the like decree, if he had known at the time of the claim of the plaintiff, and had confederated with the surety to defeat the same.

Same—Interrogatories.—Case in which a defendant was brought in by a messenger to answer interrogatories.

Benjamin Davis of Campbell county died intestate leaving no children, whereby his widow became entitled to one half of his personal estate, including the use for her life of two slaves named Billy and Esther, who were in her share. The widow removed to the state of Tennessee and married John W. Evans.

In 1821, William Davis senior the father of Benjamin, and the reversioner in the two slaves, exhibited a bill in equity to the superior court of chancery at Lynchburg against Evans, setting forth that the 730 slaves had till *then remained in Campbell county, but that Evans had come to Virginia for the purpose of removing them out of the commonwealth. An injunction was prayed to restrain their removal, which the court awarded.

An amended bill was filed, setting forth, that before the process was served upon Evans, he actually removed the slaves out of the commonwealth. It alleged that there were moneys or effects in the hands of Thomas Fox as administrator of Benjamin Davis, to which Evans in right of his wife would be entitled, the amount whereof would depend upon a suit in which Fox as administrator of Davis was plaintiff and Jesse Harvey was defendant. Fox and Harvey were made defendants as well as Evans, and an injunction asked to restrain Fox and Harvey from secreting or paying over the said moneys or effects. The bill also prayed that Evans, who it was insisted had forfeited his and his wife's interest in the slaves by removing them from the commonwealth, might surrender the slaves, or that the plaintiff might receive from Harvey and Fox the value of them.

A restraining order was made, in May 1822, according to the prayer of this amended bill. After which Evans brought the slaves back into the commonwealth, and the plaintiff thereupon went into the office of the court of chancery and consented that the said order should be discharged, so as to permit Evans to collect from Fox and Harvey whatever he should be entitled to from them.

In May 1823, a second amended bill was filed, alleging that it was the intention of Evans to remove the slaves out of the com-

monwealth, or sell them to some person for the purpose of being removed, and praying that the injunction might be reinstated until Evans should give bond and security that he would not remove them. The injunction was reinstated accordingly; and thereupon, to wit, on the 13th of June 731 *1823, Evans gave bond with Cornelius Turner his surety, in the penalty of 2000 dollars, conditioned that he would abide by and perform the final decree of the court of chancery in the cause.

In November 1826, a third amended bill was filed against Turner, alleging, that after the bond was given, Evans left Esther with Turner, who was his brother in law, and that she had been carried out of the commonwealth and sold by Turner or his agents.

A fourth amended bill was filed, making defendant thereto William Helm, who had in possession the slave Billy and other effects of Evans.

Evans answered, that he sold Esther to Turner, and in the sale sacrificed her value by binding Turner to continue her in the state.

Turner, though served with a subpoena as early as the 17th of March 1827, not having filed any answer, the circuit court of Lynchburg (to which the case was by law transferred) made an order, on the 11th of January 1833, that he should be brought in by Hill Shaw, a messenger for that purpose, on the wednesday following, to answer interrogatories. Turner was accordingly brought in, and by his answers to the interrogatories it appeared, that he placed Esther in the hands of Daniel Johns of Pittsylvania to sell, and he afterwards understood from Johns that she had been sold by him for 250 dollars; but whether she was in or out of the commonwealth, he (Turner) did not know.

Thereupon, to wit, in February 1833, a fifth amended bill was filed, alleging that Johns, with a perfect knowledge of the plaintiff's right and of the pendency of this suit, carried Esther out of the commonwealth and sold her; charging a combination between Evans, Turner and Johns to deprive the plaintiff of his reversionary estate; insisting that the act of carrying the slave out of the commonwealth was a forfeiture of the life estate, and that he was entitled to receive from any or all of those participating in the act the full value of the slave.

732 *Johns, by his answer, admitted that he sold Esther as agent of Turner, but denied that he had confederated with Turner to defeat the plaintiff's claim, and indeed denied that he had any knowledge of the claim.

He did not admit that the slave was removed and sold out of the commonwealth: but in the opinion both of the circuit court and of this court, the fact was clearly established by the evidence. The circuit court was also satisfied from the evidence, that Johns confederated with Turner with

full knowledge of the situation and title of the slave.

The cause having been revived in the name of the executor of Davis against the administrator of Evans, the circuit court, on the 4th of February 1835, decreed that Turner and Johns out of their own proper goods, and the administrator of Evans out of the goods of his intestate in his hands, should pay to the plaintiff the sum of 300 dollars, the value (in the opinion of the court) of Esther, with interest from the 16th of June 1826 (the time when she was sold by Johns) and the costs. But the plaintiff was not to have execution of the decree against Evans's administrator unless it should be ascertained that the money could not be made out of the other defendants. In case he should be subjected to payment, leave was given him to apply for a decree over. And liberty was reserved to Johns, in case the money should be made of him, to apply for a decree over against Turner.

On the petition of Johns an appeal was allowed.

733 *Stanard for appellant. As a general rule, a bill in equity will not lie for a reversioner or remainderman to recover from the tenant for life a slave or the value, upon the ground of a forfeiture having been incurred under the statute. The penalty is severe, and it would be contrary to a fundamental principle of equity to aid in its recovery when the party has a remedy at law. *Livingston v. Tompkins*, 4 Johns. Ch. Rep. 431. The case cannot be different here, merely because the plaintiff had applied before to the conservative power of the court to secure the property to him when his right of enjoyment should accrue.

But the decree goes beyond the statute. That, while it forfeits the husband's life

The statutes of Virginia bearing upon the case are in 1 R. C. of 1819, ch. 111, § 48, 49, p. 481, 2. They are as follows:

§ 48. "If any person or persons possessed of a life estate in any slave or slaves shall remove, or voluntarily permit to be removed, out of this commonwealth, such slave or slaves, or any of their increase, without the consent of him or her in reversion or remainder, such person or persons shall forfeit every such slave or slaves so removed, and the full value thereof, unto the person or persons that shall have the reversion or remainder thereof; any law, custom or usage to the contrary notwithstanding."—Note in Original Edition.

§ 49. "If any female possessed as aforesaid shall be married to a husband who shall remove, or voluntarily permit to be removed, out of this commonwealth, any such slave or slaves, or any of their increase, without the consent of him or her in reversion or remainder, in such case it shall be lawful for him or her in reversion or remainder to sue for, recover and possess such slave or slaves so removed, for and during the life of the said husband; who shall moreover be liable to the action of the person or persons entitled to the reversion or remainder thereof, for the full value of the slave or slaves so removed."—Note in Original Edition.

estate for his wrongful act, does not affect the interest of the wife, who has committed no wrong. At all events, the liability created by the statute is only of the husband or the tenant for life. When a third person is liable for aiding in the elignment of a slave, that liability does not result from the statute; it is not independent of the actual damage, but is strictly measured by such damage, and cannot be carried beyond it.

C. Johnson for appellees. Turner, if Johns had not intromitted at all, would have been liable to the decree which was rendered. And if so, how can Johns stand in a better situation? He acted in combination with Turner, and under his direction; he acted pendente lite; he acted, as we contend, with full and actual knowledge of the pendency of this suit, and of Davis's rights in the property.

The court of chancery, having properly taken jurisdiction for the purpose of protecting the plaintiff's rights in remainder, as properly proceeded to decree indemnity for the violation of those rights, perpetrated while the suit was pending, and in defiance of the restraining orders of the court. It is immaterial that the conduct of the defendants produced a forfeiture of the life estate, and an immediate right of possession on the part of the plaintiff. The jurisdiction originally vested in the court was never afterwards divested. And when the court was satisfied that the slave was irretrievably gone, it properly proceeded, having all the parties and all the facts before it, to do complete justice and put an end to the controversy, without imposing on the injured party the burthen of a new litigation at law.

Grattan, on the same side, cited *Sparks v. Liverpool Waterworks*, 13 Ves. 428; *Hill v. Barclay*, 16 Ves. 402; *S. C.* 18 Ves. 56, and *Bracebridge v. Buckley*, 2 Price 200; 1 Eng. Excheq. Rep. 216, as cases shewing the limitation on the powers of courts of equity to relieve against forfeitures; *Whetstone v. Bury*, 2 P. Wms. 146; *Picketts v. Dowdall*, 2 Wash. 106, cases in which the defendant in equity was held entitled to set up a forfeiture by the plaintiff, as a defence against the claim asserted by the bill; *Fountain v. Phoenix Insurance Company*, 11 Johns. R. 293; *Kennedy v. Strong*, 14 Johns. R. 128, and *Wilkins v. Despard*, 5 T. R. 112, cases which decide that under the operation of forfeiture the present estate is absolutely determined, and the property vested absolutely and immediately in the remainderman or reversioner, so that he may maintain detinue or an action for money had and received; and *Peachy v. Duke of Somerset*, 1 Str. 452; *Attorney General v. Duplessis*, 2 Ves. sen. 286, and *Harrison v. Southcote &c.*, 2 Ves. sen. 389, in which equity lent its aid directly to enforce rights founded upon forfeitures.

735 *Stanard. There is no evidence to prove any such knowledge or confed-

eracy on the part of Johns as the circuit court and the counsel on the other side have supposed.

BALDWIN, J., delivered the following as the opinion of the court:

The court, without considering whether it is competent for a court of equity to enforce the forfeiture of the life estate in slaves, incurred by the tenant for life's removal of the slaves beyond the limits of the commonwealth, to the prejudice of the right of the remainderman or reversioner, is of opinion that the claim to such forfeiture on the part of Davis, the appellee's testator, asserted in his first amended bill in regard to the slaves in the proceedings mentioned, removed from the commonwealth by Evans the intestate of the appellee Fox, was waived, after said Evans had brought back said slaves, by the consent of said Davis to discharge the restraining order of May 1822 against the effects of said Evans, and his proceeding afterwards by his second amended bill, and the injunction and restraining order of May 1823 obtained thereupon, to prevent the said Evans from again removing the said slaves out of the commonwealth. And the court is further of opinion that the effect of the injunction against the removal of the slaves, granted by the last mentioned order, and of the bond given by said Evans with the defendant Turner as his surety, under the provisions thereof, conditioned to have said slaves forthcoming to answer the decree of the court, would have been to secure to the said Davis the relief sought by his second amended bill, inasmuch as the court, upon the hearing of the cause, could have directed that said Evans should give bond and security conditioned against the removal of the slaves from the commonwealth, and in the event of his failure, that the slaves 736 should be kept within the *power and under the control of the court. And the court is further of opinion that the subsequent conduct of said Turner, after he had obtained possession of the slave Esther from said Evans, and while bound as his surety as aforesaid, and of course with a full knowledge of said Davis's claim, in causing said Esther to be removed and sold beyond the reach of the court, was in contempt and subversion of its authority, and that it was competent for the court to give the only redress within its power, and to vindicate its jurisdiction, by decreeing against said Turner, to the party injured, the value of the reversion in said slave Esther; and that said conduct of said Turner was moreover a breach of the condition of the bond executed as aforesaid by said Evans with said Turner as his surety, which subjected the said Evans also to the like decree. And the court is further of opinion that the appellant, by his agency in the removal and sale of said slave, would have subjected himself also to the like decree, if he had known at the time of the claim of said Davis, and had confederated with said Turner to defeat the same; but

that such knowledge and confederacy have not been established by the evidence in the cause. The court is therefore of opinion that the said decree is erroneous in giving any relief against the appellant, and is moreover erroneous in the measure of relief given against said Turner and the administrator of said Evans, inasmuch as the same should have been not for the value of the slave Esther, but for the value of said Davis's reversionary estate in her, which ought to have been ascertained by reference to a commissioner. It is therefore ordered and decreed that the said decree of the circuit court be reversed with costs. And this court proceeding to render such decree in regard to the appellant as ought to have been rendered by the said circuit court, it is further ordered and decreed that the fifth amended bill of the appellee be dismissed as to *the appellant, but without costs. And the cause is remanded to the said circuit court, to be there further proceeded in, as regards the other defendants, according to the principles above declared.

Commonwealth v. Farmers Bank.

March, 1844, Richmond.

(Absent CABELL, P.)

Banks—Deposits of Public Money—When Not Entitled to Credit with Commonwealth for Premium on Specie—Statutes.—The banks of this commonwealth in which the public moneys were on deposit, paid the interest falling due in January 1840 upon public loans, in specie or its equivalent. Under the proviso to the second section of the act of March 28, 1838, (Sess. Acts of 1838, p. 27, ch. 13.) they claimed credit in account with the commonwealth for the premium which they had to pay to the public creditors for the then difference between specie and the notes of the banks. HELD. 1. That under the acts in 2 R. C. of 1819, ch. 174, § 6, p. 2, and in Sess. Acts of 1838, p. 27, ch. 14, the claim of any bank for such premium may properly be presented to the first auditor. 2. That, upon the disallowance of such claim, the bank may file a petition for redress to the court of chancery for Henrico and Richmond, created by the act of March 18, 1841, in Sess. Acts of 1840-41, p. 65, ch. 48. 3. That according to the true construction and effect of the act of December 11, 1839, in Sess. Acts of 1839-40, p. 52, ch. 68, (especially of the first proviso thereto) the claim of any bank for the premium so paid must be disallowed; dissentiente BROOKS, J., on the last point.

During a suspension of specie payments by the banks of this commonwealth, an act was passed the 28th of March 1838 to provide for the payment of the interest on the public debt in specie or its equivalent, which contained these provisions:

1. That the interest which shall hereafter accrue on the existing debts of the commonwealth for loans obtained, 738 *and on the debts which may be created for future loans, shall be paid

*See monographic note on "Banks and Banking" appended to Bank v. Marshall, 26 Gratt. 378.

in the current gold and silver coins of the United States, at their value as established by law, or in their equivalent, at the option of the holder.

2. That all warrants which shall be drawn upon the treasury in payment of the interest aforesaid, by the auditor of public accounts, or the second auditor, shall be discharged by the bank or banks at which such warrants shall be made payable by the checks of the treasurer, in the manner prescribed in the foregoing section: provided, that the said bank or banks shall be entitled to a credit in account with the commonwealth for whatever premium or discount the said bank or banks may be subjected to in making payment of the several warrants or checks as directed by this act.

Subsequent to this act the banks of this commonwealth resumed the payment of their debts in specie; but in October 1839 they again suspended; and on the 11th of December 1839 an act was passed for their temporary relief, which contained (amongst other things) a proviso in these words:

"Provided, that the banks of this commonwealth in which the public moneys are on deposit shall pay the interest falling due in January next upon public loans, in specie or its equivalent, if the public creditors require it, if there be so much in said banks to the credit of the commonwealth."

The Farmers bank of Virginia was one of the banks in which the public moneys were on deposit. And when warrants were drawn upon the treasury in payment of the interest due the public creditors in January 1840, some of those warrants were made payable at the Farmers bank by the checks of the treasurer, and were there discharged; there being therein to the credit of the commonwealth as much as the warrants so discharged. The Farmers bank

739 claimed that the payment of these warrants or checks for interest falling due in January 1840 subjected it to a premium or discount of 4452 dollars 46 cents, and that it was entitled to a credit in account with the commonwealth for this premium or discount.

The claim was presented to the first auditor, and the same not being allowed, a petition was filed by the bank in the superior court of chancery for the Richmond circuit, under the acts in 2 R. C. of 1819, ch. 174, § 6, p. 2, and Sess. Acts of 1839, p. 27, ch. 14. The auditor filed an answer, insisting 1. that upon the merits the bank was not entitled to the amount claimed; and 2. that the claim was against the board of public works, because the premiums and discounts were paid by the bank upon the warrants of the second auditor, issued for interest on loans contracted for internal improvement.

The court of chancery,—being of opinion that the provision contained in the act of the 28th of March 1838, declaring that the banks should be entitled to credit for whatever premium or discount they might be subjected to, was in full force at the

date of the payments in question, notwithstanding the proviso contained in the subsequent act of the 11th of December 1839,—reversed the decision of the auditor, and made a decree in favour of the bank against the commonwealth for the sum of 4452 dollars 46 cents, but without interest or costs.

From which decree an appeal was allowed on the petition of the auditor, wherein it was farther insisted that the petition of the bank ought to have been to the circuit court of Henrico on its law side, and not to the court of chancery; the claim being a common law claim, and not one of which equity has jurisdiction.

The cause was argued by Cooke for the commonwealth, and Macfarland for 740 the Farmers bank. The *grounds taken in the argument are sufficiently indicated by the following opinions.

ALLEN, J. The various questions supposed to be presented by the record in this case have been argued with much zeal and ability. But in the view that I have taken of our legislation on the subject, it does not appear to me to be necessary to discuss many of the propositions advanced in the argument. The question presented by the record is, whether, as the law stood on the 1st of January 1840, the banks paying the interest due on that day to the public creditors in specie or its equivalent, were entitled to charge the commonwealth with the premiums or discount which they were subjected to making such payments.

On the 16th of May 1837, the banks suspended specie payments. Prior to the suspension, all the banks were bound by their charters to pay their debts in specie. Two of the banks, of which the appellee was one, were the fiscal agents of the commonwealth. All money due to the commonwealth was deposited in those banks to the credit of the treasury. The notes of all the incorporated banks in the state were receivable in the payment of taxes. With a knowledge of this fact, and of the obligation thereby imposed upon the deposit banks to receive these notes as cash, to debit themselves with that amount as so much money to the credit of the commonwealth, and to pay it as they were bound to pay other debts due by them, these banks undertook to act as the fiscal agents of the commonwealth. It may have been supposed that any responsibility for loss, growing out of the receipt of the notes of the various banks receivable in payment of public taxes, was compensated for by the advantages accruing to the banks as the chosen fiscal agents of the government. However this may be, there is no question

741 raised as to the liability of the banks to pay *the debts they owed to the commonwealth in specie, and that upon a failure to pay in specie they forfeited their corporate privileges.

After the suspension in May 1837, several acts were passed for the temporary relief of the banks. By these acts the forfeitures and penalties incurred by the banks were

remitted or suspended, their notes declared to be still receivable in the payment of public taxes, and the public moneys were still to be deposited as theretofore. The last act in this series was passed on the 2d of April 1838, which suspended the laws imposing forfeitures until the 1st of April 1839. During this period of legalized suspension, it became necessary to make some provision for the payment of interest to the public creditor. The commonwealth was bound, by the strongest of all obligations, to guard the public creditor from any loss growing out of the temporary embarrassments of the community, or from her indulgence to her own corporations. With this object the act of March 28, 1838 was passed. The first section, so far as respected the existing debts, was no more than a solemn recognition by the commonwealth of the obligation of her contracts; but taken altogether, seeing that it speaks of future loans as well as the existing debts, it was clearly the object and intention of the legislature that this should be a part of the permanent law. But such a general declaration would have been of little avail towards the support of the public credit, unless some efficient mode had been prescribed for giving it practical effect. The public creditor wanted something more than the "word of promise to the ear." And this was given in the second section, which provided that warrants &c. in payment of interest should be discharged by the banks at which they were made payable, in the manner prescribed by the first section.

742 *This provision, it is insisted, is part of the temporary legislation growing out of the then existing suspension of specie payments, and terminated with it. I do not concur in this construction of the law. There is nothing in the terms of the statute, or any part of it, which indicates an intention that it should expire with the cause which led to the enactment. The second section alone gives efficacy and vitality to the law: without it, the first section, which in terms refers to future times, would be an empty and unmeaning sound. If it was important to the maintenance of public credit through all time, to declare that the commonwealth recognized the obligation which good faith imposed on her; it was of tenfold more importance to provide the mode by which that obligation should be met and discharged. The law, too, regards the public credit, and the mode of preserving it, irrespective of the banks, and has no connexion, in the important particulars referred to, with the legislation concerning them.

The proviso entitling the banks to a credit in account with the commonwealth for the premium or discount they might be subjected to, necessarily refers to the then existing legalized suspension. But it is part of the second section, which I think permanent in its character; and it must, as it seems to me, receive the same construction. It is argued on behalf of the commonwealth,

that this provision would be nugatory when the banks were not in a state of suspension, and that it could not have been the intention of the legislature to authorize them to charge this premium in case of a subsequent suspension, no matter under what circumstances occurring. To this I think it may be satisfactorily answered, that no such suspension could be recognized which had not received a legislative sanction. Any other construction would impute to the legislature an intention to hold out inducements for an improper

743 *suspension. If, not only without authority of law, but directly in violation of it, the bank subsequently suspended specie payments, such illegal act could be the foundation of no valid claim. If, during such illegal suspension, it should fail to pay the interest in specie, there could of course be no claim against the commonwealth. But if it should pay the interest in specie, it would do no more than its charter required of it towards all its creditors; and such act, being no more than the performance of a duty, could create no claim. The proviso authorizing the charge would operate whenever, and only when, the law sanctioned a suspension. But whenever a law should so sanction and legalize a suspension of specie payments generally, the act of 1838 would justify the claim to a credit against the commonwealth for the amount of the premium. If the case rested here, and upon this act alone, the claim of the bank would be well founded for all premium or discount it may have been subjected to.

This brings us to the act of December 11, 1839. In the interval between the act of March 1838 and the 11th of December 1839, the banks had resumed specie payments. The laws specially relating to the banks, so far as they remitted forfeitures and suspended penalties, had expired. The banks were again in a regular course of proceeding under the authority of their charters. In October 1839 they again suspended specie payments. Until the act of December 11, 1839 was passed, this suspension was illegal. If, before that act, they had disbursed the public money to the public creditors in payment of interest, such payment would not, as already remarked, have furnished any ground for charge against the commonwealth. No such payment was made; and the act of December 11, 1839 again sanctioned the suspension for eighty days.

If the law had done nothing more, 744 the claim to premiums would *have been clear under the act of 1838. But the whole effect and operation of the act of December 1839, so far as it respected the public moneys on deposit which might be necessary to pay the interest due to public creditors in January following, was controlled by the proviso. The act legalizes the suspension as to the creditors of the banks generally; but, by the proviso, excepts from the effect of such suspension so much of the public money on deposit as might be required to pay the January in-

terest, if there should be so much in the banks to the credit of the commonwealth. I do not consider it important to go into the doctrine how far a subsequent statute is to be considered as a repeal of a former one. In my view, the proviso of the act of 1839 did not repeal, and was not intended to repeal, the act of 1838, or any provision of it; and this because, as to the public money on deposit required to pay interest, the contingency had never happened, upon which alone the act of 1838 could operate. That act, as I have attempted to shew, did not justify the charge for premiums, except when the payment was made during a legalized suspension. The suspension in October 1839 was illegal; and until it was sanctioned, no payment made during its continuance could confer a right to charge the commonwealth. The act of December 1839 gave that sanction, with the one exception before specified; and as to this, the bank was placed in precisely the same condition it would have been in if the act had never passed. When, therefore, it paid the January interest in 1840, it did no more than its charter required. It would have been illegal to refuse; and the performance of a mere legal duty entitles it to no charge against the commonwealth. This construction limits the exception to the interest due in January 1840. For subsequent payments, made after the act of December 1839, and other acts continuing the suspension, 745 it would have been entitled to *the premium under the act of 1838, unless those acts had made some other provision. If, therefore, any loss for premiums was incurred in making payments of interest at subsequent periods, as alleged in argument, such payments were within the act of 1838. And hence too the necessity of the section in the act of March 18, 1840, (Sess. Acts of 1839-40, ch. 65, § 13, p. 55,) respecting the interest falling due in July; a provision in effect similar to that contained in the act of the 11th December 1839, but applying to the July interest only.

This construction reconciles all the acts, and the various provisions contained therein. It gives to the act of 1838, for the support of public credit, the construction obviously necessary to give it any validity. It gives to the proviso in that act the construction which enables the bank to claim a credit for the discount it may have been subjected to, whenever it has seemed expedient to the legislature to give a general sanction to a suspension. It imparts full force and efficacy to the proviso in the act of December 11, 1839, by construing it as excepting from suspension so much of the public money as was required to pay the interest due in the following January; and by limiting its operation to that payment, it leaves the act of 1838 to operate on all subsequent payments made during a period of authorized suspension, and so shews the necessity of the provision in the act of March 18, 1840, for relieving the commonwealth from the charge for premiums on the July interest falling due in that year.

I am therefore of opinion that the charge preferred in this case was properly disallowed by the auditor.

A question of practice has been argued, upon which a decision is desired. The claim being for premiums on payments of interest to the public creditors, it is contended that it should have been pre- 746 ferred to the second *and not to the first auditor, as the warrants for the interest were issued by the second auditor. The first auditor, it is argued, can know nothing of the public debt contracted for purposes of internal improvement, or whether the interest was really due. There is not much weight in this objection.

It was not the business of the bank, to which a warrant for interest was presented, to enquire into the right of the holder to receive the amount. That matter was confided by the commonwealth to her own officers. All that the bank had to do was to see that the warrant was in the form prescribed by law, and authenticated by the proper officers; and, when it paid the holder, to charge the premiums in account with the commonwealth. The amount of those premiums became a claim against the commonwealth, to be audited by the first auditor, the general accounting officer, not upon the evidence of the books on which the public debt was listed, or on which it was transferable, but upon the production of the warrant and check, duly authenticated by the officers authorized to issue and give them.

As to the jurisdiction of the particular court: previous to the division of the jurisdiction of the court between two judges, the same judge had jurisdiction of all such applications. The proceeding was by way of petition, and it would seem to have been of no consequence whether addressed to his common law or to his chancery ear.* He could direct an issue and impanel a jury to try any controverted fact. The division of jurisdiction between two judges does not vary the question. The application may be addressed to either, as convenience may require. And this being a case involving accounts and questions between principal and agent, it would seem to have been most properly addressed to the judge having charge of the chancery side of the court.

747 *STANARD, J. The objections to the channels through which the bank pursued its claim are untenable. The auditor was the proper officer to whom to present the claim, and the judge of the superior court on the chancery side had jurisdiction of the appeal from the decision of the auditor. At all events, no objection being made on this ground in the court below, it ought not to be entertained here.

To determine the validity of the claim preferred by the bank, the material question to be solved is, what is the true construction and effect of the act (and espe-

cially of the proviso thereto) of the 11th of December 1839?

This construction depends on the legislative intent. In the earnest and elaborate argument of this case, the counsel on both sides, agreeing in nothing else, properly admitted that that was the essential enquiry. The construction by this court is but the judicial expression of the result of its enquiry, under the guidance of well considered and established rules, into the intent of the legislature, and is just and sound only so far as it successfully ascertains and gives effect to that intent.

The bank founds its title to the reclamation it makes of the commonwealth on the act of the 28th of March 1838, which declares by its 1st section, that the interest which should thereafter accrue for public loans, made prior or subsequent thereto, should be paid in current gold and silver coins of the United States, or in their equivalent, at the option of the holder; and by its 2d section, that the warrants on the banks for such interest shall be paid as prescribed by the 1st section, with a proviso that the banks shall be entitled to credit in account with the commonwealth for whatever premium or discount they might be subjected to in making payment of those warrants.

The argument is, that this law was indefinite in its duration and has never
748 been repealed, and that the *claim under it to the reclamation in question is compatible with the intent of the proviso in the act of December 1839; in other words, that, on sound principles of construction, an intent cannot be judicially imputed to the legislature to exempt the payment by the banks of the interest on the public loans falling due in January 1840 from the operation of the 2d section of the act of March 1838.

On the other hand, it is insisted that the proviso to the 2d section of the act of 28th March 1838 was temporary, made for the existing occasion of suspended specie payments, and that it became, on the resumption of specie payments by the banks, *functus officio*.

In maintenance of these conflicting propositions, the counsel have very properly brought under the notice of the court the various acts of the legislature from the period of the first suspension in May 1837 until the close of the second suspension, as sources from which light, of more or less distinctness, might be shed on the enquiry into the intent of the legislature in its different enactments, and especially in the proviso to the act of 11th December 1839.

At the time of the first suspension of the banks, the laws then existing enforced specie payments by forfeitures and heavy penalties for failing to make them. It was by these sanctions that the rights of the creditors of the banks to have their demands paid in specie were guarded. The acts of the extra session of 1837 and of the session of 1837-8 suspended the laws inflicting those forfeitures and penalties, and

though they did not protect the banks from demands for specie, removed the sanctions by which such demands were to be enforced. The suspension, though not unconditionally legalized, was tolerated, by the removal of those sanctions, and by the further provision that the public taxes should be payable in the notes of the banks, and that executions for public dues
749 might be discharged in such *notes as were receivable for taxes. The proviso to the act of the 28th March 1838 was passed during such period of tolerated suspension by the banks of specie payments, when all the sanctions intended to coerce such payments were by law suspended, and of course the creditors of the banks, and among them the holders of warrants for the interest of public loans, were disarmed of the means previously provided by law to compel the payment in specie of their claims. That proviso, passed during a time of suspension, was applicable only to the exigencies arising from that condition of things. On the resumption of specie payments by the banks, either voluntarily, or under the coercion arising from the expiration of the suspension of the laws inflicting penalties and forfeitures for failing to pay specie, the warrants for the interest on the public loans would be payable in specie, and the banks could not refuse so to pay them without forfeiting their charters to the state, and becoming responsible to the holders of such warrants, upon motion on ten days notice, for 10 per cent. damages and 15 per cent. interest. Whatever construction may be given to the act of 28th March 1838, from the nature of things it became dormant after the resumption of specie payments, and reinstatement of the forfeitures and penalties for failing to make them, and continued so during the continuance of such payments.

The proviso in the act of 28th March 1838 thus becoming dormant from the resumption of specie payments, and necessarily continuing so until a suspension of those payments, it is indispensable for the counsel of the bank to maintain that such suspension revived it. For if, as the counsel of the commonwealth contends, it became *functus officio* on the resumption of specie payments, and could only be resuscitated by subsequent legislation, the foundation of the claim of the bank is taken away. The revival and renewed activity of that
750 proviso might result either from the simple *act of suspension of specie payments, operating *ipso facto* its resuscitation until repealed or modified by subsequent legislation; or from the restoration by law of the state of things in which it had its birth, to wit, a suspension of specie payments, so far tolerated by law, as the exemption of the bank from forfeitures and penalties, and the withdrawal from its creditor of the aid of those legal sanctions by which specie payments were to be coerced, imply such toleration.

The counsel of the bank insists that suspension of specie payments *ipso facto* re-

stored activity to the proviso in the 2d section of the act of March 1838, so that if the suspension had occurred before the payment of the interest on the state loans that became due in July 1839, and the bank had paid that interest with the specie from its vaults, or had purchased specie with its notes at a premium, or delivered its notes at a discount to make them equal to specie, it would have been entitled to charge the commonwealth not only the nominal amount of the warrants for the interest, but a further sum equal to the premium at which specie sold in the market for the notes of the bank, or the premium paid for such specie, or the discount of such notes. If the counsel be right, the title to make this charge must exist irrespective of the conduct of the bank in suspending, unaided by legislative acquiescence in the suspension, and in spite of any legislative resistance to it: the bank might discharge its debt to the commonwealth by discharging a claim on the commonwealth less, by the amount of the depreciation of its notes, than the amount of such debt; and the only plea to sustain the claim would be founded on its own act in direct violation of law, subjecting its charter to forfeiture, and incurring a responsibility to its creditor much larger than the premium on the specie it might have paid. Would it not be an unexampled incongruity in the law, at the same time that it denounces

751 *against the bank the forfeiture of its charter to the state, and heavy responsibility to the creditor who is not paid in specie, to allow it to found on the act incurring such forfeiture and responsibility a title to discharging its debt by casting on the creditor all loss resulting from the depreciation caused by that act?

That it was not intended by the act of March 1838 to confer on the banks a legal right, on any future suspension, irrespective of the circumstances of justification or excuse for such suspension, and of the legislative discretion acting on such circumstances, to discharge their responsibilities, to the extent of the interest on the public loans, by charging to the commonwealth the amount of the premium on specie, or of the depreciation of their own notes, in addition to the amount of the public debt paid while the aforesaid laws of forfeiture and penalty were in full activity, is evidenced by the consideration that in such a predicament this legal right could at the discretion of the legislature be rendered wholly nugatory. Had the banks suspended before the month of July 1839, and paid the July dividend in specie or specie funds purchased at a premium, of what avail would the legal right to charge that premium to the commonwealth be, when encountered by the legislative will resisting that claim, and the responsibilities of the banks incurred by the act of suspension, and which the legislature had the power to enforce? Suppose the banks and the commonwealth accounting together in respect to such payment. The banks claim to debit the

commonwealth with the premium paid for specie, or the depreciation of their notes. The legislature, representing the commonwealth, enquires what has caused this premium or depreciation. The banks answer, "We have been compelled to violate our legal obligations, and refuse the payment of our debts in specie or its equivalent."

The legislature rejoins, "If you have paid these claims *in specie or its equivalent, you have but discharged the duty imposed by law, and enforced by its strongest sanctions; and if this charge is made because that duty had been violated, then the very act by which only you have been subjected to pay this premium, or to suffer this depreciation, has subjected you to the forfeiture of your charter, and to 10 per cent. damages and 15 per cent. interest on the amount of the debt you have refused to pay in specie or its equivalent; and without discussing the question whether you had a legal right, under the act of March 1838, to make the charge against our will, that will is sufficient to enforce the law you have violated, and thereby to subject you to a much heavier loss than will be averted by the successful assertion of your legal right under the proviso of the act of March 1838." It is therefore obvious, that unless the legislature should choose to assent to or acquiesce in the claim of the banks to credit for the premium on specie or its equivalent, used in paying the interest on the state loans while the laws denouncing penalties and forfeitures for the suspension of specie payments were in full vigour, the supposed legal right of the banks under the proviso of the act of March 1838, might at the discretion of the legislature be rendered utterly abortive: and the conclusion seems to me most cogent, that no such legal right, irrespective of or in opposition to the legislative will, results from that act; and that, having become dormant on the resumption of specie payments after its passage, a subsequent suspension, not sanctioned or tolerated by law, did not ipso facto resuscitate it. The most that can be said is, that it would be resuscitated when the state of things existing at the time of its passage should recur, to wit, a suspension tolerated so far as the withdrawal of the legal sanctions of forfeiture and penalty for failure to pay specie would import such toleration. A benign consideration of the question might, and I

753 think *probably would, justify the construction which would sustain such revival, either as the proper exposition of the original act, or as a fair implication of legislative intention from the enactment by which the status existing in March 1838, in respect to the unconditional exemption of the banks from penalty and forfeiture for failing to pay specie, should be restored. That such would be the effect of the exceptionless restoration of the said status of March 1838, was probably the construction of the legislature, when the act of 18th March 1840, continuing until

the 1st of April 1841 the suspension of the forfeitures and penalties for failing to pay specie, provided that the premiums for the specie or specie funds, in which the interest on the public loans falling due in July 1840 might be discharged, should be paid by the banks; and such the construction which, in the opinion of the officers of the commonwealth, justified an allowance said to be made to the banks in account for such premiums during the tolerated suspension posterior to July 1840.

When the act of 11th December 1839 was passed, the banks were exposed to demands for specie for all their responsibilities on their notes, or on checks or warrants on general deposits with them, and liable to heavy penalties in the form of damages and a high rate of interest for failure to meet those demands. The function of that act was to withdraw, by suspending for a time, those sanctions by which the rights of the creditors of the banks were to be enforced. Had the suspension of the penalties and forfeitures been exceptionless, then the status of March 1838 would have been restored, and with it activity given to the proviso of the act of March 1838. But the suspension of the penalties and forfeitures was not exceptionless. It was qualified by the proviso that the interest on the state loans falling due in January 1840 should be paid by the banks in specie or its
754 equivalent. And the effect *of that proviso is the material question, to the elucidation and solution of which the foregoing review and exposition of the previous legislation has been deemed by me apposite, if not necessary.

Whether the proviso be regarded as an exception of the class of claims specified in it from the suspensive effect of the body of the act on the sanctions by which the obligations of the banks to their creditors were guarded, so as to leave those sanctions in full effect in respect to the specified class, while in respect to others they were temporarily withdrawn; or as a condition, on the nonperformance of which the suspension of those sanctions in respect to all claims would terminate, and the banks be exposed to forfeiture and penalty to the same extent as they would in case the act had not been passed, it must, I think, have the same interpretation, as to the intent in respect to the liability of the banks or the commonwealth for the premiums for specie or specie funds in which the interest on the state loans falling due in January should be paid. In either view, it left all those sanctions in full activity in respect to the claimants of the January interest on the public loans, and pro hac vice the rights and responsibilities of the banks were as if the act had not passed. Any payment made of those claims would necessarily stand on no better ground than if the act of December had not passed; and had not that act passed (if the view heretofore taken be correct) the banks would not be entitled to charge to the commonwealth the premium of specie, or depreciation of their notes, in which the

interest might be paid. If this was not the intent of the proviso, what other function can reasonably be ascribed to it?

The able counsel of the bank anticipated this question, and discerned the conclusion necessarily flowing from the inability to give a sufficient answer to it; and he has ingeniously suggested, that whereas
755 the act of *March 1838, while it entitled the banks to charge the premiums paid for specie or specie funds when they were provided and applied by them to the discharge of the interest on the public loans, imposed on them no obligation secured by adequate sanctions to provide and apply such funds to that object, the proviso in the act of December 1839 supplied that sanction, and that was its proper and adequate function. That such was not its intended function I think is perfectly clear. What are the banks authorized by the act of March 1838 to do? To discharge the debts due the commonwealth in paper depreciated when compared with specie, and charge the nominal amount of the depreciated paper to the commonwealth. In effect that act rather confers a privilege than imposes a duty on the banks, and it is not probable that the legislature could deem it necessary to enforce by any sanction the exercise of that which, though in words imposing a duty, in substance confers a privilege. The argument of the counsel for the bank supposes that the existing and operating law, as understood by the legislature, entitled the banks to charge the premiums in question to the commonwealth (in other words, to pay the commonwealth the nominal amount of their depreciated paper in discharging a smaller debt of the commonwealth), and then that the legislature, by the proviso in question, proceeded to menace the banks with forfeiture and heavy penalties if this privilege were not exercised. Surely it could not enter into the mind of the legislature that such coercion was necessary. If the law authorized the banks (specie bearing a premium of ten per cent. or bank notes being depreciated that amount) to extinguish a debt due by them to the commonwealth of 110 dollars, by paying notes to that amount, or specie purchased with that amount of notes, to a creditor of the commonwealth in discharge of a claim of 100 dollars, what possible motive, interest, or even right,
756 could they *have to refuse? The transaction might benefit but could not injure the banks. To assign such a function to the proviso would, giving expression to this interpretation, make it read thus: "provided, that the banks shall pay to the claimants of the interest on state loans falling due in January, specie or notes, for which they shall have credit with the commonwealth to the full nominal amount of the notes, or of the specie with the premium paid for it." Such a proviso would have been supererogatory, if not ridiculous; and therefore the construction which impresses that meaning upon the proviso actually used cannot be just.

That the legislature did not intend that the banks should have credit with the commonwealth for the excess of the value of specie, or for premiums paid for it, is further evinced by the circumstance that the proviso makes the duty of paying the January interest in specie dependant on the indebtedness of the banks to the commonwealth, and limits their liability to make the payment in specie or its equivalent, to the amount that might be to the credit of the commonwealth. Surely it cannot be doubted that the legislature supposed, that if there was as much to the credit of the commonwealth in the banks as would pay the interest, the banks would, under the proviso, be compelled to pay the whole interest; and yet, if the proviso be so interpreted as to leave the banks at liberty to charge the premium on specie to the commonwealth, it would, in the predicament supposed, be unavailing to secure the payment of the whole interest in specie.

On this enquiry into the intent of the legislature, it is not irrelevant to advert to the fact that the same assembly which enacted the law of December 11, 1839, a law obviously passed under jealous if not hostile feelings to the banks, and limiting the qualified toleration of the suspension to eighty days, by a subsequent act passed after a more thorough investigation, 757 and upon a *more indulgent consideration of the necessities under which the suspension of specie payments had taken place, extended the toleration for more than twelve months, yet required that the banks should bear the loss of the premiums on specie or specie funds to pay the interest falling due before the next session of the legislature, to wit, in July 1840. It cannot be supposed that the same legislature which imposed this loss upon the banks at a time when, on deliberate investigation, they were deemed entitled to this more liberal indulgence, intended, by the more stinted and jealous indulgence accorded by the previous act, to exempt them from that loss.

On the whole, my opinion is that the banks were not entitled to the premium of the specie, or specie funds, with which the interest on the public loans falling due in January 1840 was paid; and that the decree of the court below be reversed, and the appeal from the decision of the auditor dismissed.

BROOKE, J. There are two impressions that have great influence in ruling this case, neither of which I think justified by any thing in the record or in the law. One is, that the bank, as the fiscal agent of the state, was bound to pay the interest on the public debt, without any allowance for the difference in the value of specie and bank paper during the suspension of specie payments. I find nothing in the record or in the law, which constitutes the bank the fiscal agent of the state, in any other degree than it is the fiscal agent of all who deposit money with it, and draw out such money by checks. The deposit of the money

collected for public taxes may afford to the bank a temporary addition to its capital, upon which it may trade: and so may every deposit made by individuals. But that, I think, does not constitute the bank the fiscal agent of individual depositors, and oblige it to pay their checks in specie 758 during *the suspension of specie payments; though it may be said they have higher claims than the state, which owns half the stock, and has four votes out of nine in the directory (and may have five if it will) on the question of the suspension of specie payments.

The other impression is, that the release of the forfeitures incurred by the suspension of specie payments was a great boon to the banks. There is nothing in the record to shew that the suspension was not justified by the condition of the currency at the time, or that it was not necessary to prevent the drawing of all the specie from the vaults of the banks. The forfeitures incurred by the suspension must then be released, or the banks forced into liquidation; which would have been more calamitous to the country than to them. It would have been ruinous to the debtor portion of the community to be compelled to pay their bank debts, and others also, with a limited currency. The sale of their property would bankrupt the greater number of them. And in what could the taxes be collected? In the actual condition of things, it was impossible for the state to refuse to release the forfeitures; and I cannot see that it was any boon to the banks, for which they were under an obligation to pay the interest on the public debt without compensation for the difference in the value of specie and paper during the suspension. The stockholders, other than the state, would feel no greater interest in the payment of the interest on the public debt than any other citizens of the commonwealth. These views will be much strengthened by the consideration that a large amount of the deposits of the state was in the paper of the western banks, which had been received for taxes, and was depreciated below the value of the paper of the banks in which it was deposited.

I think, therefore, that these impressions ought to have no influence in the decision of the case.

759. *Disregarding them, and turning to the acts of the legislature applicable to the case, I think there can be no doubt that the compensation claimed by the bank, for the difference in value of paper and the specie which it paid in discharge of the interest on the public debt, ought to be paid by the state. The proviso in the act of 1839, it is admitted, did not repeal the second section of the act of 1838. That section expressly provides that the banks should be entitled to a credit in account with the commonwealth for all premiums or discount to which they might be subjected in order to render their paper equivalent to specie. The act of the 11th December 1839 refers to the payment of the

interest on the public debt falling due on the first of January 1840, and directs that the deposit banks shall pay such interest, if required, in specie or its equivalent. One would suppose that the sole object was to authorize the banks to pay the public creditors the interest on the public debt. It was quite unnecessary to repeat the terms on which the payment was to be made; those terms being before stated in the second section of the act of 1838. All the cases cited in argument shew that a law is not to be repealed by implication. I shall not examine their application to this case. I think the inference from the act of 18th March 1840 proves that the legislature did not intend, by the proviso in the act of 1839, to repeal the second section of the act of 1838. The 13th section of the said act of 1840 declares that the deposit banks "shall pay the semiannual interest due from the commonwealth in the month of July next, in specie or its equivalent, if so required by the creditors, without charging any premium therefor." If the legislature had considered the act of 1839 as repealing the second section in the act of 1838, this refusal in the act of 1840 to compensate the banks for premiums and discount would have been entirely superfluous.

760 *On the merits, supposing those acts of the legislature out of the case, what claim had the state on the other stockholders to pay the interest on the public debt without compensation for the loss on the premiums paid for specie? I cannot perceive any.

In every view of the case, I think the decree was right, and that it ought to be affirmed.

BALDWIN, J., concurred with judges Allen and Stanard in reversing the decree of the court of chancery, and dismissing the petition of the bank. And it was decreed accordingly.

761 *Boyd's Heirs v. Magruder's Heirs.

March, 1844. Richmond.

(Absent CABELL, P., and STANARD,* J.)

Arbitration and Award—What Submission is Binding and Entitles to Specific Execution of Award.—An equitable title to land of which an intestate died seized being set up against his heirs, some of the heirs and the claimants enter into an agreement under seal, referring the matter to arbitration, and the arbitrators award in favour of the claimants, and direct a conveyance by the heirs of their interest in the land to the claimants: **Held**, it was competent for the adult heirs who were sui juris to enter into the submission, notwithstanding there were other heirs interested in the subject who were not parties; that the award made in pursuance of such submission is binding on the parties to such submission, according to the

terms thereof; and that, upon a bill in equity for the purpose, specific execution may be decreed against such parties to the submission, and a conveyance compelled of such legal title to the land as has descended to them respectively. *Accord. Smith and others v. Smith &c., 4 Rand. 96.*

Same—Specific Execution in Part.—Such decree will be without prejudice to the right of the plaintiffs to proceed at law for a failure to comply with the submission and award in any other respect.

John B. Magruder having purchased a tract of land in the county of Albemarle, on which his sister Mrs. Mary Boyd resided during her life, the heirs of Mrs. Boyd, after her death and the death of her brother, claimed that he intended the purchase for his sister, and had so declared, and that in fact the land was paid for by her, or by her brother out of funds of hers in his hands; and they insisted that there was a resulting trust for her in the land. To adjust the controversy growing out of this claim, the heirs of Mrs. Boyd and some of the heirs of Magruder entered into an agreement under seal, submitting the matter to arbitrators; the parties to the submission agreeing that all others interested, whether adults or infants, should, as well

762 *as themselves, submit to and perform whatever award should be made. The arbitrators awarded (amongst other things) that the heirs of Mrs. Boyd were entitled to the land, and that Magruder's heirs should convey their interest therein to them. But Magruder's heirs refused to execute such conveyance. Whereupon a bill in equity was filed by Boyd's heirs, insisting, that though some of the heirs of Magruder were infants or femes covert, there should nevertheless be a decree for a conveyance by them, upon the ground of the original resulting trust.

John B. Magruder junior, one of the parties to the submission, having died intestate without issue, whereby his interest in the land descended to his mother, brothers and sisters and their descendants, an amended bill was filed, making defendants thereto as well the parties bound by the submission, as the other heirs of the said John B. Magruder junior, and praying a conveyance, according to the provisions of the award, of whatever legal title might be in the defendants.

Answers had been filed to the original bill; but this amended bill was taken for confessed.

The cause coming on to be heard before the circuit court of Albemarle the 17th of May 1836, that court decreed that the bills be dismissed with costs.

From which decree an appeal was allowed on the petition of Boyd's heirs, insisting, 1. that upon the proofs in the cause they were entitled to relief against all the defendants; and 2. if not against all, that they were clearly entitled to a decree against the parties to the submission, for a conveyance of the land with special warranty; for which was cited *Smith &c. v. Smith &c., 4 Rand. 96.*

*He had been counsel for the appellants.

†See monographic note on "Arbitration and Award" appended to *Bassett v. Cunningham*, 9 Gratt. 664.

The cause was argued by Lyons, Stanard and C. Johnson for the appellants, and by Leigh for the appellees.

763 *ALLEN, J., delivered the following as the opinion of the court:

The court, without considering whether, under the circumstances disclosed in the record of this case, it would be competent to set up and establish by oral testimony such a resulting trust for the benefit of Mary Boyd in the lands described, as by the bill is alleged, is of opinion that the testimony relied on does not prove that said lands were in fact paid for by said Mary Boyd, or that the purchase money was discharged out of any funds belonging to her in the hands of the said John B. Magruder deceased; and that although said John B. Magruder may have intended said purchase to be for the benefit of his sister the said Mary, and have so declared, such intention and declaration, in the absence of satisfactory proof of the payment of the purchase money, could create no resulting trust in her favour. The court is therefore of opinion that there was no error in the decree, so far as it determined that the heirs of said Mary Boyd deceased were not entitled to demand from such of the heirs of said John B. Magruder deceased, who were not parties to or bound by the said submission and award, a conveyance of the legal title descended to them from their father or ancestor the said John B. Magruder deceased.

The court is further of opinion, that it was competent for the adult heirs who were sui juris to enter into the submission in the proceedings mentioned, notwithstanding there were other heirs interested in the subject who were not parties; that the award made in pursuance of such submission is binding on the parties to the submission, according to the terms thereof; and that the plaintiffs are entitled, as against such parties to the submission who laboured under no disability of coverture, to a specific execution of the award, by a conveyance of any legal title to the lands aforesaid which has descended to them re-

spectively, and also to their legal remedy for any breach of the award or agreement of submission in any other respect.

764 *The court is further of opinion, that as it appears by the amended bill, which has been taken for confessed, that John B. Magruder junior, one of the parties to the submission, has departed this life intestate and without issue, whereby his interest in said lands has descended to his mother, brothers and sisters and their descendants, those who were not parties to or bound by the award, as well as those who were, are necessary parties in a suit by the plaintiffs to procure a conveyance of the legal title vested in said John B. Magruder junior; and therefore it was erroneous to dismiss the bill as to any of the defendants, as the plaintiffs, to this extent, were entitled to relief against all.

The court is further of opinion, that as the parties bound by the award were made defendants by the amended bill, which was taken for confessed, under the allegations thereof the specific execution of the award, by a conveyance of the interest in the lands held by the parties bound by the award, was the only matter in issue, and the only relief which can properly be given is a decree for a conveyance to the plaintiffs, by the parties bound by the award and their representatives, of such interest in said lands as was vested in said parties bound by the award, with covenants of special warranty; but such decree to be without prejudice to the right of the plaintiffs to proceed at law for any other matter embraced in the award, or to recover for any failure to comply with the terms of the award and the submission in any other respect.

The court is therefore of opinion, that said decree dismissing the original and amended bills with costs was erroneous, and that the same be reversed with costs. And the cause is remanded to the circuit court, with leave to make any new parties, should that have been rendered necessary by death or otherwise, and to be finally proceeded in according to the principles above declared.

REPORTS OF CASES DECIDED BY
THE GENERAL COURT OF VIRGINIA,
AT JUNE AND DECEMBER TERMS 1843.

767

*JUNE TERM 1843.

JUDGES PRESENT.

*Field,
Lomax,
Scott,
Leigh,
Thompson,
Estill,
Brown,
Duncan,*

*Fry,
CLOPTON,
Baker,
Christian,
Nicholas,
Wilson,
Gholson,
Robertson.*

Summerfield v. The Commonwealth.

June, 1843.

Criminal Law—Bail—What is No Ground for Allowing—

Case at Bar.—A prisoner having been examined by the county court and remanded for trial for the offence of feloniously passing two counterfeit half eagles, one of them to J. C. and the other to W. M., two indictments are found against him, in one of which he is charged with passing one of the counterfeit coins to J. C. on the 13th of October 1842, in the other with passing the other

768 *coin to W. M. on the same day. Upon a trial of one of the indictments, the jury find the prisoner not guilty. **HELD,** his acquittal in that case does not entitle him to be let to bail in the other.

At a court held for Giles county the 18th of January 1843, for the examination of Elijah Summerfield, "charged with having feloniously passed, on or about the 13th day of October last past, in the county of Giles, two certain base and counterfeit pieces of coin, purporting to be gold half eagles or five dollar pieces, such as are current in this commonwealth, one of which he passed in payment to John M. Cunningham, and the other to William B. Mason, the said Elijah Summerfield knowing the said coin to be base and counterfeit," the court was of opinion "that the prisoner is guilty of the offence wherewith he stands charged, and that he be further tried in the next circuit superior court for the county of Giles." In the warrant for convening the court, the charge was set forth in the same terms as in the record of the examination.

In the circuit court, at May term 1843, two indictments were found against the prisoner; in one of which he was charged with passing a counterfeit half eagle to John M. Cunningham on the 13th of October 1842, in the other with passing a like coin to William B. Mason on the same day. A trial being had on the first mentioned indictment, the jury found the prisoner not guilty, and he was acquitted. Whereupon, on the motion of the attorney for the commonwealth, the trial of the other

indictment was postponed till the next term, and the prisoner was remanded to jail.

He now applied, by petition to the general court, to be let to bail on the indictment last aforesaid. The transcript of the record filed with his petition did not shew what was the evidence against him, either in the court of examination, or upon his trial in the circuit court.

769 *Lyons, W. B. Preston and N. Harrison, for the petitioner, submitted a written argument of the case.

Two alternatives, they said, were presented by the record. Either the charge for which the prisoner was remanded was but one offence in law, and would consequently authorize but one indictment; or it constituted two substantive and distinct offences, which might either be comprised in a single indictment, or made the subject of two. In either view, the petitioner is bailable. In the former, he is of course bailable, for then the second indictment ought never to have been permitted by the court, and he can never be required to answer it. It is obvious from the record, that neither the committing magistrate nor the examining court made any discrimination of the charge, but considered the whole of it as constituting a single offence. The court examined and remanded the prisoner as for a single offence. Nor does it follow that there was error in doing so. It is certainly not impossible for a man to pass two different pieces of coin, and to two different persons, under such circumstances as to make it but a single simultaneous and continuous act of passing; as much so as the uttering of several forged receipts, which it has been decided may constitute only one offence. 1 Chitty's Cr. L. 253; 2 Russ. on Crimes 468; Thomas's case, 2 Leach 882.

At all events the offences here might have been joined in the same indictment. 1 Chitty's Cr. L. ch. 5, p. 237, 249, 253. And as they were charges of the same character, and not even differing in degree, it was not proper to disjoin them. The people v. Rynders, 12 Wend. 429; The people v. Gates, 13 Wend. 311; Harman v. The commonwealth, 12 Serg. & Rawle 72. There was certainly no necessity in this case for two indictments; the prisoner did not ask that the charges might be separately tried, and the court would have been justified in overruling his application, if he had asked

770 it. *The consequence of the separation has been oppressive, for he is now in prison on a charge of which otherwise he would probably have been acquitted.

But conceding not only that the record shews two offences, but that two indictments were admissible, the case of *Green v. Commonwealth*, 11 Leigh 677, is relied upon as establishing that the acquittal of the prisoner on the first indictment furnishes such a presumption of his innocence in the other case as entitles him to be let to bail. Green's case is in fact stronger than this. There the offences were not only separate and distinct, but had relation to separate and distinct periods of time. Here both the indictments have reference to the same period, that is, the 13th of October 1842. There, there was obviously more discrepancy in the charges, and less dependency in the proof, so that an acquittal in the first case was a more uncertain criterion as to the others. It might there have been urged, that though the commonwealth had failed on one indictment, she might succeed on others; that though the prisoner had been acquitted of aiding and abetting the embezzlement, yet the evidence might shew conclusively that he was guilty of the larceny. The presumption "that the commonwealth has put the prisoner upon his trial in the case in which the proof against him was strongest," is at least as fair in respect to this petitioner as it was in respect to Green: and if Green's acquittal in one case furnished such a presumption of his innocence in twenty-three others as entitled him to bail, the acquittal of this petitioner surely furnishes an equivalent presumption in respect to the single case yet pending against him.

PER CURIAM. Petition rejected.

771 *M'Cune v. The Commonwealth.

Cottrell v. Same.

Parsons v. Same.

June, 1843.

Criminal Law—Jurors—Opinion Formed—Competency*

—Case at Bar.—On the separate trial of a prisoner jointly indicted with three others for murder, several persons called as jurors are examined on voir dire touching their indifference. 1. One of them states, that he has heard rumours and conversations in the country touching the case of the prisoner, and a representation of part of the evidence given on the trial of one of the parties indicted with him, and from these sources of information, if the same be true, he had made up an opinion of decided character, which he still entertains, and which will remain the same unless removed by evidence of a state of facts different from what he has heard; but he feels no prejudice or bias for or against the prisoner, and is satisfied

*Criminal Law—Jurors—Opinion Formed—Competency.—On this subject the principal case is cited in *foot-note* to *Com. v. Hallstock*, 2 Gratt. 564; *Clare v. Com.*, 8 Gratt. 621, 623 (see also, *foot-note*); *Jackson v. Com.*, 23 Gratt. 931 (see also, *foot-note*); *foot-note* to *Shinn v. Com.*, 32 Gratt. 901; *Dejarnette v. Com.*, 75 Va. 873; *State v. Baker*, 33 W. Va. 324, 336, 10 S. E. Rep. 641, 646. See monographic note on "Juries" appended to *Chahoon v. Com.*, 20 Gratt. 733.

that the opinion so formed and entertained would have no influence upon his mind in trying him, and that he could now give him as impartial a trial upon the evidence as if he had heard nothing of his case. 2. Another juror states, that he has heard no evidence in relation to the prisoner's case, nor formed any opinion on the question of his guilt or innocence; that he was present at the trial of another of the parties indicted, and heard a part of the evidence, from which he had formed a decided opinion as to that party, and if he were now called to try him, he should be influenced thereby; but that opinion would have no influence upon his mind in trying this prisoner, as to whom he feels no prejudice or prepossession, and he thinks he could try him as fairly and impartially as if he had heard nothing about the transaction. 3. A third juror states, that he heard the reports in the country concerning the death of the deceased, and the prisoners implicated therein, and had formed some opinion thereon, dependant upon the truth and fulness of those reports; he believed them to be true at the time he heard them, and the opinion formed on them was decided, and yet rests upon his mind; but he is satisfied the opinion so formed would have no influence upon him in trying the prisoner, and that he could now try him according to the evidence, free from any leaning or bias for or against him, and decide the case as impartially as if he had previously heard nothing of it. *H.M.* all of these persons are good and impartial jurors.

772 *Same—New Trial—What Conviction WILL NOT Be Set Aside as Contrary to Evidence.†—Where

a verdict of conviction in a criminal case is clearly against the evidence, or clearly without evidence to justify it, it is the duty of the court to set the verdict aside on the application of the prisoner, and to award him a new trial. But where, upon evidence merely circumstantial, the jury has found the prisoner guilty, and the court which tried the case has refused to grant a new trial, the verdict will not be disturbed by the general court, even though, in the opinion of that court the evidence do not amount to very strong and clear proof.

Same—Murder—Sufficiency of Evidence.—Case in which, under the circumstance just mentioned, a conviction of murder in the second degree was sustained by the general court.

William Turner, Daniel F. M'Cune, Jackson Cottrell and Joseph W. Parsons were jointly indicted, in the circuit superior court of Kanawha county at May term 1843, for the murder of Jonathan Nichols. Upon separate trials of M'Cune, Cottrell and Parsons, they were respectively found guilty of murder in the second degree, and sentenced to imprisonment in the penitentiary; M'Cune and Cottrell each for the term of eighteen years, and Parsons for the term of five years.

†New Trials—Evidence—Weight and Sufficiency.—On this subject see the principal case cited in *Hill v. Com.*, 2 Gratt. 603, 617, and *foot-note*; *Vaiden v. Com.*, 12 Gratt. 728 (see also, *foot-note* to same case); *Read v. Com.*, 22 Gratt. 942 (see also, *foot-note*); *Howell v. Com.*, 26 Gratt. 1007; *State v. Morgan*, 35 W. Va. 57, 13 S. E. Rep. 391. See monographic note on "New Trials."

I. On the trial of M'Cune, William Earle being called as a juror, and sworn and examined on his voir dire, stated, that he had heard none of the evidence on any of the previous examinations of the prisoner, but had heard the rumours and reports in the country concerning this case, and conversations respecting the same, and from what he had thus heard he had made up and expressed a pretty decided opinion thereon, if they be true, which opinion was unchanged by any thing he had since heard; but if the evidence should present the facts differently from the relations which he had heard, then there would be no opinion resting on his mind, drawn from the rumours and conversations aforesaid: that he felt no leaning or prejudice for or against the prisoner, and notwithstanding the rumours and reports which he had heard, and the opinions or

773 conclusions of *his mind if these reports be true, he was satisfied that he could now try the prisoner as fairly and impartially upon the evidence that might be adduced, as if he had never heard of him or his case. Whereupon the court decided that Earle was a competent juror, and he was put to the election of the prisoner; who excepted to the opinion of the court, and challenged the juror peremptorily.

II. On the trial of Cottrell, — Baber, Henry C. Sisson and Isham Bailey being called as jurors, were severally sworn on the voir dire, and examined touching their indifference.

1. Baber stated, that he had heard rumours and conversations in the country concerning the occurrences in which the prisoner was charged with being a participator, which were much talked about: that during the trial of M'Cune, who was jointly indicted with the prisoner and tried at this term, the juror had been present in court, but heard none of the evidence, though he heard some of the arguments, and he thinks a part of the argument by the attorney for the commonwealth: that upon the rumours and conversations aforesaid, if they be true, he had formed an opinion of decided character, which was still abiding on his mind: but that such opinion, so formed from the sources aforesaid, and what he had heard, would have no influence upon him in trying the prisoner's case: that he felt no prejudice, leaning or bias for or against the prisoner, and was satisfied that he could now give him a fair and impartial trial according to the evidence which he might hear.

2. Sisson stated, that he had heard rumours and frequent conversations in the country touching the case of the prisoner and of others indicted with him: that a person who represented himself as being present at a part of one or both of the trials of M'Cune and Turner during the present

774 term, had related in his presence a *part of the evidence said to have been given in: that from these sources of information, if the information be true, the juror had made up an opinion of decided character, which he still entertained, dependent however upon the fulness and accuracy

of the representations which he had heard: that he felt no prejudice, leaning or bias for or against the prisoner, who was a stranger to him; and he was satisfied that what he had heard in relation to his case, and the opinions formed thereon as before described, and resting upon the grounds aforesaid, would have no influence upon his mind in trying the cause; he believed he could now give the prisoner as fair and impartial a trial upon the evidence to be adduced, as if he had heard nothing about him or his cause. In answer to a question by the prisoner's counsel, whether the opinion he now entertained would not remain the same unless removed by evidence of a different state of facts? he said, that it would.

3. Bailey stated, that he had heard divers rumours and conversations in the country relative to the case of the prisoner and his associates in the indictment: that the affair had been considerably talked of in the neighbourhood; and from these rumours and conversations, if true, the juror had made up an opinion of decided character, but which was necessarily dependant upon the fulness and accuracy of the reports he had heard: that his mind was free from prejudice, bias or leaning for or against the prisoner, who was unknown to him; he was satisfied the opinion before stated would have no influence upon his mind in trying the cause; and he believed that notwithstanding the rumours and conversations aforesaid, he could give the prisoner as fair and impartial a trial upon the evidence that might be adduced in his case, as if he had previously heard nothing in relation thereto. In answer to a question by the prisoner's counsel, whether the opinion he now entertained would not remain the

775 same unless removed *by evidence of a different state of facts? he said, that it would.

The court decided that Baber, Sisson and Bailey were all competent jurors; to which opinions the prisoner filed exceptions, and challenged the jurors peremptorily.

III. On the trial of Parsons, John Forqueran and Dioclesian Martin being called as jurors, were severally sworn on the voir dire, and examined touching their indifference.

1. Forqueran stated, that he had not been present at any previous examination of the prisoner, nor heard any evidence in relation to his cause, nor formed any opinion on the question of his guilt or innocence: that upon a former day of the term, he was present at the trial of M'Cune, jointly indicted with the prisoner for the murder of Nichols, when he heard a part of the evidence, and a portion of the arguments of counsel: that from what he then heard, he formed a decided opinion as to M'Cune, and if he were now called to try him, he should be influenced thereby: but that as to the prisoner Parsons, he had no prejudice or prepossession, and he thought he should be able to try him as fairly and impartially as if he had heard nothing about the transaction; that the opinion formed as to M'Cune would have no influence upon his mind in trying the prisoner. The

court was of opinion, that although the evidence as to the manner in which Nichols was killed might be the same on the trial of each of the persons indicted, yet as the proofs and circumstances indicating the presence and cooperation of each, as well as the evidence of previous threats, and circumstances indicating ill blood and revenge towards Nichols, must be and were strictly confined to the separate prisoners as they respectively came upon trial, an opinion formed

as to the guilt or innocence of any one of them did not *implicate another, whose guilt or innocence depended upon his presence and giving aid, assistance or cooperation in the murder; and therefore Forqueran, who had formed no opinion as to the prisoner Parsons having participated in the transaction, and was in a state of mind fairly and impartially to try his case, was a competent juror.

2. Martin stated, that he had heard the reports in the country concerning the death of Nichols, and the prisoners implicated therein, and had formed some opinion thereon, dependant upon the truth and fullness of the reports he had heard; but he was satisfied that these reports, and the opinion formed on them, would have no influence upon his mind in trying the prisoner, and that he could now pass upon his case according to the evidence, free from any leaning or bias for or against him, and decide it as impartially as if he had previously heard nothing of it. In answer to a question by the prisoner's counsel, he said that the opinion formed on the reports which he had heard was decided; that the rumours and conversations before referred to he believed to be true at the time he heard them; and that the opinion aforesaid yet rested on his mind: but as to the case of this prisoner, he again repeated the declaration herein before set out. The court, considering the rumours and conversations aforesaid as relating to the general circumstances of Nichols's death, and hypothetical in their character, nowise disturbing the impartiality of the juror in passing upon the separate case of the prisoner, decided that this also was a competent juror.

The prisoner peremptorily challenged both of the jurors Forqueran and Martin, and excepted to the opinions of the court deciding them to be competent.

When the verdict of the jury was rendered against him, he moved the court to set it aside and to award him a new trial, upon the ground that the said verdict

777 *was contrary to the evidence; which motion being overruled, he filed a bill of exceptions to the opinion of the court, wherein the facts proved at the trial were set forth as follows.

The widow of the deceased Jonathan Nichols proved, that on the night of the 8th of April last, soon after dark, her husband went to bed in ordinary health. In a short time thereafter the witness went to bed also, in the same bed, together with her youngest child. When she went to bed, she found her husband asleep, lying on his back on the back

side of the bed. At the time she lay down, she left a wood fire burning on the hearth, which gave a tolerable light in the room. The house occupied by the deceased was a log cabin, 16 by 18 feet square, with two clapboard doors on opposite sides of the house. At the time she went to bed, both of the doors were closed, the one by a chair set against it, and the other (nearest to which she and the deceased slept) by a trundle bed and bedstead in which two of her other children slept. Between 8 and 9 o'clock, the witness was awakened by the discharge of a gun, and immediately called to her husband and enquired if he did not hear the firing, saying, she believed they were about to be murdered; to which he made no reply, but made a moaning noise as if awakening from a dream, and turned in the bed nearly upon his face. In placing her hand on his body and shaking him in order to arouse him, she felt blood, and getting immediately out of the bed, and going to the head of it, she saw that her husband was dead. He did not live more than a minute after her awakening. Immediately upon her awakening, she heard the report of three, four or five guns, as she supposed, in quick succession, as in counting one, two, three, fired on the outside of the house, and near to and around it. There was then a pause for a short time, about sufficient to enable the parties to reload their guns, when there was another firing

778 of *four or five guns in quick succession as before. After a second pause of about the same length of time, three other guns were fired, at a somewhat greater distance from the house; and in a few moments thereafter a single gun was fired, at the distance, as witness supposed, of about one hundred yards from the house, being more remote than either of the previous firings; which last report was accompanied by the scream or yell of a man, which the witness then believed and now believes to have been the voice of Daniel F. M'Cune (one of the parties jointly indicted with the prisoner, and whose trial and conviction had preceded the present trial). The witness had on several other occasions (logrollings &c.) heard the yell of the said M'Cune, and thought she could distinguish it from that of any other person: but in the sounds heard by her, there were no words articulated, it being a single halloo or yell. The door which had been closed with the chair was at that time standing open about wide enough to admit a man's body. When it was closed, there were open cracks or joints in the clapboards, sufficient to admit of seeing into the room from the outside; and the house was an open one, owing to the chinking being loose or having dropped out. When the witness awakened, the fire was still burning briskly.

It was further proved that the death of the deceased was occasioned by a leaden bullet, which entered his body about half an inch above the left nipple, and in its course destroyed the large arteries leading from the heart to the upper extremities, and after its force was spent, was lodged near the right shoulderblade, about three

fourths of an inch from the surface of the right side. That the bullet, before striking and penetrating the body of the deceased, passed through the clapboard door nearest to the bed on which the deceased lay, about three eighths of an inch thick, over the bodies of the witness and her child, and through a calico quilt *and light feather bed used as a covering, an oblique direction, carrying a portion of the feathers into the cavity of the body. From the position of the ground, the bullet hole in the door, and the direction in which the ball passed through said covering into the body of the deceased, it must have been discharged from a gun aimed from a piece of ground on the outside of the house, elevated from seven to nine feet above the floor, and about ten steps from the door aforesaid.

It was further proved on behalf the commonwealth, that on the afternoon of the 8th of April, about one hour and a half before sunset, William Turner and Jackson Cottrell, parties jointly indicted with the prisoner, were at the residence of Anthony Parsons, the father of the prisoner and with whom he lives, distant about two miles from the house of the deceased Jonathan Nichols. That the said Cottrell and Turner each had their guns with them, the latter having the gun which was produced in court on the trial, and which will be hereafter mentioned. That the witness (who was a neighbouring man) was at the same time at the house of Anthony Parsons on a visit, and also had with him his own gun; and on a conversation arising between the witness and the prisoner about an exchange of guns, the prisoner went into the house and brought his gun out. That between sunset and dark of the same evening, the aforesaid Daniel F. M'Cune and Jackson Cottrell were together at the house of John Connelly, about a quarter of a mile from the house of said Anthony Parsons; each of them having a gun, and Cottrell a pistol in addition. That they left said Connelly's before dark, and went in the direction of A. Parsons's. That the said Daniel F. M'Cune was the brother in law of the said Anthony Parsons, and the uncle of Jackson Cottrell and the prisoner: that the said Jackson Cottrell was the grandson of the said Anthony Parsons: and that the said

Daniel F. M'Cune lived about 10 or 11 miles from the said Parsons's. *It was also proved, that in the neighbourhood where the transaction in question occurred, which is a remote and thinly settled part of the county of Kanawha, on the west fork of the Little Kanawha river, and some sixty miles from the court house of said county, it is the general custom of the inhabitants, when going about the neighborhood from house to house, to travel on foot and to carry their guns with them. It was further proved on the part of the commonwealth, that on the night of the 8th of April, about nine o'clock, some five young persons, males and females, in making a visit through the neighbourhood,

called at the house of the said Anthony Parsons, where they remained about the space of ten minutes. That they did not see there either the prisoner, or either of the parties jointly indicted with him; and the witnesses (the young persons aforesaid) were satisfied that neither of said persons (the prisoners) was in the house when they were there. There were two beds on bedsteads in the house, (which was a small one, about 16 feet square) in one of which they saw Anthony Parsons and his wife; the other was unoccupied. There was a pallet on the floor, in which two or three of the prisoner's children were asleep. The prisoner's wife was out of bed, standing by the fire, with her clothes partly off and the remainder loose upon her, as if she was either preparing to go to bed, or had just risen from it. That the same party of young persons went directly from said Anthony Parsons's to the house of said William Turner, which is about 300 yards from the house of said Anthony Parsons: that a woman and her little girl, the only persons who lived with said Turner, had gone to bed, but said Turner was not there. That they (the young people aforesaid) extended their visit up the creek, about a mile and a half above said Turner's, to one Jacob Berkheimer's, who also was not at home at the time of their visit. That as the same party of young people were *returning from their visit that night between 11 and 12 o'clock, the aforesaid Jackson Cottrell and William Turner overtook them: Turner then had a rifle gun, but Cottrell had no gun. The party proceeded together to Turner's house, where the witnesses (the young persons aforesaid) remained with Cottrell and Turner from one hour and a half to two hours, during which time a pistol was seen in the possession of said Cottrell. The witnesses then left said Turner and Cottrell together at the house of the former, and returned home about one o'clock.

It was further proved, that on the morning after the death of said Nichols (being Sunday), a number of the neighbours being assembled at the house of the deceased, much search was made for tracks and other signs of the persons who might have been present at the house on the preceding night. That no bullet hole or other mark of shooting was discovered, except the bullet hole through one door aforesaid: but on and about the piece of elevated ground near the house, before mentioned, and from which the gun is supposed to have been fired, foot prints were discovered, but not sufficiently distinct to enable them to determine what number of persons had been there, or to ascertain any thing as to the size or covering of the feet. That beyond the enclosure of the house, and some two yards from it, appearances of footprints in the woods were found leading in a direction from the premises, but not so distinct as to enable the witness to trace or follow them; but on approaching the creek, tracks were discovered crossing a small sandbar, and as

the witness thought, of four persons walking abreast; two of which were of feet covered with moccasins, and the other two with square toed shoes. That the said tracks were measured by the witness, and the length thereof taken on a stick, which stick he afterwards gave to the widow of the deceased, by whom it was lost or

782 mislaid. The said *stick was never applied to the feet of the prisoner, or to those of either of the persons jointly indicted with him. That the first time the prisoner and the persons indicted with him were thereafter seen, the prisoner and the said Daniel F. M'Cune had on moccasins, and the said Turner and Cottrell had on squaretoed shoes. From mere observation of the feet of the prisoner and of the persons indicted with him, but without measurement, the witness who took the measure of the tracks was of opinion that the size of said tracks would correspond with the feet of the parties so jointly indicted. It was also proved, that in the neighbourhood of the occurrence, the use of moccasins by the male inhabitants was general and common, and that, of the shoes worn in the same neighbourhood, those of the squaretoed form were as common as any other. That early on sunday morning after the death of the deceased, and before the tracks on the sandbar were examined by the witness, it had snowed for a short time with violence, which snow did not lie on the ground for any length of time, but melted nearly as fast as it fell: that some rain also fell, accompanied by hail of considerable size, which continued for a very short time, but fell rapidly while it did continue.

It was further proved on the part of the commonwealth, that on the sunday after the death of the deceased, about 9 or 10 o'clock in the forenoon, some five or six persons on horseback passed up the creek, with a view to give intelligence to the neighbourhood of what had happened. That on approaching the house of Thomas Cottrell (the father of Jackson Cottrell) who was the uppermost settler on said creek, and lived about four miles from the house of the deceased, the said William Turner was seen standing in the door of said Cottrell's house. He immediately withdrew from the door, went into the house, and quickly returned accompanied by the prisoner and the said Jackson 783 Cottrell *(who lived there with his father). Turner and the prisoner had their guns in their hands; Cottrell had no gun, nor any other weapon. Upon being informed of the death of Nichols, the prisoner (in the language of witness) "appeared astonished at the news;" Turner whistled and seemed indifferent; while Jackson Cottrell said nothing. Upon being asked by the witness to go down to the house of the deceased, the prisoner declined doing so, saying that he was going to another neighbour's house to pay for some flaxseed. On the same day (sunday after the death of Nichols), Daniel F. M'Cune and William Turner came together to the

house of the deceased. The prisoner came also a short time afterwards. There was at that time a considerable number of persons collected at the house of Nichols, and the corpse was lying on the bed in the same position, not having been moved except for the purpose of looking at the wound. When the prisoner came into the house, he asked, "Where is the dead man?" to which the witness replied, "There he lies." As the prisoner came into the room, he put his hand upon the wall, apparently for the purpose of steadying himself, and observed that "people had better be praying, than doing the like of this." Several of the witnesses for the commonwealth were also asked by her attorney to describe the appearance of the prisoner and M'Cune and Turner at that time. Some of the witnesses in reply said, that the prisoner looked whiter in the face that day than common; another, that he looked confused, and that his countenance indicated alarm; another, that he looked distressed in mind, was pale and red alternately, and that occasionally there was a twitching or quivering in the muscles about the chin. They also stated that Turner trembled, as did likewise M'Cune in a greater degree; that the last-mentioned, standing by and leaning 784 against the fence in the yard, *shook all over, and with so much violence that he shook the fence.

It was also proved, that in the afternoon of the same day (sunday the 9th) the said Daniel F. M'Cune was seen some two or three miles from the house of Nichols, travelling in a direction towards his home, with his rifle gun in his possession, which, as above stated, the said William Turner had in his possession at the house of Anthony Parsons on the evening of saturday the 8th, being the same gun which was produced in court on the trial of this indictment.

It was also proved by the coroner who held the inquest over the body of the deceased, that the rifle gun produced on the trial of this cause was sent for by him while engaged in taking the inquest; the place where the gun, and the bullet moulds belonging to it, (which were also produced on this trial) were to be found, having been first stated and pointed out to him by Daniel F. M'Cune. That the gun and bullet moulds now in court were accordingly, and in a short time, produced before him. That the moulds belonging to said gun ran bullets weighing from 55 to 60 to the pound; and the bullet extracted from the body of the deceased, upon being placed in a pair of small medicine scales against one of the bullets run in the said moulds, weighed within from two to five grains of the same weight with the latter. The witness who extracted the bullet from the body of the deceased, and weighed and compared it as aforesaid, supposed that its loss of weight by passing through the door and other substances before mentioned, before its force was spent, would be equivalent to the difference aforesaid. It was further proved, that some five or six years

ago, guns of as large calibre as the gun aforesaid produced in court on the trial of the prisoner, were common in the neighbourhood of the deceased, but are
785 not so common *latterly, smaller guns being now more generally used.

It was also proved on the part of the commonwealth, that on the afternoon of Sunday the 9th of April, and after the prisoner and others indicted with him had been at the house of the deceased as aforesaid, the prisoner, Daniel F. M'Cune and William Turner were together in the yard of Anthony Parsons (with whom the prisoner resided as aforesaid). The said M'Cune stated to the said Turner, that from what he (M'Cune) could learn down at Nichols's, he (Turner) was suspected of having committed the murder; and that he (M'Cune) would advise him to leave. Whereupon the prisoner also remarked to Turner, that if he (the prisoner) were in Turner's place, he would be off. To which Turner replied, "Well, I have nothing to keep me here any longer;" but did not deny or admit the charge thus stated to have been made against him. This conversation was held in the presence of the witness who delivered it in court upon the present trial, without any apparent wish of the parties to conceal the same. It was further proved, that Turner left the neighbourhood the next morning, and was not arrested until some days after the prisoner, M'Cune and Cottrell were apprehended and sent to the county jail.

The commonwealth also gave evidence tending to prove a previous state of ill blood on the part of the prisoner towards the deceased, as follows, to wit:

That about a year ago, the witness thought in May, the prisoner was at the house of the witness, when the witness said to him, he had understood that the Nichols's had run him (the prisoner). The prisoner replied, No, they had tried to do it, but he had run them with a loaded gun. Prisoner also said, he would kill Jonathan and Zephaniah Nichols for it yet, if they did not watch. The witness lives in the neighbourhood of the prisoner, about two miles
786 off; has been in the habit *of frequently seeing the prisoner, at his own house and the house of the witness, at logrollings, houseraisings &c. but never heard him in any other wise threaten the deceased than as above. When he had the conversation above stated, he seemed to be in a good humour, and it did not make any impression on the mind of the witness. Witness has never spoken of it until since the death of Nichols. He has seen the prisoner and the deceased in company since the conversation aforesaid, and they appeared friendly.

Another witness proved, that in April 1842, on Easter day, he met with the prisoner, who complained to him of the Nichols's. He said that Zephaniah Nichols, a brother of the deceased, jumped out from behind a tree with a handspike as the prisoner was passing along, and that he (the

prisoner) ran him with his gun for a short distance, when Jonathan Nichols (the deceased) and Robert Nichols (another brother) came to the assistance of Zephaniah, and the prisoner in turn gave way and ran. The prisoner at the same time applied to the witness, who was a justice of the peace, for a warrant against the said Nichols's; but the witness, being in the act of removing to an adjoining county, declined issuing such warrant: whereupon the prisoner said, he would then take his gun and run them out of the neighbourhood; that they were bad and troublesome people; that he had no fears of them personally, but was afraid they would do him some private mischief.

Another witness proved, that he was at work at Anthony Parsons's (the father of the prisoner) last hay harvest (1842), when the prisoner and his father and mother were talking about the Nichols's. One of the party stated, that some time previous, some one had stolen some meat from their smokehouse; that the mother of the prisoner, being about the door or yard at the time, was hit on the heel by one of the party stealing the meat; that she had
787 called to the prisoner her son, then

*in the house, who came out with his gun; but that they had made their escape. In the said conversation the prisoner remarked, that if he could have got at them, they would not have got off so easily. He said also, it must have been the Nichols's, as he did not know any body else likely to have done it. Witness then said to the prisoner, "There is law for such men, why don't you take the law on them?" to which the prisoner replied, No, he would take an easier plan for it than that; but did not say what plan, or any thing further.

Another witness proved, that the prisoner was at his house about a year ago, and was telling him of some of the Nichols's clubbing him. But Jonathan Nichols (the deceased) was not connected with the affair in that conversation.

It was also proved, that in January last the deceased, who was overseer of the road in his neighbourhood, had called the hands out to work the same. Some altercation took place as to the location of the road at or near the house of Anthony Parsons, the father of the prisoner; in which, however, the deceased took no part. Words passed between Zephaniah Nichols (brother of the deceased) and Anthony Parsons, who, it was proved, was an elderly man and blind. The said Zephaniah threw three sticks or clubs at old Anthony Parsons, when some one of the company advised the prisoner to go and take his father in; and he did go in the direction of said Anthony Parsons, and accompanied him to the house. The prisoner seemed disinclined to work on the road, and did little or no work that day. The deceased, as overseer, about the time of the altercation before mentioned, ordered the men to go to work; when the prisoner replied, "Go to hell!" or "Who

the hell are you?" (Stated in both forms by two witnesses for the commonwealth.) Whereupon the deceased told the prisoner he was dismissed from the road, and that he would make him pay for that day's work, and his conduct "on the road; to which last remark the prisoner replied, that "he would pay it in hell," or that "he would pay it after he was in hell." (Stated in both forms by two of the witnesses.) A third witness, who testified to the same occurrence and conversation on the road, represented the prisoner as saying that he (the prisoner) "would pay it when Nichols was landed in hell." The last mentioned witness, after giving his account of the occurrence and altercation on the road, and being asked by the attorney for the commonwealth whether he knew any thing more, said, that "it ran in his head that the prisoner also observed on that occasion, that he would see blood that day." This witness also said, that the occurrence testified to by himself and the two other witnesses last mentioned took place last fall, instead of January as stated by them. He also, in reply to interrogatories of the prisoner's counsel, stated that he did not know on what day or month new year came, on what day of the month or year christmas came, did not know the number of days or weeks in the year, or how often the moon changed.

It was also proved, that the deceased lived on a small creek, a branch of the west fork of Little Kanawha river: that from the mouth of said creek to the uppermost settler thereon is about nine miles: and that, exclusive of the deceased and two of his brothers, who lived about a quarter of a mile from him, the only male adults who at the time of the death of said Nichols lived on said creek, were the following, namely, Edward Parsons, John Connelly, Thomas Cottrell the father of the said Jackson Cottrell, and his brother George Cottrell, Jacob Berkheimer, the said William Turner, and the prisoner and his father the said Anthony Parsons. It was further proved, that the deceased was a peaceable and orderly man in his neighbourhood, and that the prisoner had heretofore sustained a tolerable character in the same particulars.

In the language of a witness, "he was of average character with those in his neighbourhood. The attorney for the commonwealth having given the evidence hereinbefore stated, of this prisoner being in company with others of the prisoners as aforesaid, of his being absent from home as aforesaid, and that his father and mother resided in the same house with him and slept in the same room, the prisoner entirely omitted to give any evidence accounting for his absence from home on the night aforesaid, at what hour he returned, or with whom he had been out that night.

And this was all the evidence in the cause.

M'Cune, Cottrell and Parsons severally presented petitions to the general court,

praying for writs of error to the judgments rendered against them respectively. The opinions of the circuit court declaring the competency of the several jurors Earle, Baber, Sisson, Bailey, Forqueran and Martin, were all complained of as erroneous; and Parsons complained also of the refusal of the court to set aside the verdict against him and award a new trial. On the question of competency of the jurors, Armistead's case, 11 Leigh 657, Oslander's case, 3 Leigh 780, and 3 Rob. Pract. 157-163, were cited and relied upon.

G. W. Summers, B. H. Smith, J. Hendrick and J. L. Carr, for each of the petitioners.

FIELD, J. (after stating the proceedings had against the petitioners respectively, and reciting the bills of exceptions relative to the several jurors aforesaid) delivered the opinion of the court as follows.

I. The opinion entertained by the juror William Earle, who was called upon the trial of M'Cune, had been formed from mere rumour. It was purely hypothetical.

And as he did not appear to be under the influence of bias or prejudice either for or against the prisoner, the court is unanimously of the opinion that he was a good juror. The writ of error is therefore refused in M'Cune's case.

II. In relation to the three jurors Baber, Sisson and Bailey, called upon the trial of Cottrell, the judges present are also unanimously of opinion that they were competent. The opinions which they had formed were derived from mere rumour. They had not heard the evidence. And so far as the prisoner and the commonwealth were concerned, these men were free from partiality, bias or prejudice. There does not appear to be any error in the record of Cottrell's case, and the writ of error is consequently refused.

III. The court are likewise unanimous in the opinion that John Forqueran, called as a juror on the trial of Parsons, was competent.

It appears from the examination of Dioclesian Martin, called as a juror on the same trial, that his was an opinion upon mere rumour and neighbourhood reports, of the truth of which he had no knowledge. Towards the commonwealth and the prisoner he occupied an impartial position, and was not likely to be influenced in his verdict by prejudice. The opinion was clearly a hypothetical one, and this court is unanimously of the opinion that he was a good juror.

As to the question of a new trial, that depended on the evidence before the jury. That evidence was entirely circumstantial. Whether the circumstances were sufficient to establish the guilt of the prisoner, or not, it was the province of the jury to decide. The jury was satisfied that they were sufficient, and convicted the prisoner. With this verdict the judge before whom the trial took place, and who heard all the evidence, has indicated his satisfaction, by overrul-

ing the prisoner's motion for a new trial. Where the finding of the jury is clearly against the evidence, or clearly without
791 *evidence to justify it, it is the duty to the court to set the verdict aside upon the application of the prisoner, and to grant him a new trial. The circumstantial evidence in this case, which has been set forth in the bill of exceptions, has been examined by this court, and although we do not regard it as amounting to very strong and clear proof, yet a large majority of the court are of the opinion that this court cannot with propriety disturb the verdict and judgment on that ground. From this opinion, however, judges Lomax and Gholson dissent. They regard the testimony as clearly insufficient to establish the guilt of the prisoner, and would be willing to award the writ of error on that ground only.

In each case, writ of error denied.

Campbell and Others v. The Commonwealth.

June, 1843.

Criminal Law—Trespass—Construction of Statute*—

Case at Bar.—A party in actual and peaceable possession of land, which he claims as his own, encloses it with a fence. About four years afterwards another person, who claims the same land and has a better title to it, forcibly pulls down and removes the fence. HELD, this is not a trespass for which a prosecution can be sustained under the statute of February 14, 1823, Acts of 1822-3, ch. 34, § 1.

An indictment for wilful trespass, containing two counts, was found against David C. Campbell, Elisha Hobbs and Alexander Smyth, in the circuit court of Lee county at April term 1842. The first count charged that the defendants, on the 31st of March 1842, at the said county, "did unlawfully and maliciously, and without lawful authority, pull down, injure and destroy a certain fence then and there
792 being on the land of John G. *King in the said county, against the form of the statute" &c. The second count charged that the said defendants, on &c. at &c. "did knowingly and wilfully, without lawful authority, but not feloniously, take and carry away a certain other fence then and there being on the land of John G. King in the said county, against the form of the statute" &c.†

*Criminal Law—Trespass—Construction of Statute.—

For the proposition that the statute of February 14, 1823, has been uniformly construed to be a statute against *wilful trespass*, the principal case is cited in *State v. Porter*, 26 W. Va. 690. See *Israel's Case*, 4 Leigh 675; *Dye's Case*, 7 Grat. 662.

†The indictment was framed upon the statute of February 14, 1823, (Acts of 1822-3, p. 36, ch. 34, § 1; Supp. to R. C. p. 280, ch. 226.) which enacts, "that any person who shall knowingly and wilfully, without lawful authority, cut down any tree growing on the land of another, or destroy or injure any such

The defendants pleaded not guilty. Upon the trial, a patent to John G. King, dated in 1822, and embracing the land in question, was introduced on the part of the commonwealth. The prosecutor further gave evidence, that 18 or 20 years ago, a certain James Campbell, claiming that King's patent interfered for a few acres at one corner with his (Campbell's) land, went upon the disputed part, built a cabin on it, and lived there for some time. That King, in October 1824, brought his complaint of forcible entry and detainer against Campbell, upon which, during the same month, a verdict was found for King, but in consequence of an informality in the finding, judgment was rendered in favour of Campbell: whereupon King threatened suit by writ of right; to prevent which, Campbell, before leaving the courthouse, agreed to surrender possession to King, and did shortly afterwards surrender it, and King had ever since held peaceable possession, until the commission of the trespass
now complained of. That about
793 *4 years ago, King fenced the disputed land, and cleared and cultivated part of it; 3 or 4 years after which, the defendants went upon the land and tore down and removed the fence, in opposition to the remonstrances of King. Shortly afterwards, this indictment was found against them.

On the part of the defendants, evidence was adduced for the purpose of shewing that the said James Campbell, under whose authority and direction the alleged trespass was committed, had title to the land older and better than that of King. Campbell himself was examined as a witness. He claimed, under various deeds which he produced, 500 acres of land, parcel of a tract of 920 acres alleged to have been granted by the commonwealth to W. Anderson; but no patent was produced, nor were the deeds aforesaid in any way connected with such patent; and one of them purported to have been made by the widow and executor of a decedent, without authority from him to convey. Neither was it shewn that any of those deeds conveyed the land on which the trespass was alleged to have been committed.

After the evidence was closed, the attorney for the commonwealth moved the court to instruct the jury as follows: "If the jury shall believe from the evidence, that, at the time of the commission of the trespass charged in the indictment, John G. King was in actual peaceable possession of the land inclosed by the fence in the indictment

tree, or any building, fence or other improvement, or the soil or growing crop on the land of another; or shall knowingly and wilfully, without lawful authority, but not feloniously, take and carry away, or destroy or injure any tree already cut, or any other timber or property real or personal belonging to another,"—"shall be deemed guilty of a misdemeanour, and may be prosecuted and punished as in other cases of misdemeanour at the common law."—Note in Original Edition.

mentioned, under a claim of right thereto, and had built said fence, and held such possession for about four years prior to the said trespass; then, although James Campbell, who had employed the defendants to commit the act charged as a trespass in said indictment, may have had a better legal title to the land inclosed as aforesaid than the said King, the defendants had no authority to enter forcibly upon the said land and pull down and remove said fence, and

794 *an entry by them for such purpose, under the authority of said Campbell, and the pulling down and removing said fence, if done by the defendants, amount to such an act of trespass as is sufficient to sustain this prosecution."

The court gave the instruction; being clearly of opinion that the same was correct in point of law, though entertaining some doubt whether the evidence in the case even tended to prove a title in Campbell superior to that of King, and so whether the instruction was not objectionable as presenting merely an abstract proposition.

To this instruction of the court, the defendants excepted.

The jury returned a verdict finding the defendants guilty, and assessing upon each of them a fine of 1 dollar 66 cents; and the court rendered judgment against them for the fines so assessed, and the costs of the prosecution.

On the petition of the defendants, the general court, at the last term, awarded a writ of error to the judgment.

H. S. Kane for the plaintiffs in error: the attorney general for the commonwealth.

The general court decided, "that the instruction which the circuit court gave to the jury upon the trial was incorrect, and ought not to have been given." Therefore, judgment reversed, verdict set aside, and cause remanded to circuit court for a new trial.

795 *Thomas v. The Commonwealth.

June, 1843.

Perjury—Indictment—Averments—"Wilfully, Corruptly and Falsely."—An indictment for perjury in giving false testimony before a grand jury, charges that the defendant, being duly sworn, "did depose and give evidence to the grand jury in substance and to the effect following." (stating the testi-

***Perjury—Indictment—Averments—"Wilfully, Corruptly and Falsely."**—The principal case is cited in *Fitch v. Com.*, 92 Va. 834, 24 S. E. Rep. 372. See monographic note on "Indictments, Informations and Presentments" appended to *Boyle v. Com.*, 14 Gratt. 674.

Grand Jury—Evidence of Proceedings before.—The principal case is cited in *United States v. Farrington*, 5 Fed. Rep. 347, to the point that generally the evidence of grand jurors is competent whenever it is necessary to ascertain what was the issue or what the testimony of witnesses before a grand jury in a given case.

mony) "which said evidence was wilfully false and corrupt, for in truth" &c. (falsifying the facts deposed to) "and so the defendant did, in manner and form aforesaid, commit wilful and corrupt perjury." On general demurrer to the indictment. **Held**, here is no sufficient averment that the defendant wilfully or corruptly swore falsely, and the indictment is defective as well at common law as under the statute.

Solomon Thomas was indicted in the circuit superior court of law and chancery for Giles county, as far back as October term 1831, for perjury alleged to have been committed by him in giving evidence before a grand jury impaneled in the late superior court of law for the said county. The indictment set forth, that on the 19th of April 1830, a grand jury being sworn in the said superior court of law, diligently to enquire &c. (stating the oath in the terms prescribed by the statute) the said Solomon Thomas, after the grand jury were sworn, appeared in court and was desirous to go to the grand jury as a prosecutor, to give evidence of a breach of the peace alleged by him to have been committed by Isaac French in January 1830; and at his own instance he was sworn by the clerk of the court, by direction of the court, to give evidence to the grand jury: which said clerk, by direction of the court, had full power and authority to administer such oath. And then the indictment proceeded in the following words: "And the said Solomon Thomas, being sworn in manner and form aforesaid, did then and there go to the grand jury, and did depose and give evidence to the said grand jury in substance and to the effect following, to wit, that

796 Isaac French, at James French's infare, which *was in the month of January 1830, pushed on him the said Solomon Thomas for a fight, and struck him two or three times before he (Thomas) struck Isaac French, and that he (Thomas) was obliged to strike said French in order to defend himself, after having been struck by said Isaac French two or three times; which said evidence given to the said grand jury was wilfully false and corrupt, for in truth and in fact the said Isaac French, at the infare of James French in the month of January 1830, had not pushed on the said Solomon Thomas for a fight, and struck the said Solomon Thomas two or three times before the said Solomon Thomas struck the said Isaac French, but on the contrary the said Solomon Thomas struck the said Isaac French first, when the said Isaac French did not push on the said Thomas for a fight, and was not wanting to fight with the said Solomon Thomas: which said evidence given by the said Solomon Thomas to the said grand jury on the said 19th day of April 1830, was material in procuring the grand jury to find an indictment against the said Isaac French, for a breach of the peace, a true bill, and which the said grand jury, in consequence of the evidence of the said Solomon Thomas given to them, did find.

And so the grand jurors aforesaid do say that the said Solomon Thomas, on the said 19th day of April 1830, did, in manner and form aforesaid, commit wilful and corrupt perjury, against the form of the statute" &c.

Process to answer the indictment was from time to time awarded and ineffectually issued against the defendant, and the case regularly continued, until the year 1841. Being at length arrested, he was brought into court at October term 1841; when he demurred generally to the indictment, and the attorney for the commonwealth joined in the demurrer. The court, after argument of the demurrer, overruled the same, and the defendant thereupon pleaded not guilty to the indictment. A trial being had,
797 the jury found him *guilty, and assessed his fine to one dollar; and the court rendered judgment against him, for the said fine and the costs of the prosecution, and that he be imprisoned in the county jail for the term of one year without bail or mainprize.

Upon his petition, the general court, at December term 1841, awarded a writ of error to the judgment.

Standard for the plaintiff in error: the attorney general for the commonwealth.

FIELD, J., delivered the opinion of the court. This case has been argued upon a variety of questions that arise upon the record; but as the opinion of the court upon a single question is decisive of the cause, we deem it necessary to refer to so much only of the record as will be sufficient to shew the point upon which the decision is made.

The indictment, as to the perjury, is in the following words: [Here the judge recited the terms of the indictment as above set forth.] Upon the general demurrer, all defects in the indictment, both as to form and substance, were put in issue. *Commonwealth v. Jackson*, 2 Va. Cas. 501. Whether we regard the indictment in this case as an indictment for perjury at common law, or for perjury under the virginian statute, 1 Rev. Code, ch. 148, § 1, p. 571, we are unanimously of opinion that it is defective, in not setting forth the crime of perjury with sufficient direct and positive averments. An indictment upon the statute should aver that the defendant did "wilfully, corruptly and falsely" swear or affirm, as the case may be. An indictment at common law need not contain these words; but if they are omitted, such other words should be used in lieu of them, as will serve to shew the criminal intent, give to the indictment a precise and sufficient certainty, and apprise the defendant of the distinct charge made against him.

798 *In all indictments, the offence charged should be averred distinctly and directly, and not by way of intendment or argument. In this case the indictment, after setting out the evidence given, charges that the "said evidence was wilfully false and corrupt:" but nowhere does it directly

charge that the accused wilfully and corruptly swore falsely. We regard the averment (if averment it be) that the "evidence was wilfully false and corrupt," at most as charging the corrupt oath by argument only, and not directly.

Judgment of circuit court reversed, and judgment entered sustaining the demurrer, and discharging the plaintiff in error from the indictment.

(Note by reporter.) It has been held in *Pennsylvania*, that it is not indispensable, in mentioning the act of swearing, to state that the defendant did falsely, corruptly and voluntarily swear, in order to constitute the offence of perjury at common law. The allegation that the defendant did voluntarily and of his own free will and accord propose to the court to purge himself of the contempt alleged against him; and then (after stating the oath, the matter deposed to, and wherein it was false) the concluding averment that so the defendant, by his own act and consent, and of his own most wicked and corrupt mind and disposition, in manner aforesaid did knowingly, falsely, wickedly, maliciously, wilfully and corruptly commit wilful and corrupt perjury,—did, it was considered, sufficiently assert and charge against the defendant the wilfulness, absoluteness, falsity and malice of the oath. *Respublica v. Newell*, 3 Yeates 407.

In *Cox's case*, 1 Leach's C. L. 71, an indictment at common law, which charged that the defendant "falsely, maliciously, wickedly and corruptly swore," &c. was holden sufficiently to imply that the offence was committed wilfully: but it was considered at the same time, that in an indictment on the statute 5 Eliz. ch. 9, the offence must be expressly laid to have been wilfully committed.

In *The king v. Richards*, 7 Dowl. & Ry. 665, 16 Eng. Com. Law Rep. 814, the indictment charged that the defendant was duly sworn as a witness on the trial of I. H. "and then and there falsely and maliciously gave false testimony against the said I. H." &c. "by then and there falsely deposing and giving in 799 evidence" *&c. and so the said defendant "did in manner and form aforesaid commit wilful and corrupt perjury." The case coming before the court of king's bench on a rule nisi for arresting the judgment, Abbott, C. J., said—"I am of opinion that the rule must be made absolute. As to the first four counts, the objection is, that they do not charge that the defendant swore wilfully and corruptly, but merely that he swore falsely and maliciously. Now, according to every definition, the offence of perjury consists in swearing to some matter which is untrue, wilfully and corruptly. Whether the word maliciously may supply the place of one or other of these words, it is not necessary, in the present case, expressly to decide, because this indictment contains neither; but the case of *Rex v. Cox*, Leach's Cr. Ca. 71, is an express authority to shew, that without one or the other, an indictment for perjury cannot be sustained. It still remains a question, whether the use of one, in the absence of the other, would be sufficient." The other judges present (Bayley and Littledale) concurred. The case of *The king v. Stephens*, 5 Barn. & Cress. 246, 11 Eng. Com. Law Rep. 216, decided by the court of king's bench at the same time with *Richards's case*, is in all respects similar to it.

800 *Pitman v. The Commonwealth.
Wright v. Same.

June, 1843.

Gaming—Construction of Statute.—The statute of March 26, 1842, (Acts of 1841-2, ch. 69, § 4, p. 44,) enacting "that in all recoveries hereafter had for violations of the gaming laws, the fee recovered shall be ten dollars for the commonwealth's attorney, and the sum of thirty dollars shall be paid to the literary fund in lieu of the sum as at present provided," had no application whatever to offences committed before its passage, but such offences remained liable to prosecution and punishment under the preexisting law, in the same manner as if the said statute had never been passed.

Same—Process—Capias—Reversal of Judgment.—A party being indicted for playing at an unlawful game, the court immediately awards a capias against him, returnable the next day; at the return day, he moves to quash the capias as improper process, which motion the court overrules, and compels him to plead forthwith: HELD, the irregularity (if any) in this proceeding is no sufficient ground to reverse judgment against the defendant.

John W. Pitman was indicted in the court of hustings for the town of Fredericksburg, on the 13th of May 1842, for unlawful gaming by playing at cards at the Eagle tavern, a place of public resort in said corporation, within six months then last past. On the 15th of July 1842, the defendant, having been duly summoned to answer the indictment, appeared and pleaded not guilty; and a trial being thereupon had, the jury found him guilty in manner and form as in the indictment alleged, and the court rendered judgment against him for a fine of 20 dollars and the costs of the prosecution. By a bill of exceptions filed by the defendant, it appeared, that on the trial of the issue, the commonwealth proved that the said defendant, within six months before the finding of the indictment, and prior to the first of March 1842, did game by playing at a game played with cards, at the Eagle tavern, a place of public resort in Fredericksburg; which being all the facts

801 proved on the trial, the defendant, after the verdict was rendered, moved the court to set it aside and grant him a new trial, upon the ground that the said verdict was against the law and the evidence of the case; and this motion being overruled by the court, he excepted to its opinion. To the judgment of the court of hustings a writ of error was awarded by the judge of the circuit superior court of Spotsylvania, upon a petition of the defendant, in which he insisted that the act of March 26, 1842, (Acts of 1841-2, ch. 69, § 4, p. 44,) enacting "that in all recoveries hereafter had for violations of the gaming laws, the fee recovered shall be ten dollars for the

commonwealth's attorney, and the sum of thirty dollars shall be paid to the literary fund in lieu of the sum as at present provided," had the effect to repeal the preexisting statute for punishing this class of offences; and as it contained no provision for the prosecution of offences committed before its passage, and the only act of gaming proved against this defendant was committed before that date, this prosecution could not be sustained, and consequently the court of hustings erred in overruling the motion for a new trial. The cause was heard in the circuit court of Spotsylvania at October term 1842; when that court was of opinion, that the statute of March 26, 1842 did not operate to discharge the punishment of offences committed prior to its passage, but that the court of hustings nevertheless erred in giving judgment for the sum of 20 dollars fine, instead of 30 dollars. The circuit court, therefore, proceeding to give such judgment as the court of hustings ought to have given, considered that the plaintiff in error, for the offence alleged against him in the indictment, forfeit and pay to the commonwealth 30 dollars, and that he pay the costs of the prosecution in the said court of hustings, including a fee of ten dollars to the attorney for the commonwealth, and also the costs expended about the defence in the circuit court.

802 *Thomas Wright was also indicted in the said court of hustings, on the same 13th of May 1842, for unlawful gaming by playing at cards at the tavern of R. L. Blackburn, a place of public resort in said corporation, within six months then last past. On the motion of the attorney for the commonwealth, the court, immediately upon the finding of the indictment, awarded a writ of capias against the defendant, returnable the next day. On the return day (the 14th) the defendant moved the court to quash the capias, as irregular and improper process; but the court overruled the motion, and required him to plead forthwith to the indictment; to which opinion and decision of the court he excepted. He thereupon pleaded not guilty, and a jury was impaneled for his trial. At the trial, the commonwealth having offered in evidence the testimony of a witness, who deposed that in December 1841 the defendant played a game with cards at R. L. Blackburn's tavern, a place of public resort in Fredericksburg, and this being all the evidence offered on the part of the commonwealth, the defendant moved the court to instruct the jury, that, upon the evidence aforesaid, the prosecution in this case could not be maintained, and that the jury ought to find a verdict for the defendant. The court refused to give such instruction, and the defendant excepted to its opinion. The jury having found him guilty in manner and form as alleged in the indictment, the court rendered judgment against him for a fine of thirty dollars, and the costs of the prosecution. He then applied to the circuit court of Spotsylvania for a writ of

***Gaming—Construction of Statute.**—The principal case is cited in 2 Va. Law Reg. 458. See monographic note on "Gaming" appended to Neal v. Com., 2 Gratt. 917.

error; alleging in his petition (among other objections which it is unnecessary to notice), 1. that the writ of *capias* was not the proper process upon the indictment, but unlawful, injurious and oppressive, and the court of hustings erred in overruling the motion to quash the same; 2. that this prosecution, being instituted since the passage of the act of March 26, 1842, for 803 an offence *committed before, could not be maintained; 3. that even if the prosecution could be maintained, yet the judgment was wrong in imposing a fine of thirty dollars, instead of twenty. The circuit court awarded the writ of error; but afterwards, at October term 1842, upon the hearing of the cause, affirmed the judgment of the court of hustings, with costs.

On the several petitions of Pitman and Wright, the general court, at December term 1842, awarded writs of error to the judgments of the circuit court against them respectively. Both of them, in their petitions, relied upon the act of March 26, 1842, as operating to discharge them from prosecution: and Wright also insisted that the issuing of the *capias* against him, and the refusal of the court to quash it, were erroneous.

The cases were argued by Morson, Seddon and Archer for the plaintiffs in error, and by the attorney general for the commonwealth.

FRY, J., delivered the opinion of the majority of the court.—These cases present judgments under the gaming laws, for the offences committed before the passage of the act of March 26, 1842.

It is contended that the judgments are erroneous, because the laws existing previous to the said act were repealed by it, and of consequence all previous offences were thereby remitted or discharged.

The question depends, therefore, on the true construction of the act of the 26th of March 1842. The act is in these words: "That in all recoveries hereafter had for violations of the gaming laws, the fee recovered shall be ten dollars for the commonwealth's attorney, and the sum of thirty dollars shall be paid to the literary fund in lieu of the sum as at present provided."

804 *These are brief words, and, we must confess, not free from difficulty. What construction shall we give them? Do they repeal the previous offences?

There is no repealing clause; and the words do not import any repeal. So far from it, they imply the continuance of the previous laws. "In all recoveries hereafter had for violations of the gaming laws" &c. What recoveries can be had, or violations occur, under laws that have no existence? The act manifestly contemplates that the previous laws shall continue in force, and recoveries continue to be had under them.

It is said, however, that though there is no express repeal of the previous laws, there is an implied one: that the act prescribes

a new punishment for past offences,—an aggravated punishment,—by increasing the fine from twenty to thirty dollars: that it is inconsistent with the former laws, and, being the last expression of the legislative will, must abrogate them, upon the principle, *leges posteriores priores contrarias abrogant*.

The authorities cited at the bar shew, that implied repeals are not favoured; that two affirmative statutes shall coexist if they can, and this notwithstanding the use of general words, whose grammatical construction might imply the contrary. 6 Bac. Abr. 439.*

805 *Let us then enquire why we are obliged to imply a repeal of the previous laws, and discharge of previous offences? Did the legislature intend such repeal and discharge? For we admit that in this act, as in all others, we must enquire into the legislative intent, and give effect to it if we can.

Admitting, then, (though some of the judges deny it) that the act varied and increased the punishment prescribed by former laws, the question occurs, to what offences does it apply? Does it apply to violations committed before its passage, or only to those committed afterwards? If it applies only to offences committed after its passage, it does not conflict with the former law, and consequently both will stand. If it applies, or can be legally applied, to previous offences, then the conflict will arise, and the last law only will have effect.

Before pursuing this question, we advert to a few general rules of construction.

1. The laws against gaming are to be construed as remedial laws. 2. Such construction shall be made as will give effect to the legislative intent, and not defeat it. *Magis valeat quam pereat*. 3. The construction shall be, as nearly as possible, in conformity with the principles of the common law. 4. If it be possible, a reasonable construction shall be made, and a reasonable and lawful intent imputed, rather than one unreasonable and unlawful. 5. All laws are, or ought to be, prospective in their action. Retrospective laws are odious, and never presumed to be intended, unless

*Note by the judge. The statute of 29 Car. 2. ch. 8, enacted, "that from and after the 24th day of June 1677, no action shall be brought to charge any person upon any agreement made upon consideration of marriage, unless the agreement upon which such action shall be brought &c. shall be in writing and signed." After this statute, an action was brought upon a promise in consideration of marriage, not in writing, made before the act passed. Upon special verdict found, it was adjudged for the plaintiff. And by the court: "It cannot be presumed that the statute was to have a retrospect, so as to take away a right of action which the plaintiff was entitled to before the time of its commencement." *Gilmore v. Shuter*, 2 Lev. 297. And see *Wader v. Arell*, 2 Wash. 282; *Wallace & ux. v. Taliaferro & ux.*, 3 Call 447; *Elliott's ex'or v. Lyell*, 3 Call 268; *Commonwealth v. Hewitt*, 2 Hen. & Munf. 181.

by inevitable construction. And ex post facto laws are void. 6. All laws in pari materia should be considered together.

Let us pursue the enquiry with the aid of these principles.

Does the law mean to embrace violations before its passage, and to vary and enlarge the punishment?

806 *To suppose that the legislature so intended is to suppose, first, that it intended what was unjust in design, and vain and idle in effect. It is to suppose the legislature intended what was wrong in itself, and what it had no power to inflict. Shall we impute his unrighteous and idle purpose to it? And to what end? In order that we may give effect to it? By no means—the plaintiffs in error contend not for that—but in order that we may both deny effect to this new purpose of the assembly, and, whilst we refuse to give it effect, make it abrogate the former law, which it was intended to supply: in other words, that we may make it something, and nothing; give it the power to kill, but only, like the insect, to lose its life in the wound. If the legislature intended to apply the law to former cases, then it cannot take effect; it is a dead letter. If such was not the legislative intent, the question is at an end. And in either case there is no conflict with the old law, and that law remains in full force.

Secondly, to apply the law to former cases makes it ex post facto. It imputes an unreasonable and unlawful purpose to the legislature. It defeats the purpose itself; or, worse than useless, as the plaintiffs contend, abolishes the former punishment, while it fails to inflict the new. It violates the principle that the laws should be prospective. It fails (contrary to the declaration that the laws shall be deemed remedial) to advance the remedy and suppress the mischief contemplated by the laws against gaming, by giving impunity to offenders against them.

For the foregoing reasons, we think the legislature did not intend to apply their enactment to previous offences; and if general words are used that admit of such construction, we are bound to limit their application, and to give them a reasonable and constitutional interpretation. We may even interpolate words for such purpose.

Abundant cases, we believe, may be 807 *found to this effect. (See cases cited in preceding note.) And to illustrate the subject by an example, suppose the legislature should enact "that in all convictions hereafter had for any violations of the laws against larceny, the party shall be hanged;" what construction would we give it? Would we not say it applied to future violations only, and was even so intended by the legislature, notwithstanding the general words used? And if we even supposed they intended to apply it to past offences, would we turn such abortive intent into an implied legislative pardon for all such offenders?

If we limit the act of March 26, 1842 to

future offences, then it is to be construed as if it read thus—"That in all recoveries hereafter had for violations of the gaming laws hereafter committed," &c. Supply these words, or apply the act to future offences only, and the cases before us fall precisely within the principle of Pegram's case, 1 Leigh 569. In 1825, Pegram had been presented for keeping a faro bank table. At this time, the offence was punishable by imprisonment in the common jail, and by stripes at the discretion of the court. By the act of 1827-8 it was enacted, that whoever should thereafter be guilty of any of the offences &c. should be punished by imprisonment and fine, &c.—changing the punishment. Pegram, who was not arrested until after this act went into effect, insisted that he was entitled to be discharged. But the court said: "In the case of Attoo v. The Commonwealth, 2 Virg. Ca. p. 382, it was decided, that where a new statute prescribes a new punishment for an offence which had been previously punishable otherwise, and the new statute repeals all laws which come within its purview, but does not provide that offences committed before the operation of the new law, shall be punished under the old, such repeal operates as a discharge of all such offenders.

But that case is very different from 808 *this. There the law repealed and annulled the punishment enacted before that time against the offenders: here the act of 1827-8 does not, either expressly or impliedly, repeal the previous punishment prescribed by the act of 1822-3, except in the case of future offences. There is no repealing clause in the act of 1827-8; and although the principle is correct that *leges posteriores priores abrogant*, yet they only abrogate them from the time that the latter law is passed, or goes into effect. The principle on which this rule prevails is, that the latter statute being incompatible with the former, they cannot exist together, and the latest expression of the will of the legislature is the law. But there is no incompatibility in the statutes now under consideration. A punishment affixed to an offence prior to the 1st May 1828, is not incompatible with a different punishment, either lighter or more severe, affixed to the same offence subsequent to that date. They may both well stand together."

The reasoning in the above case of Pegram, under the construction which we give to the act of 1842, answers all the cases which have been cited before us on the effect of the repeal of statutes.

We think the conclusion we have come to, best effects the intention of the legislature. It puts a reasonable and just construction upon the act, by making it provide punishment for future cases only, without attempting to provide one for past offences. If the legislature intended to apply it to past offences, and to punish them higher than before, the attempt is abortive; and an abortive attempt to punish more severely, should not be converted into an implied or intended dispensation from all punishment

whatsoever. We think that we best subserve the legislative intent to punish, by leaving in force the punishment lawfully inflicted, though we deny that unlawfully devised.

809 *The judges are not unanimous in this opinion. Some of them think that the court below committed no error, because the act does not vary or increase the punishment. Some of them are for reversing the judgments and discharging the offenders altogether: and one of them thinks that the act was intended to apply to former cases, but is void as to the fine, and can affect only the taxation of costs.

As to the question arising on the process in one of the cases, a majority of the judges think there is no error which should affect the judgment of the court. Some of the judges think it was competent to the court to award the process; some, that if any error was committed in that respect, it is not now material; while two of them think there was error in that respect, and that, for such error, the judgment should be reversed, and the cause remanded for a summons to issue, &c.

FIELD, J. I concur with the majority of the court in the judgment to be given; but as I take a view of the subject entirely different from that of the other judges, I will in a few words state my own reasons. In construing the laws of Virginia to suppress unlawful gaming, the statute requires that they should be construed remedially, so as to advance the object and intention of the legislature. The act of the 26th March 1842 was intended by the legislature to apply to all cases of unlawful gaming, in which the attorney's fee and fine together amounted to 40 dollars. It was not their intention to repeal any existing law, nor did they suppose that they were about to increase the penalty. Their idea was, that there would be an apportionment of the attorney's fee in part for the benefit of the commonwealth; that so far as the defendant was concerned, the amount to be paid by him being the same, the punishment by fine would be the same. But this

810 *view cannot be sustained. Costs and charges of prosecution are never regarded as a part of the penalty or punishment for the offence. The law of costs may at any time be changed and modified. Costs may be increased or diminished at the will and pleasure of the legislature, and applied to all prosecutions, whether they be for offences committed before or after the passage of the act. It was competent for the legislature, after the 26th of March 1842, to pass another law raising the attorney's fee to 20 dollars, 30 dollars, or any other sum that they might deem reasonable and proper. If such law had been passed, how would the act of the 26th March 1842, as to the 30 dollars for the commonwealth, be then regarded? Could it be then said that the penalty had not been increased? Whatever may have been the understanding of the legislature upon this point, it is very clear to my mind, that when they took 10

dollars from the attorney's fee and added it to the penalty, which was 20 dollars, they did thereby increase the penalty to 30 dollars. This law, therefore, so far as it was intended to apply to offences which had been committed before its passage, was void; and being void, it cannot have the effect of repealing by implication any previously existing law, with which it would have been in conflict if it had been a valid law. It is not in conflict with any law against unlawful gaming, as to offences theretofore committed, because it is void, and as a piece of blank paper. But as to offences committed after the passage of the act, it is in conflict with the old law, because it increases the penalty from 20 dollars to 30 dollars. From this view of the case it follows, that as to the offences of which the defendants have been convicted (both of which were committed before the 1st of March 1842), the old law was in force, and is yet in force, and judgments should be rendered against them for the fine of 20 dollars only, and costs. In 811 the taxation of costs, *the attorney's fee of 10 dollars only should be taxed.

The law of the 26th March 1842, not being void in that respect, repeals the old law as to the attorney's fee, by implication.

As to the objection taken by Wright to the process, I do not regard that as a matter about which error can be assigned in this record, though I am clearly of opinion that the proper process was a summons, and not a *capias*. Upon habeas corpus, I would have discharged the defendant. But as it was competent for the court in such a case, by express law, to have issued the summons returnable instantly, and to give judgment instantly against the defendant if he failed to plead, it was certainly unnecessary to go through the ridiculous absurdity of issuing process to bring a man before the court, who was then there in his proper person, not as a casual bystander, but as a party to the record. Being then present judicially as party upon the record, the court might have quashed the *capias*, and at the same time made an order in his presence requiring him to plead forthwith; and, if he failed to plead, might have entered judgment against him according to law.

CHRISTIAN, J. I dissent entirely from the opinion and judgment pronounced in these cases by the majority of the court, and from the whole course of reasoning so ably and ingeniously urged in support of them. And so confident do I feel that the view I have taken of the law is the correct one, that nothing less than the great respect I entertain for the ability and legal learning of my brethren who differ with me, could induce me even to doubt. I beg leave to state, as briefly as I can, the grounds and reasons for my opinion. I regard these cases as important, not on account of the interest to the parties concerned, but as regards the principle which I consider involved in and settled by the judgment of the court.

812 *These cases depend upon the proper

construction to be given to the act of the 26th March 1842. The defendants were indicted for offences against the gaming laws. These offences were committed prior to the passage of the act of 26th March 1842. At the time they were committed, the punishment for them was a pecuniary fine of 20 dollars. The act of 26th March 1842 is in these words: [Here the judge recited it.] Can any judgment for a fine be rendered against the defendants? and if any, what, and under what law? I maintain that no judgment can be rendered. None can be rendered for the fine of thirty dollars, as directed by the act of 26th March 1842, because that act, having passed since the offences were committed, is, as to all such cases, *ex post facto*, and hence to apply it to such cases would be contrary to the constitution. Nor can any judgment be rendered for the fine of twenty dollars; because the act in force at the time the offences were committed, which imposed the fine of twenty dollars, is repealed by the act of 26th March 1842. For although the act of March 1842 contains no clause of express repeal, it nevertheless operates an implied repeal of all previous laws relating to the same subject, so far as it conflicts or is inconsistent with them; the principle being, that where there are two inconsistent statutes upon the same subject, the last statute repeals the former by implication, to the extent of such inconsistency. If authority should be required to sustain a principle so obviously just and right, I refer to *Dwarris on Statutes* 672, 3; 6 *Bac. Abr.* 372, 3; 11 *Rep.* 63a.; 8 *East* 580; 4 *Burr.* 2026; *Leach's Cr. Cas.* 228.

The only remaining question, then, is whether the act of 26th March 1842 be inconsistent with the previous laws on the same subject. Can that act stand in harmony with the former statute, which for these offences imposed a fine of twenty dollars? I humbly insist, that so far from being harmonious, the two statutes are
813 directly *inconsistent and hostile.

The act of the 26th March is so short, so plain, so simple, so direct, and the meaning of the legislative body so obvious, that argument cannot render it more clear, nor can metaphysics obscure it. It declares that "in all recoveries hereafter had" &c. the fine imposed shall be thirty dollars, in lieu of the fine now imposed by law. These cases, it seems to my mind, are stated, argued, and concluded by answering two questions; 1st. when were the offences committed? and 2. when were the recoveries had? If the offences were committed before the act of March 1842, and the recoveries were after, the court can render no judgment for the fine. I have already shewn that where two statutes relating to the same subject are in hostility to each other, the last statute gives the law of the case, and, to the extent of the incompatibility, is regarded as impliedly repealing the first. So far as consequences are concerned, can it make any difference whether the repeal is express or implied? I apprehend not. I can see no

difference on principle, and if there be any authority, I beg to see it; I have never seen or heard of such. To prove, then, that if there had been in the act of 26th March 1842 a clause repealing all acts coming within its purview, no judgment could have been rendered in these cases, I will refer to the following cases decided by the general court: *Scutt's case*, 2 *Virg. Cas.* 54; *Attoo's case*, 2 *Virg. Cas.* 382, and *Leftwich's case*, 5 *Rand.* 657,—in all and each of which the proposition is distinctly announced and clearly settled, that where a new statute prescribes a new punishment for an offence previously punishable otherwise, and the new statute repeals all laws coming within its purview, but does not provide that offences committed before the operation of the new law shall be punished under the old, such repeal operates as a discharge of all such offenders. In *Leftwich's case*, the defendant was indicted for marrying his deceased wife's sister. At the time
814 of *the offence committed, the punishment prescribed by statute was separation of the parties. Before the trial, the legislature, by a new act, provided a different punishment, to wit, fine and imprisonment; and the new act contained a clause of repeal of all acts within its purview. The general court unanimously decided that no judgment could be rendered, either under the old act or the new. *Scutt's case* is still stronger. The defendant was indicted for malicious stabbing; the act being charged and proved to have been committed on the 29th of March 1817, at which time such offences were punishable under the act of 1803. The trial was had on the 17th of April 1817. On the 20th of February 1817, the legislature passed another act upon the subject of stabbing, commencing from and after the first day of April 1817, which, however, provided the same punishment for malicious stabbing as was prescribed by the act of 1803. But the act of February 1817 contained a clause repealing all acts within its purview. The general court, with the able judge White at its head, unanimously decided that no judgment could be rendered against the accused. In *Attoo's case*, the accused, a free man of colour, was indicted on the 15th of September 1823, for forgery. The offences was charged and proved to have been committed on the 10th May 1823, at which time it was punishable under the act of 1819, by confinement in the penitentiary. By an act passed the 21st of February 1823, which went into operation after the offence was committed, but before the indictment and trial, the punishment for the offence was changed to sale and transportation, and the act contained a clause of repeal, without making any provision for the prosecution of offences before committed. The court unanimously decided that no judgment could be rendered against the accused, and that he be acquitted and discharged.

815 *But the majority of this court rely upon *Pegram's case*, 1 *Leigh* 569, as authority against the views I take of the

cases at bar, and as answering all the cases which have been cited before us on the effect of the repeal of statutes. Pegram's case, properly understood, furnishes, as I humbly think, no authority whatever that militates against any principle for which I contend, or against any principle properly involved in the cases before us. What is that case? Pegram was indicted for keeping and exhibiting a faro bank table. The offence, at the time it was committed, was punishable under the act of 1822-3, by confinement in the common jail and by strike. Pegram was not arrested and put upon his trial until December 1829. In the mean time, to wit, at the session of 1827-8, the legislature passed an act in which they declared, that whoever should thereafter be guilty of the said offence, should be punished by confinement in the county jail, and by fine of not less than 200 nor more than 800 dollars. This act contained no repealing clause. Pegram insisted that the act of 1822-3, which was in operation at the time his offence was charged to have been committed, was repealed by the act of 1827-8, because the latter act prescribed a new punishment. But the court decided that the act of 1822-3 was not repealed by the act of 1827-8, either expressly or impliedly. And why did they so decide? Because the act of 1827-8, by its very letter, provided only for the case of those who should thereafter be guilty, leaving entirely intact the case of previous offenders. There was no express repeal, and no inconsistency to work an implied one. But suppose the legislature, instead of using the language "whoever shall hereafter be guilty" &c. had said that in all judgments hereafter rendered against any person found guilty of keeping and exhibiting a faro bank table, the sentence shall be that the accused be hanged, in lieu of the punishment now prescribed; the case would
816 be in principle precisely *like the cases at bar, and in such case, upon the authorities cited, no judgment could be rendered: not the judgment of hanging, because it would be *ex post facto*; and by the plain terms of the supposed act, no other judgment could be rendered.

The majority of the court have also relied upon a decision made in England upon the statute of 29 Car. 2, ch. 3. I have not examined that case, but I see enough in the statute itself to satisfy me that the decision ought not to be regarded as of any authority or weight in cases like those now before us. That statute is one affecting contracts. To give here to such an act a construction depriving the party of his remedy, would be plainly in violation of the constitution of the United States, which declares that "no state shall pass any law impairing the obligation of contracts." And in this the constitution but affirms that great principle of the common law, under the influence of which the court, in the case referred to, very properly decided as it did.

Much has been said about the intention

of the legislature, and it is insisted by the majority of the court, that the legislature could never have intended that offenders such as Wright and Pitman should go unpunished. It is sufficient to reply, *ita lex scripta est*. Where the language of the legislature is neither equivocal nor ambiguous, but short, plain, simple and positive, we are bound to give effect to it according to the obvious meaning, without looking to the consequences. This is both the proper, and the only safe rule. If it be departed from, every thing is left in doubt and uncertainty; men are set to guessing at the legislative meaning, and we may have as many different interpretations of an act, as there are judges whose duty it is to expound it. Suppose that in the cases of Scutt, Attoo and Leftwich, heretofore cited, the general court had resorted to such a mode of ascertaining the intention of the legislature; all must see at
817 once that the judgment *in each of those cases must have been the reverse of what it was. For they must have known that it was not the intention of the legislature, in enacting the several laws under which those cases were decided, to pass acts of amnesty and pardon for all who had previously been guilty of similar crimes, though that was the consequence of the court's decision. It is the duty of the court to expound the statute as it is written, and if mischievous consequences follow, the fault is not theirs. The legislature will in all cases do as they have done in the present instance,—guard against the mischief by subsequent legislation. At the late session, they passed an act (Sess. Acts of 1842-3, p. 57, ch. 84), remedying, as far as practicable, the mischief resulting from the act of the 26th March 1842, and thereby giving to the last-mentioned act a legislative construction very different from that given by this court; plainly shewing that they themselves did not understand the act as this court construed it. And I maintain, that admitting the fact that some mischief, or even very great mischief, may sometimes result from adhering strictly to the rule which I insist is the true one, such mischief is only as dust in the balance, compared to the evil that may result from the adoption of the principle which I think involved in the judgment of the court in the cases before us,—a principle by which the citizen is to be held amenable to laws that are *ex post facto*, and which weakens, if it does not cut asunder, the tenure by which we hold our property, our liberties, and our very lives.

The majority of the court, speaking of the act of 26th March 1842, have said, "These are brief words, and not free from difficulty." I think that if the difficulty were such as to create even doubt in the mind of the court as to the true construction of the act, the decision should have been in favour of the defendants.

818 *Upon the other question, I concur with the majority of the court.

In the foregoing opinion, judges Brown and Clopton concur.

In Pitman's case, judgment of circuit court reversed, and that of the court of hustings affirmed, with costs to the commonwealth of her defence in the circuit court.

In Wright's case, judgment of circuit court reversed. "And this court proceeding to enter such judgment in the premises as the said circuit superior court ought to have rendered, it is farther considered that the said judgment of the court of hustings for the town of Fredericksburg be also reversed and annulled, and that the said Thomas Wright forfeit and pay to the commonwealth, instead of the fine of thirty dollars thereby imposed, a fine of twenty dollars only, and that he pay the costs of the prosecution in the said court of hustings, including a fee of twenty dollars to the attorney prosecuting in that court on behalf of the commonwealth."

819 *DECEMBER TERM 1843.

JUDGES PRESENT.

*Smith,
Field,
Scott,
Leigh,
Thompson,
Estill,
Brown,*

*Duncan,
Fry,
Douglass,
Christian,
Wilson,
Gholson,
Bayly.*

The Commonwealth v. Hart.

December, 1843.

Criminal Law—Perjury—Witness—Competency—Case at Bar.—On the trial of an indictment for a perjury, the commonwealth offers as a witness a person against whom a civil action is pending, wherein the defendant in the indictment has been summoned as a witness for the opposite party: **Held**, the witness so offered for the commonwealth has no such interest in the prosecution as renders him incompetent to testify.

In the circuit superior court of Harrison county, on the 20th of May 1842, an indictment was found against Josiah Hart for perjury, alleged to have been committed by him on the 11th of December 1841, in falsely swearing to a schedule then subscribed and delivered in by him as an insolvent debtor, under a ca. sa. issued on a judgment recovered against him by Burton Despard assignee of Henry Shue. The indictment was found upon the information of James Devers and Solomon Johnson, witnesses called on by the grand jury.

820 *The defendant having pleaded not guilty, and a jury being impaneled for his trial, the said James Devers was offered as a witness on the part of the prosecution, and was about to be examined, when he was objected to by the defendant on the ground of incompetency from interest. The evidence adduced in support of

the objection disclosed the following state of facts.

The judgment and execution set out in the indictment had been transferred, prior to the defendant's taking the oath of insolvency as aforesaid, to the said James Devers, who was entitled to the benefit thereof at the time the oath of insolvency was taken. Devers subsequently sued out a writ of fieri facias upon the judgment, directed to the sheriff of Harrison, who levied the same upon certain chattels in the possession of Josiah Hart the defendant. This property being claimed by a certain John G. Hart, and a doubt thereupon arising as to the title, the sheriff required an indemnifying bond; which, on the 15th of February 1842, was accordingly given in the usual form, by James Devers with James Blair as his surety. The sheriff having thereupon proceeded to sell the property, an action was shortly afterwards instituted upon the indemnifying bond, at the relation and for the benefit of John G. Hart, against Devers and his surety. The declaration was filed at June rules 1842; the defendants pleaded to issue at October rules 1842; and the action was still pending and undetermined in October 1843, when Devers was offered as a witness for the commonwealth upon the trial of the said indictment. In the action on the indemnifying bond, the said Josiah Hart, who stood indicted as aforesaid, had been summoned as a witness for the plaintiff.

The question arising upon the motion of the prisoner to exclude the examination of the said Devers as a witness being considered by the circuit court to be new and difficult, by consent of the prisoner, 821 the court discharged *the jury impaneled in the case, and adjourned to this court the question, Whether the said James Devers is a competent witness on behalf of the prosecution?

FRY, J., delivered the opinion of the court.—The court deems it right to repeat what was said in Nix's case, 11 Leigh 636, that the practice of dismissing a jury to take the opinion of this court upon matters occurring in the course of a trial, is inconvenient and hazardous, and not to be commended. Acting on that case however, as a precedent, we will consider the case adjourned.

The exclusion of the witness Devers is supposed to be sought on the ground that he is interested to get rid of the accused as a witness against him; which would be the effect of the accused being convicted of perjury. But this effect is not peculiar to a conviction for perjury. It would follow if the accused were convicted of any felony punishable by death, or by confinement in the penitentiary. For the same act which declares that "no person convicted of perjury, although he be pardoned or punished for the same, shall be capable of being a witness in any case," declares also, that "no person convicted of treason, murder, or other felony whatsoever, shall be ad-

mitted as a witness in any case whatsoever, unless he be first pardoned, or shall have received such punishment, as by law ought to be inflicted upon such conviction." 1 Rev. Code, ch. 131, § 1, 2, p. 517. If the accused should be convicted of any capital felony, he would be put out of the way very effectually; and if sentenced to confinement in the penitentiary, though the disability is pro tempore only, yet it would have the effect to get rid of the witness at the trial, as it is not likely the civil action would be kept depending for three years at least, or more, in order to abide his discharge. In a prosecution for felony or perjury, then, suppose the accused to be a

material witness in a pending civil action against one who is offered *as a witness against him; is the witness offered for the prosecution incompetent for that reason? "It is a general rule that in criminal prosecutions the injured party may be a witness, although, on the conviction of the prisoner, he will in many cases be entitled to a reward.—It is the constant practice on an indictment for robbery, to admit evidence of a person who has been robbed; and it is not a sufficient objection that he will be entitled to the restitution of his property on the conviction of the offender. The same evidence is admitted in prosecutions for a cheat or perjury; and in the case of perjury it is not material whether the party has or has not paid the judgment in the suit in which the perjury was committed.—In other cases, also, the party aggrieved will be allowed to give evidence in a criminal prosecution, as he cannot afterwards avail himself of the record of conviction, in any future suit, in order to prove the criminal act." 1 Phillpotts on Ev. (Cowen's ed.) 119, 120, 121. And after discussing the rule in the case of forgery, with the history and grounds of it, this author adds, "With regard to any probable advantage the witness may be supposed to receive from a conviction, by the prisoner being disabled from giving evidence in any future suit, or from the great probability of his failing in an action in consequence of the discredit which a conviction must throw upon the instrument,—these are circumstances which a jury would be directed to consider as forming a strong bias on the witness's mind, but which cannot render him incompetent." Id. 124.

This court must have acted on the principles above stated, in Baker's case, 2 Va. Cas. 353, and Gilliam's case, 4 Leigh 688, wherein it was held that a voluntary informer in the case of a misdemeanour, though liable for costs, was a good witness. For there is nothing in the statute which declares that such informer may be a witness, or necessarily implies it: as one

may *well be a prosecutor, and yet not the witness to procure or support the indictment.

We do not mean to say that there are no exceptions to the principle before stated. But in general, the rule applies in all crim-

inal pleas of the commonwealth. There are some cases where, though the form of the proceeding is criminal, it is designed only as a civil remedy, and to vindicate some private right. These perhaps may be exceptions; and possibly others.

We have considered the case as if Josiah Hart were a certain and material witness against Devers in the depending civil cause. But the case does not present him in that light. For, though summoned, it is not certain he would be called, nor that if called he would be material, or would depose to any thing which might not be proved by others. Does this shew a case in which the witness would have any certain interest in his conviction? "The true test of the interest of a witness is, that he will either gain or lose by the direct legal operation and effect of the judgment, or that the record will be legal evidence for or against him in some other action. It must be a present, certain and vested interest, and not an interest uncertain, remote and contingent; and if the interest is of a doubtful nature, the objection goes to his credibility. For, being always presumed to be competent, the burthen of proof is on the objecting party, to sustain his objection to the competency; and if he fails satisfactorily to establish it, the witness is to be sworn." Greenleaf on Evid. 434. This principle we think applies to the situation of the witness, were we even mistaken in the view first presented. And though he might use the record in any future suit, yet every one else might do the same in any suit in which he was offered as a witness. In such case, the record would not be used in the ordinary sense of the rule; for, as such, it would be res inter alios acta, and could not be admitted.

It could be used *by every body, however, to prove the fact of the conviction, and the consequent disability of the party.

We have found but two cases, bearing more directly than others on the question before us; Rex v. Hulme, 7 Carr. & Payne 8, 32 Eng. C. L. Rep. 417, and The State v. M'Kennan, 1 Harper's South Car. Rep. 302. The first was tried before Lord Denman. The defendant was indicted for perjury, committed on the trial of an action by the firm of Hulme & Co. against Gibson & others. Gibson was called, and stated that he expected the defendant Hulme would be called as a witness against him in another cause which was coming on between the same parties. The witness was objected to on the ground of interest. Lord Denman said, "The point appears to be a new one, not touched by any of the cases, and I must say I feel very great difficulty about it. And that being so, and there being no decision on the subject, I think it is my duty to receive the evidence, as we are not to disqualify witnesses without some clear determination on the subject. If I had to decide the question finally, I should reject the evidence. I only receive it because there is an opportunity of revising my decision."

The attorney general thought he ought not to press the reception of the witness against his lordship's impression. Lord Denman then said, "I think the only ground on which I could receive the evidence is, the possibility that some great public inconvenience may result from a contrary course, which does not suggest itself to one's mind on the first consideration of the subject. And perhaps I may add, that it is hardly fair to subject a witness to such strong observations as would be made upon him." This case can hardly be considered as a decision at all, or as any thing more than the strong impression of lord Denman; and of little more weight than the opposite case of *Campbell v. Freeling*, before lord Tenterden, cited in the argument of the attorney general.

825 *The second case (*The State v.*

M'Kennan) is a decision of the supreme court of South Carolina, admitting a witness in a prosecution for perjury, against objections very similar to those which would exclude the witness in the present case. The defendant was indicted for perjury, alleged to have been committed on the trial of an action of slander, in swearing to the perpetration of a felony by the party who was now offered as a witness for the prosecution. This witness was objected to as incompetent on the ground of interest, inasmuch as a conviction of the defendant would prevent him from giving testimony against the witness, in case the latter should be indicted for the felony. "Certainly," said the court, "he may feel a bias, arising out of his possible consciousness, or the anticipation of such eventual consequences; but his danger is barely possible, at least until an indictment shall have been found against him. On the other hand, if every defendant could get rid of his prosecutor by charging him in turn with a felony, I know not how any real felon could be brought to justice, provided he can find out in due time the names of the witnesses against him; for he would only have to charge each with a crime, and then say that they were all interested to convict him, in order to render him an incompetent witness against themselves. This objection must go to the credit and not to the competency of the witness." In a case like the one before us, the accused would only have to learn what suits were depending against the prosecutor, or, for want of such, to get one brought, and procure himself to be summoned, in order to delay or wholly defeat the prosecution.

We all think it should be certified to the circuit court, that the witness is competent.

826 *The Commonwealth v. Burcher.

December, 1843.

Grand Juror—Qualification—Freeholder—Escrow.—A lot of land being sold for a sum of money payable by instalments, the vendee receives immediate

possession, and the vendor signs, seals, and acknowledges before magistrates, a conveyance of the land to the vendee in fee simple, which is thereupon, by consent of the parties, placed in the keeping of a third person, to be retained by him until the whole purchase money is paid, and to be then delivered to the vendee. The vendee pays some of the instalments as they become due: others are still unpaid, the time of payment not having arrived. **HELD**, this vendee is a freeholder duly qualified to serve as a grand juror.

In the circuit superior court of Petersburg, at November term 1843, the grand jury made a presentment against James Burcher for keeping and exhibiting an unlawful gaming table, commonly called a roulette table. Being arrested under a *capias* and brought into court, the defendant pleaded in abatement, that William Lea, one of the grand jury which made the presentment, was not a freeholder at the time of making the same. Issue being joined on this plea, the facts relating to the issue were stated and agreed by the defendant and the attorney for the commonwealth, as follows.

The grand juror William Lea, between two and three years ago, purchased from John Grammer a house and lot in the town of Petersburg for the price of 4360 dollars, payable by instalments, and was immediately thereafter put in possession of the property. He has quietly held possession ever since, and has made improvements on

Title.—Legal title in the person is not necessary to constitute him a freeholder.

Thus a grantor in a deed of trust for the payment of debts is a legal grand juror, although the legal title has passed from him, and although the debts remain unpaid, and the time at which sale might be made has passed. *Carter's Case*, 2 Va. Cas. 319; *Moore's Case*, 9 Leigh 689.

In *Cunningham's Case*, 6 Gratt. 605, a purchaser, by oral contract, in possession, who had paid for the land, was held to be a freeholder.

Helmondollor's Case, 4 Gratt. 536, held that one having the equitable interest in land, entitled to call for the legal title, is a freeholder qualified to serve as a grand juror; and it is stated that, among many Virginia cases, no one denies that a *cestui que trust* of a freehold estate is a good grand juror, who is required to be a freeholder. See *Com. v. Reynolds*, 4 Leigh 663.

In the case of the *Commonwealth v. Burcher*, 2 Rob. 826, it was held that a vendee of a freehold, in possession, was a good grand juror, although a part of the purchase money remained at the time unpaid, and the legal title in the form of an escrow, was deposited with a third person, and could not be called for by the vendee, until all the purchase money was paid.

The principal case is cited in *State v. McAllister*, 36 W. Va. 509, 18 S. E. Rep. 779; *Com. v. Helmondollor*, 4 Gratt. 540.

In *Kerby's Case*, 7 Leigh 747, the court refused to declare the grand juror a qualified freeholder, because it appeared from the evidence, that he himself disclaimed title to the freehold, and instituted suit against the vendor in relation to the title and purchase money.

*Grand Jurors—Qualification—Freeholder—Legal

Same—Same—Owner or Occupier of Cistern.—The

the property to the value of 750 or 800 dollars. The whole of the purchase money has not yet been paid; but negotiable notes with an endorser were given for the same, and all the notes which have fallen due have been regularly paid. At the time of making the purchase the said Lea was allowed his choice, either to take a deed in fee simple for the property, *executing a deed of trust thereon to secure the purchase money, or to allow the deed in fee simple to be retained by a third person until the purchase money was paid. He preferred the latter course; whereupon a deed of bargain and sale, conveying the property to him in fee simple, was signed and sealed by John Grammer and Mary E. his wife; the acknowledgment of the former, and the privy examination and acknowledgment of the latter, were duly taken and certified by two justices of the peace; and the deed was, by consent of the parties, placed in the keeping of William Pannill, to be delivered to Lea on the payment of the last note due for the purchase money. (The deed and certificates were set forth in the record in *hæc verba*.) John Grammer held the said property by a good and valid title. There is now no contro-

versy between Grammer and Lea as to the said bargain and sale, and Lea is satisfied with the deed for the property, now in the custody of Pannill.

Whereupon the circuit court, with the consent of the defendant, adjourned to the general court, on account of novelty and difficulty, the questions arising on the foregoing facts and the plea in abatement aforesaid.

The cause was argued here by the attorney general for the commonwealth, and Macfarland, Allison and J. S. French for the defendant.

GHOLSON, J., delivered the opinion of the majority of the court.—We are of opinion that William Lea possessed a sufficient freehold qualification to constitute him a good grand juror. It was clearly not necessary to his competency that the legal title to the house and lot should have been in him. *Cestuis que use* of freehold estates are good jurors in England. *Co. Litt.* 272 b. Mortgagors, or grantors in deeds of trust made to secure debts, while in possession and entitled to the equity *of redemption, are good jurors in Virginia. *Carter's case*, 2 Va. Cas. 319; *Moore's case*, 9 Leigh 639. It seems sufficient if the juror is in the possession of a freehold estate, and "is enjoying the profits and the substantial ownership thereof." Lea was the tenant of the freehold in the house and lot; he was not only receiving the profits of it, but was so enjoying the possession as that no one could oust him from it. He was nowise in default; he was in the lawful possession; and a court of equity would have kept him there against the world. Should he even hereafter fail to pay the deferred instalments of the purchase money, a court of equity would not allow him to be dis seized or evicted. It would regard the house and lot as his property: in the event of his failing to pay the purchase money within a limited time, it would direct the property to be sold as his, and not as Grammer's: if the amount of the sale exceeded the balance due on the purchase, the excess would be decreed to him. Grammer never can hereafter be permitted to recover or reclaim the property itself. If it were conceded that the legal title is still in him, a court of equity would yet regard him as holding it in trust for Lea. But the legal title is not in fact outstanding in him; he has so far parted with it that he can in no way recall it, while the mere act of paying the residue of the purchase money devolves it on Lea fully and unconditionally. In *Carter's case* and *Moore's case*, above referred to, this court decided that though a person had conveyed his land by deed of trust to secure the payment of debts, and though the debts were due, and the time had passed when the trustee was authorized to sell, yet if the grantor retained the possession and equity of redemption, he was a freeholder qualified to serve as a grand juror. This case is stronger than those, inasmuch as Lea is

owner or occupier of a grist mill is disqualified to serve as a grand juror. *Com. v. Long*, 2 Va. Cas. 318; *Moran v. Com.*, 9 Leigh 651.

In *Moran's Case*, 9 Leigh 651, it was held that the disqualification of owners and occupiers of water grist mills, though general in its terms, is limited to the jurisdiction within which their mills are situated. JUDGE SUMMERS, in delivering the opinion of the court in that case, makes the following observation: "The privilege of a freeholder residing in the county to serve on grand juries, is inherent by the common law and sanctioned by our act of assembly, except so far as the latter may have taken it away on principles of public policy; therefore, in construing the latter, we deem it proper to adopt the interpretation which will least abridge the general privilege and confine the exception to the necessity and reason of the enactment."

Same—Same—Keeper of an Ordinary.—The keeper of an ordinary is disqualified to serve as a grand juror. *Com. v. Willson*, 3 Leigh 739. But in this case it was held that residence at the tavern was necessary in order that the disqualification prescribed by the statute might apply.

Same—Same—Alienage.—An alien is disqualified from being a grand juror. *Com. v. Cherry*, 2 Va. Cas. 20.

Same—Same—Loyalty.—In West Virginia loyalty is prescribed as a qualification of grand jurors. *Bradford v. State*, 4 W. Va. 763.

Same—Same—Grand Juror Need Not Be Native.—A naturalized citizen of the United States or a native citizen of another state of the Union is qualified to serve as a grand juror in a state in which he resides. *Com. v. Towles*, 5 Leigh 743.

Same—Same—Residence in County.—Residence, as well as freehold within the county, is a necessary qualification of a grand juror. *Moran's Case*, 9 Leigh 651.

See generally, monographic note on "Indictments, Informations and Presentments" appended to *Boyle v. Com.*, 14 Gratt. 674.

not only in possession of the land and enjoying its profits, but he is in no default, and no one can sell the land or in 829 *any wise dispossess him. His right may be likened to that of a mortgagor in possession, where the mortgagee has no right to call for a foreclosure of the equity of redemption: and that such mortgagor would be a good grand juror no one will question.

Reynold's case, 4 Leigh 663, and Kerby's case, 7 Leigh 747, which were cited at the bar, are not regarded by this court as at all conflicting with the opinion now expressed. In the first of these cases it appeared, that Smith, the grand juror objected to, had entered into a contract in writing to sell his land, provided certain conditions precedent were complied with; but the record did not shew that any one of those conditions had been performed, or that one dollar of the consideration had been paid, or that any title had been made, or even that the possession of the land had passed from Smith. As presented in the record, it was the case of a mere contract, for the violation of which by either party the other would have been entitled to redress only in the form of damages. The court properly decided that the freehold remained in Smith. In Kerby's case, the grand juror was in possession of land which he had previously agreed to purchase; but before he had paid all the purchase money, a deed was tendered him which he refused as insufficient, and he thereupon instituted a suit in chancery to litigate the question of title and the rights of the parties. This court refused to pronounce him a freeholder; not only because he had disclaimed the ownership and title to the land, but because it was deemed improper to decide in a collateral way a question which was then the subject of judicial investigation in another forum. But in that very case the court reviewed and approved the judgment rendered in Carter's case, which in our opinion is decisive of this.

We therefore advise the circuit superior court for the town of Petersburg to adjudge William Lea a good grand juror.

830 *DUNCAN, J. The question adjourned in this case involves the construction of the statute, 1 Rev. Code, ch. 75, § 1, p. 264, requiring that grand jurors shall be freeholders. The facts upon which the question adjourned is made to depend are these. A man impaneled upon the grand jury had purchased a house and lot of ground, the purchase money to be paid by instalments, and part of the purchase money was unpaid when he was so impaneled. He was in the possession of the lot, and his vendor had executed a deed to him for it; but, in order to secure the payment of the purchase money, the deed had been placed in the hands of a third person as an escrow, to be delivered to the vendee when the purchase money was paid. The purchase money not having been paid, the deed accordingly remained in the hands of

the third person to whom it had been so delivered; and the question adjourned is, was the vendee under the foregoing circumstances a freeholder, so as to be a qualified grand juror?

The statute above cited directs that "the sheriff shall summon 24 of the most discreet freeholders," &c. to be a grand jury. This qualification of estate was derived from an ancient english statute, and no doubt had its origin in the idea that men having a fixed and permanent interest in the soil could be more safely entrusted with the delicate and important duty of bringing offenders against the laws to justice, and at the same time, from the independence of their condition, would afford a protection to the innocent from unjust accusations. The legislature of both countries looked to the degree and permanency of the estate, rather than the amount or value of it, as the qualification best calculated to effect the ends of public policy; and I imagine the framers of neither statute anticipated that a doubt could ever arise as to the definition of an estate of freehold. Doubt however seems to have arisen, if not as to what

estate would constitute a freehold according to its strict *legal signification, yet as to what is the precise meaning of the term as employed by the statute. It is a well settled rule in the construction of statutes, that when terms having a defined common law signification are employed in a statute, that signification is intended to be adopted. We know that at the common law a freehold is an estate in lands for not less than term of life; that all estates less than that are mere chattels. We know, too, that to create by contract a freehold estate prior to the statute of uses, the feudal investiture by livery of seisin was necessary. Since the statute of uses, this investiture is by deed in writing sealed and delivered; the delivery of the deed superseding the formula of livery of seisin, in all cases where the grantor is seized and capable of making livery, as in such cases the statute annexes the possession to the use. But to create a freehold estate, there must be a union of the use with the possession; and in law there cannot be a use created, except by deed in writing sealed and delivered. This is rendered necessary by the terms of the statute itself; see 1 Rev. Code, ch. 99, § 1, p. 361. In the case under consideration, it is true that the juror had possession (which is a mere act in pais), but he had not the use; for the use he could only acquire by deed delivered. His possession, therefore, was not adverse to his vendor, but under him. But the vendor had executed a deed, and placed it in the hands of a third person as an escrow, to be delivered upon the payment of the purchase money; and it is supposed that the legal title has passed by the deed. I have before remarked (in the words of the statute) that to pass the freehold, the deed must be delivered. The delivery is the medium by which the title passes out of the bargainor to the bargainee. Without such

delivery, the title remains precisely where it was, in the same manner as if there had been no deed at all; it remains in the bargainor. But it is asked, suppose the

832 bargainor had *died before the time of payment had arrived, and after his death the bargainee had paid the purchase money; could the deed then be delivered as an operative deed? Undoubtedly it could, and the delivery would have relation to the time when it was deposited as an escrow. The deed, by such delivery, would acquire vitality which it had not before, and would operate as an estoppel to the heirs to demand the estate, in the same manner that it would in the case where a man sells and conveys land in the adversary possession of another. We know that in such case the deed would pass nothing, by reason of the disseisin of the bargainor; and the bargainee could not in his own name evict the disseisor. But he might do so in the name of the bargainor, or of his heirs: and if the recovery was in the name of the latter, eo instanti the deed of their ancestor, which till then was inoperative and without life, would become vivified; it would relate back, upon the principle of remitter at the common law, and the heirs of the bargainor would be estopped by it. I refer to this doctrine to shew, that under the statute of uses no deed can pass a freehold estate until delivery; that if a deed be delivered as an escrow, and the condition be afterwards performed, the delivery will then be consummate, and take effect from the time of the delivery as an escrow, although the bargainor may have died in the mean time; and that cases exist where a deed may be inoperative for a time, and by subsequent events become operative, and relate back to its inception.

As a further argument to test the rule I have laid down, that delivery of a deed is indispensable under the statute of uses and conveyances, suppose the vendor in this case, after depositing the deed as an escrow, had executed a conveyance of the same lot to a third person: such last conveyance would have passed the title, and the first purchaser, although in possession (his possession not being adverse to the

833 grantor), might *have been evicted in an action of ejectment by the last purchaser. And if any person claiming the lot adversely to the juror were to bring a writ of right for the recovery of the same, he would be compelled to sue the vendor, not the juror, because a writ of right can only be maintained against the tenant of the freehold, and not against a tenant in possession having merely an equitable title. But it is argued, that although the juror in this case may not at law be a freeholder, yet the statute will be satisfied if he have such an interest as would in equity entitle him to call for the freehold estate. This proposition, which I do not admit to be correct, may be conceded for the sake of argument; and how will the case then stand? The juror has not paid the purchase money, and until he does so, equity cannot decree

to him the legal title. He may never pay it, and upon default his vendor may enter upon the premises, and may sell and transfer the legal title to another. This juror, therefore, is in this condition: he has not the legal estate of freehold, he has no present right to resort to a court of equity to obtain the legal title, and he may never have that right; for it will depend upon his ability and his will to pay. And yet he is said to be a freeholder.

But I do not concede that any estate less than a freehold will satisfy the statute. I have adverted to the reasons which, as I supposed, induced the legislature to require the certain and permanent estate of freehold as a qualification for a grand juror; and it will be found that the same qualification has been also deemed important in reference to another description of jurors. In fixing the qualification of petit jurors for the trial of pleas of the commonwealth and for the trial of all causes in the superior courts, the statute requires that they shall be freeholders, and have a visible estate, real or personal, of the value of

834 300 dollars. *For a grand juror, a freehold of any value is sufficient: a petit juror must not only be a freeholder, but possessed of a visible estate, real or personal, of the value of 300 dollars at the least. The legislature, therefore, for the purpose of protecting the rights of the public, and the safety of the persons and property of its citizens, has provided that the jurymen who present for crimes, and the jurymen who try the offenders, shall have that fixed and permanent interest in the country, which will place their independence, as far as practicable, out of the reach of power, or the influence produced by fear, favour or affection. And every citizen charged with an offence has the right to demand that the grand jury which is asked to indict him, and the petit jury which is to try him, shall be composed of men who are freeholders, and nothing less than freeholders. It is not enough for him to be told, that the juror who is to indict or try him has contracted for the purchase of land, which he may pay for at some future time, and may possibly acquire a freehold estate in it.

If the objections to a departure from the express terms of the statute, which I have already adverted to, be regarded as insufficient, there exists one that in a practical point of view I deem conclusive; and it is this. A relaxation of the statute will involve the courts in innumerable questions of difficulty as to the qualifications of grand and petit jurymen. Adhere to the legal signification of a freehold, and all will understand it: but once adopt executory contracts for the purchase of land as a substitute for the requisitions of the statute, and what guide will be furnished to the summoning officers, or even to learned judges, by which they can determine whether the juror has the necessary qualification of estate or not? Will a purchaser of land in possession, with or without any agreement in

835 writing, be considered a freeholder under the statute, *merely because he has made a contract of purchase and got possession under it? A writing is not in all cases indispensable for obtaining a decree in equity for the legal title to land, as we know that part performance will take a contract out of the operation of the statute of frauds. Will it not be exceedingly inconvenient to impose upon the courts of law, in a criminal cause, a necessity to enter, in a collateral way, into the perplexing enquiries which will continually arise, whether a jurymen has such a claim to land as would justify a court of equity to decree to him the legal title? Yet such seems to me the inevitable consequence of a departure from the legal import of the qualification of freehold prescribed by the statute.

Some adjudications have taken place in this country, bearing upon the question under consideration, which it may be well to notice. It is proper to premise, however, that in England during the controversy between the houses of York and Lancaster, many lands were conveyed to uses; the feoffee holding the legal estate, but the cestui que use taking the profits. In consequence, therefore, the land was his; and the english courts extended the statute of jurors, against the letter, to embrace the cestui que use; but they have never gone any farther. The effect, however, of the subsequent statute of uses being to annex the possession to the use, the cestuis que use were converted into freeholders. In this state, in Carter's case, 2 Va. Cas. 319, a juror was held to be qualified who had given a deed of trust of his land to secure a debt, but remained in possession. This was by analogy to the decision in England prior to the statute of uses, already indicated. The general court viewed the subject in the same light in which it was looked at by the english judges: they considered, that though in form the juror had conveyed the legal title, yet in fact he was the cestui que use; that the deed of trust was not evidence of a sale of the land, but

836 *was a mere security, which might or might not be enforced. In Kerby's case, 7 Leigh 747, the question was raised whether a purchaser in possession, who had paid the purchase money and had a complete right in equity to call for the legal title, was qualified to serve as a grand juror; but a majority of the judges were of opinion that the case should be decided on other grounds. They affirmed, however, the proposition, that it would be inconvenient in practice to impose upon the courts the necessity of deciding in criminal causes, in a collateral way, the qualification of jurors resting upon a mere equitable title. There is nothing, therefore, in the rule that prevails in England, or in the adjudications of this state, that authorizes a mere purchaser of land, because he is in possession, to serve as a grand juror, although he has not paid the purchase money,

and is not in a condition to demand in equity the title.

ESTILL, and BROWN, J., also dissented from the opinion of the majority of the court.

Foulkes v. The Commonwealth.

December, 1843.

Criminal Law—Forgery*—Party Whose Signature is Forged Need Not Be Produced as Witness.—Upon a trial for forgery of a written instrument, the commonwealth may, without producing as a witness the party by whom the instrument purports to be signed, and without accounting for his absence, prove by the evidence of other witnesses that the instrument is not genuine: such evidence not being in its nature secondary to that of the party whose signature is in question.

Same—Same—Loss of Forged Instrument—Secondary Evidence—Notice—Case at Bar.—On trial of indictment for forgery of a letter of credit with intent to defraud W. & W., the commonwealth proves that a draft, presented by the prisoner to W. 837 & W. at the same time with *the letter of credit, had been filed, together with an indictment against the prisoner for forging the same, with the clerk of the court, who, on making search for the draft among the papers in his office, has been unable to find it; and thereupon the commonwealth offers secondary evidence of the contents of the draft; no notice having been given to the prisoner, before the jury was impaneled, of any intention to offer such evidence. HELD, the foundation so laid for the admission of the secondary evidence is sufficient.

Same—Same—Of What Writing Forgery Cannot Be Committed.—Indictment for forging, with intent to defraud W. & W., a letter in the following terms: "Nottoway, April 24, 1841. Gent., Agreeable to Mr. Wm. I. Watkins' request, I take pleasure in making you acquainted with his name, and would say to you that he is very extensively engaged in the manufacturing of tobacco, and has made some large purchases, and says that he wishes to patronize you (on my recommendation). You may be assured that whatever he engages to do he will certainly perform. He says it is probable he will want 1000 dollars by the 1st of May, to meet his engagements, and if he apply for the

*Forgery.—See monographic note on "Forgery and Counterfeiting" appended to Coleman v. Com., 25 Gratt. 865.

†Same—Loss of Forged Instrument—Secondary Evidence—Notice.—In State v. Lowry, 42 W. Va. 310, 24 S. E. Rep. 563, it is said: "There is no evidence to show that such check is not in the custody of the clerk of the court, or in the clerk's office, or that any search therefor had been made in such office. The witnesses for the state purge themselves of the possession of the check, but that does not substantiate its loss, unless diligent search has been made for it where it might be legally deposited, or unless it is traced to the possession of the prisoner or his counsel, as Mr. Howard intimates in his statement; and then notice to produce it should be given, before attempting to prove its contents. *Foulkes v. Com.*, 2 Rob. (Va.) 836; 2 Bish. Cr. Proc. § 433, citing State v. Cole, 19 Wis. 142."

amount, I have no doubt but you will accommodate him. The roads are in such a condition that it is impossible to get any produce to market. Write me a few lines by Mr. Watkins, and say what the chance is for a rise in tobacco. Your compliance with the above will very much oblige your ob't servant, Joseph M. Foulkes.—P. S. Mr. Watkins prefers giving a negotiable note payable in Petersburg Exchange bank, where he can always have an opportunity to send at the shortest notice and draw. He is not a gentleman of a low mean degree, but one that is a perfect gentleman in every sense of the term. I am confident, as I have observed to him, that you will either let him have the money, or endorse for him. J. M. F." HELD, this is not a writing in respect whereof forgery can be committed, either at common law or under the statute.

William S. Foulkes was indicted in the circuit superior court for the county of Henrico and city of Richmond, at October term 1841, for forging, with intent to defraud Winfree & Williamson, "a certain letter of credit and writing," in the following terms:

"Nottoway, April 24, 1841.

"Gent.

"Agreeable to Mr. Wm. I. Watkins' request, I take pleasure in making you acquainted with his name, and would say to you that he is very extensively engaged in the manufacturing of tobacco, and has made some large purchases, and says that he wishes to patronize you (on my recommendation). You may be assured that whatever he engages to do he will certainly perform. He says it is probable that he will want about one thousand dollars by the first of May, to meet his engagements, and if he apply for the amount, I have no doubt but you will accommodate him. The roads are in such a condition that it is impossible to get any produce to market. Write me a few lines by Mr. Watkins, and say what the chance is for a rise in tobacco. Your compliance with the above will very much oblige your ob't servant,

Joseph M. Foulkes.

"P. S. Mr. Watkins prefers giving a negotiable note payable in Petersburg Exchange bank, where he can always have an opportunity to send at the shortest notice and draw. He is not a gentleman (of Ingraham's standing or character) of a low mean degree, but one, I am happy to inform you, that is a perfect gentleman in every sense of the term. I am confident, as I have observed to him, that you will either let him have the money, or endorse for him. J. M. F."

The indictment contained another count, which charged that the prisoner, with intent to defraud the said Winfree & Williamson, did knowingly utter and publish as true, and use and employ as true, for his own benefit, a certain forged letter of credit and writing, (set forth in the same terms as in the first count).

At the trial, the prisoner excepted to sundry opinions of the court given against

him, and tendered bills of exceptions, which were received and made part of the record.

1. The first bill of exceptions stated, that on the trial, the attorney for the 839 commonwealth, without shewing *or attempting to shew that Joseph M. Foulkes, whose name is subscribed to the letter set out in the indictment and alleged to be forged, was dead, or sick, or without the limits of the commonwealth, so that his testimony could not be had on the trial, and without shewing that any subpoena had been taken out for the said Joseph M. Foulkes, offered to prove by a witness that the said letter, and the signature to the same, were not in the handwriting of the said Joseph M. Foulkes; whereupon the prisoner by his counsel moved the court to exclude such evidence from the jury, because the said Joseph M. Foulkes was by law a competent and the best witness to prove whether the said letter or signature were genuine or not, and could better know than any other person whether the same were written or signed by him: which motion the court overruled, and decided that the said evidence should go to the jury; and to that opinion the prisoner excepted.

2. The second bill of exceptions stated, that upon the trial, the commonwealth offered evidence for the purpose of proving that in consequence, and at the time, of the presentation by the prisoner to Winfree & Williamson of the letter of credit set out in the indictment, the said Winfree & Williamson gave to him a paper signed by them, and then proved that the said paper was placed in the hands of the attorney for the commonwealth in this court, with the record of the examining court called to try the prisoner for having forged the name of one William I. Watkins to the said paper, for the purpose of framing an indictment upon it; and proved by the said attorney, that he did frame an indictment against the prisoner upon it, and filed it in the indictment with the clerk of this court; and also proved by the clerk, that he had examined the papers in his office, and could not find that paper, and that he had no recollection that it ever was in his office: and then the commonwealth offered evi-

840 dence for the purpose *of proving that the said paper writing was a draft drawn by the prisoner, in the name of William I. Watkins, on Winfree & Williamson, for 1000 dollars payable to said Watkins at 90 days after date, and accepted by the said Winfree & Williamson: whereupon the prisoner moved the court to exclude all evidence of the contents and character of the said paper writing, unless it were produced; upon the ground that the said paper writing was not shewn to be lost, and it was by the laches of the commonwealth that it was not produced, and no notice had been given to the prisoner, before the jury was impaneled, of any intention to offer such secondary evidence of the said paper writing: but the court over-

ruled the motion of the prisoner, and admitted the evidence aforesaid; to which opinion the prisoner excepted.

3. The third and last bill of exceptions stated, that the counsel for the prisoner, in the course of his argument before the jury, contended, that before the jury could convict the prisoner, they must be satisfied that he forged, or uttered as true knowing it to be forged, with intent to defraud Winfree & Williamson, a letter of credit, and then proceeded to shew that the paper writing described in the indictment and offered in evidence to the jury was not a letter of credit; whereupon, after the prisoner's counsel had closed his argument, the attorney for the commonwealth asked the court to instruct the jury, that it was not necessary to the conviction of the prisoner that the jury should be satisfied he forged, or uttered as true knowing it to be forged, a letter of credit with intent to defraud Winfree & Williamson, but they might convict him if the evidence satisfied them that he forged, or uttered as true knowing it to be forged, with intent to defraud Winfree & Williamson, the paper writing described in the indictment and offered in evidence, although they should believe that the said paper writing was not a letter
841 "of credit: which instruction the counsel for the prisoner resisted, but the court gave it, and the prisoner thereupon excepted.

The jury found the prisoner guilty upon the second count of the indictment, and ascertained the term of his imprisonment in the penitentiary to be two years; and the court pronounced judgment accordingly.

On the petition of the prisoner, the general court, at the last term, awarded a writ of error to the judgment.

The cause was now argued by Lyons and Scott for the plaintiff in error, and Brooke for the commonwealth.

DUNCAN, J. The court are unanimous in the opinion that there is no error in the judgment of the circuit court set forth in the first bill of exceptions; being satisfied, as well upon principle as authority, that it was not obligatory upon the prosecutor to examine Joseph M. Foulkes, whose name was subscribed to the paper alleged to be forged, as a witness to prove that said paper and the signature thereto were not in his handwriting, but that it was competent to prove the same facts by other witnesses, and that the testimony of such other witnesses would not be secondary in its nature, but of equal degree with the testimony of the said Joseph M. Foulkes, the only difference being as to its persuasive effect before the jury, which was a matter solely addressed to the discretion of the prosecutor.

The courts are also unanimously of opinion, upon the second bill of exceptions, that a legal foundation was laid for the introduction of the secondary proof therein set forth, and that there is no error in the

judgment of the circuit court to which that bill of exceptions relates.

But a majority of the court (judges Brown and Fry dissenting) consider that
842 there is error in the judgment *of the circuit court set forth in the third bill of exceptions; being of opinion that the writing set out in the indictment is one of which forgery could not be committed, either at common law or under the statute.

Judgment of circuit court reversed, and judgment of acquittal entered.

Cropper v. The Commonwealth.*

December, 1848.

Court of Oyer and Terminer—Confinement in Penitentiary by Judgment of—Habeas Corpus.—A prisoner confined in the penitentiary under the judgment of a court of oyer and terminer, for an offence which such court had no jurisdiction to try, may be discharged by the general court upon a writ of habeas corpus.

Same—No Jurisdiction to Try Free Mulatto for Simple Larceny†—Statute.—Under the act of March 15, 1832. (Acts of 1831-2, ch. 23, § 9.) a free negro or mulatto, for simple larceny to the value of 20 dollars or less, must be tried by a justice of the peace of the county or corporation, and a court of oyer and terminer has no jurisdiction of the case.

Elkaney Cropper, a free woman of colour, was tried, on the 29th of March 1843, by a court of oyer and terminer held by five justices of Accomac county, upon a charge of having, on the tenth day of the same month, feloniously stolen, taken and carried away one cotton shirt and one pair of socks. The entry of the judgment was in the following terms: "It is the unanimous opinion of the court that the prisoner is guilty of the crime aforesaid. And it appearing to the court that she has heretofore been tried, convicted, and punished by confinement in the penitentiary for the crime of petit larceny, it is considered by the court that she be confined in the public jail and penitentiary house of this commonwealth for the term of five years
843 for the *crime aforesaid. And command is given the sheriff to remove her to the public jail and penitentiary house as soon as can conveniently be done."

She now presented a petition to the general court, setting forth that she is confined in the penitentiary under the sentence aforesaid; insisting that the court of oyer and terminer had no jurisdiction of the offence of petit larceny committed by a free person of colour, and consequently that her imprisonment is without colour of lawful authority; and praying that she may be brought before the court by writ of habeas corpus, and discharged.

The court awarded a writ of habeas cor-

*For monographic note on Courts, see end of case.

†Jurisdiction.—See monographic note on "Jurisdiction" appended to Phippen v. Durham, 8 Gratt. 457.

pus, directed to Charles S. Morgan superintendent of the penitentiary; who, in obedience thereto, brought the petitioner into court, and certified that she was detained in his custody by virtue of the aforesaid judgment of the court of Accomac county, and for no other cause. He exhibited, as a part of his return, a transcript of the record of conviction; whereby it appeared that the former conviction for petit larceny, mentioned in the entry of the judgment, was nowise set out or charged in the warrant for convening the court, or in any part of the proceedings except the said entry.

J. Mayo for the petitioner.

DUNCAN, J. By the ninth section of the act passed the 15th of March 1832, (Acts of 1831-2, ch. 22, p. 22; Suppl. to Rev. Code, ch. 187, p. 247,) free negroes and mulattoes committing simple larceny to the value of 20 dollars or less, are to be tried and punished in the same manner as slaves are directed to be tried and punished by the fifth section of the act passed the 12th of February 1828 (Acts of 1827-8, ch. 37, p. 30; Suppl. to Rev. Code, ch. 183, p. 242). The mode of trial, and the nature of the punishment, of free negroes 844 and mulattoes *for simple larceny to the value of 20 dollars or less, are made referable to and governed by the 5th section of the last mentioned statute. That section is in these words: "If any slave shall hereafter commit simple larceny of any money &c. of the value of twenty dollars or less, he or she, for every such offence, shall and may be tried by any justice of the peace of the county or corporation in which the same was committed, and upon conviction thereof shall be punished, by order of the justice, by stripes, not exceeding thirty-nine, and if acquitted, the acquittal shall be final."

The legislature having therefore, by the 9th section of the act of 1832, placed the trial and punishment of free negroes and mulattoes for simple larceny to the value of 20 dollars or less, upon the same footing with the trial and punishment of slaves for the same offence; and as the trial of a slave for such offence is by a justice of the peace, and the punishment is by stripes it follows, that a free negro or mulatto must be tried in the same way, and punished in the same manner; and consequently the justices of the peace of Accomac county, sitting as a court of oyer and terminer, had not jurisdiction to try the prisoner for the offence with which she was charged.

And the court being of opinion, that although a writ of error will not lie from this court to the judgment of a court of oyer and terminer, to correct an error of such court in a matter of which it could lawfully take cognizance, yet that in a case clearly not within the jurisdiction of such court, it is in the power of this court to discharge a prisoner who may be imprisoned by its judgment; and being also of opinion, for

the reasons aforesaid, that this prisoner is unlawfully detained in custody by the keeper of the public jail and penitentiary, in virtue of the said judgment of the court of oyer and terminer of the county of Accomac;

It is therefore ordered that she be discharged.

COURTS.

- I. Definition and Scope.
- II. Creation—Duration of Terms.
- III. Special Terms.
- IV. Rules of Decision.
- V. Mayor's Courts.
- VI. County Courts.
 1. Formation.
 2. Power and Authority.
 3. Terms.
 4. Jurisdiction.
 - a. Amount in Controversy.
 - b. Court of General Jurisdiction.
 - c. Of Administrations.
 - d. Of Injunctions.
 - e. Of Bridges, Roads and Ferries.
 - f. Of Tavern and Liquor Licenses.
 - g. Civil Suits in General.
 - h. Criminal Cases in General.
- VII. Corporation, Hustings and Municipal Courts.
 1. In General.
 2. Duration of Term.
 3. Jurisdiction.
 - a. Constitutional Provisions.
 - b. Civil Suits in General.
 - c. Criminal Cases in General.
- VIII. Circuit Courts.
 1. Jurisdiction in General.
 2. Jurisdictional Amount.
 3. Place.
 4. Where State or State Official Party.
 5. Jurisdiction in Civil Suits Generally.
 6. Jurisdiction in Criminal Cases Generally.
- IX. Court of Appeals.
 1. In General.
 2. Transfer of Causes.
 3. Special Court.
 4. Jurisdiction.
 - a. In General.
 - b. Criminal Jurisdiction.
 - c. Original Jurisdiction.
 - (1) In General.
 - (2) Mandamus, Prohibition and Habeas Corpus.
- X. District Court.
- XI. General Court.
- XII. Federal Courts.
- XIII. General Power and Jurisdiction of State Courts.
 1. In General.
 2. Abstract Questions.
 3. Contempts.
 4. Patents.
 5. When State Is Interested.
 6. Over Federal Affairs.
 7. Effect of Bankrupt Proceedings.

Cross References to Monographic Notes.

Appeal and Error, appended to *Hill v. Salem & Pepper's Ferry Turnpike Co.*, 1 Rob. 263.
 Contempts, appended to *Wells v. Com.*, 31 Gratt. 508.

Continuances, appended to *Harman v. Howe*, 27 Gratt. 676.

Instructions, appended to *Womack v. Circle*, 20 Gratt. 192.

Juries, appended to *Chahoon v. Com.*, 20 Gratt. 738.

Jurisdiction, appended to *Phippen v. Durham*, 8 Gratt. 457.

Justices of the Peace, appended to *Wallace v. Com.*, 2 Va. Cas. 180.

I. DEFINITION AND SCOPE.

Definition.—A court may be defined as a body in the government, organized for the public administration of justice at the time and place prescribed by law. 8 Am. & Eng. Enc. Law (2d Ed.) 22.

Scope.—It is the design of this article to treat in a general way the formation and jurisdiction of particular courts, and the principles governing their powers and decisions. By reason of frequent changes in statutes, their powers and jurisdiction have been at various times restricted or enlarged. No effort has been made to explain seemingly conflicting cases, by interpolating the various statutes with their amendments, as it is presumed they are familiar to all. For questions of general and appellate jurisdiction, reference is made to the monographic notes on "Jurisdiction" and "Appeal and Error," and reference is also made to the recent constitution adopted in Virginia (1902), in which many radical changes were made in the state judiciary system.

II. CREATION—DURATION OF TERMS.

By Legislature—Dependent on Number of Inhabitants—County Court.—Where two counties had been joined and were under the jurisdiction of the same county court because they had less than 8,000 inhabitants, the legislature had the power to detach one county and take it out of that jurisdiction, when the census shows a sufficient number of inhabitants, and could establish its own county court. *Foster v. Jones*, 70 Va. 642, 52 Am. Rep. 687.

Composition of W. Va. County Court in 1881—Commissioners.—Article 8 of the Constitution of West Virginia, as amended October 12, 1880, provides that after January 1, 1881, county courts shall be composed of three commissioners, abolishing the old court, which consisted of a president and two justices of the peace, and the county courts are divested of all jurisdiction except the specified subjects in § 24 of the amendment. *Fowler v. Thompson*, 22 W. Va. 106.

Schedule of Constitution Refers Only to Courts of Record.—Section 2 of the schedule of the constitution, declaring that the courts, except as afterwards provided, should continue with the same powers of jurisdiction at law and in equity, as if the constitution had not been adopted, and until the organization of its judicial department, refers only to courts of record, and does not include mayors' courts. *Richmond Mayoralty Case*, 19 Gratt. 673.

Judgment in Superior Court on Day of Session of General Court.—A judgment rendered in the superior court in one county on the day when the general court of Virginia was directed by law to be held in another county, was held to be legally rendered though it was the duty of the judge to attend the session of the general court, the distance between the places where the two courts were held being judicially known to the court to be distant from each other only three hours' ride. *Mendum v. Com.*, 6 Rand. 704.

Superior Court Created While Suit Pending in Supreme Court of United States.—Where an appeal was pending in the United States supreme court in a cause begun in the circuit court of the District of Columbia for the county of Alexandria, when that county was retroceded to Virginia, it was held that the cause was properly retained by the United States supreme court and decided by it, and that its decision was properly sent down to the superior court for the county of Alexandria established by the laws of Virginia, and ought to be enforced by that court. *McLaughlin v. Bank of Potomac*, 7 Gratt. 68.

Sunday Not Counted in Days of a Term.—In computing the days of a term of a court, Sunday is not counted as one of them. *Michie v. Michie*, 17 Gratt. 109; *Read v. Com.*, 22 Gratt. 924.

Length of Term of Superior Court.—As there is no fixed limit by law of the term of the circuit superior court, the judge of that court may continue the session until the latest period, which will allow him to arrive at the next court by 4 P. M. of the third day of the term. *Hill v. Com.*, 22 Gratt. 594.

Length of Term of Corporation Court.—Under §§ 24, 36, ch. 154, Code 1873, the corporation courts, which must be held monthly, may postpone the commencement of the next term, in order that a cause on trial may be proceeded with into the ensuing month. *Cluverius v. Com.*, 81 Va. 787.

Adjournment—Failure to Sit.—It is provided by § 15, ch. 157, Code 1873, when a court fails to sit on any day to which it may have adjourned, all matters ready for the court to act upon, if it had been held on any such day, shall be in the same condition and have the same effect, as if continued to the next day of the term that the court may sit. *Langhorne v. Walker*, 76 Va. 218.

III. SPECIAL TERMS.

Essentials.—A special session of a county court is only legal after notice of the time and purposes of the sessions have been posted by the clerk on the door of the courthouse of the county, at least two days before the session is to be held. And to give it any jurisdiction in any matter, it must appear upon its record book that such notice was posted, and the purposes of the session must also appear from such entry on the record book. *Mayer v. Adams*, 27 W. Va. 245.

Statutory Provisions—Presumptions.—Section 3000, Va. Code 1887, authorizes the judge of the circuit court by an order to the clerk, to appoint a special term, and provides that the clerk shall inform the commonwealth attorney and the sheriff, and post a copy of the warrant on the front door of the courthouse and issue all process for such term. On an issue as to whether a special term had been called in conformity with this statute, it was held that where it was shown to have been complied with in respect to the posting of the order, the appellate court would presume that all its provisions were duly complied with. *Harman v. Copenhaver*, 80 Va. 886, 17 S. E. Rep. 482.

Same—Directory.—The provision of a statute that the clerk shall inform the commonwealth attorney and the sheriff of the appointment of a special term of a court is directory merely, and his failure to do so does not affect the validity of the proceedings had at such special term. *Harman v. Copenhaver*, 80 Va. 886, 17 S. E. Rep. 482.

Same—Omissions—Effect.—Where a judge of the circuit court acting under § 5, ch. 112, W. Va. Code, directs a warrant to the clerk appointing a special term, and the clerk enters the order but fails to post

a copy on the door of the courthouse, the omission does not affect the validity of the proceedings at such special term. *State v. Shanley*, 38 W. Va. 516, 18 S. E. Rep. 734.

Same—Consent of Parties.—Section 3062, Va. Code 1887, provides that at a special term, any cause then ready for hearing may be heard with the consent of the parties. But under such section the court cannot at such term, without such consent, hear a demurrer to a bill and dissolve an injunction. *Fowler v. Mosher*, 85 Va. 421, 7 S. E. Rep. 542.

Where the report of a judicial sale was filed in the clerk's office before the regular March term, and should have been acted upon at that term, or the August term following, had either of those terms been held, consent was not necessary to authorize the court to dispose of it at a special term thereafter held, as § 3062, Code 1887, provides that any civil cause may be tried at a special term, which could have been lawfully tried at the last preceding term that was or should have been held. *Harman v. Copenhagen*, 89 Va. 386, 17 S. E. Rep. 482.

Same—Intermediate Terms—Sale for Taxes.—Under 1 Rev. Code, ch. 69, § 74, which gives the circuit court at intermediate terms, power to hear and decide all motions cognizable by them, whether the same were pending and could have been tried at the previous term or not, and § 6, Act of March 15, 1888, which gives them power to order the sale of lands for delinquent taxes in vacation as well as in term, the circuit court has power to order the sale of land for taxes at an intermediate term. *Hitchcox v. Rawson*, 14 Gratt. 526.

IV. RULES OF DECISION.

Stare Decisis—What Constitutes.—A prior decision of the court of appeals will not constitute *stare decisis* of the question involved, where only four judges were sitting, two of whom concurred only in the results and one dissented. *Chesapeake, etc., R. Co. v. Wash., etc., R. Co.*, 99 Va. 715.

When only four judges of the court of appeals are sitting, and they are equally divided in opinion, the decree of the lower court will be affirmed, and will only be reversed when a majority concur in that opinion. *Com. v. Beaumarchais*, 3 Call 122.

Where in the absence of two justices, from a court of five, a case is decided on the written opinion of two, and the concurrence of the third in the result only, and it is probable that the latter assents on other grounds, the principle on which such written opinion is based is not a precedent under the rule of *stare decisis*. *Whiting v. Town of West Point*, 88 Va. 906, 14 S. E. Rep. 698, 29 Am. St. Rep. 760, 15 L. R. A. 860.

By reason of § 4, art. 8, Constitution of W. Va., a decision is not binding authority in any other case, unless concurred in by at least three judges. *Bruff v. Thompson*, 31 W. Va. 16, 6 S. E. Rep. 352.

Decision Establishing Rule of Property—When Changed.—When a decision has been rendered by the supreme court of Virginia, establishing a rule of property, which has been repeatedly followed in like cases, before the creation of West Virginia, it will not be disturbed or departed from by the courts of the latter state except for the most cogent reasons, and upon a clear manifestation of error. *Wilson v. Perry*, 29 W. Va. 169, 1 S. E. Rep. 302.

Thus a decision in Virginia, seventeen years before the formation of West Virginia, holding that an insolvent corporation having ceased to do business, could prefer creditors, and at the time of such decision a statute was in existence in Virginia, but

not applicable to the case decided, which denied to a mining or manufacturing corporation the right to make any incumbrances preferring a creditor, and such statute continued until 1863, after the formation of West Virginia, when it was repealed by implication, and there has been no statute in force in that state for twenty-four years denying such right to a corporation, the law as thus settled in Virginia is the law of West Virginia, and it cannot be changed except by the legislature. The decision thus rendered has become a rule governing property, and it is not in the power of the court to change it. *Pyles v. Riverside Furniture Co.*, 80 W. Va. 123, 2 S. E. Rep. 909.

The decisions of the old general court, when they go to establish rules of property, are authority for the court of appeals. *Wallace v. Talliaferro*, 2 Call 447.

Restricted to Points Actually in Issue.—Adjudicated cases can only be relied on as precedents as to points actually in issue between the parties, and not as to such as may be deemed extrajudicial, unless in relation to the latter, they shall have ripened into law by various and successive decisions. *Lewis v. Thornton*, 6 Munf. 87.

Rule of Interpretation.—When the principles of a decree of the court of appeals seem to be opposed to its letter, the literal interpretation ought not to be relied on as a binding precedent. *Lewis v. Thornton*, 6 Munf. 87.

Decision of Court of Conciliation—Consent.—The decision of the court of conciliation, established by the military authority after the war, to adjust disputes during the suspension of the civil authority, is not obligatory upon a party who did not consent to its hearing the case. *Myers v. Whitfield*, 22 Gratt. 780.

Circuit Court Must Obey Directions of Court of Appeals.—If the court of appeals remands a cause to the circuit court and directs a new trial in accordance with its views as set out in the opinion, it is the duty of the circuit court at the new trial to adopt those views and instruct the jury in accordance with them, if the facts are the same and the instructions are asked for. *Chaffin v. Lynch*, 84 Va. 884, 6 S. E. Rep. 474.

Effect of English Decisions.—In Virginia, English decisions are to be referred to for information only, not as authority. *Marks v. Morris*, 4 H. & M. 468.

V. MAYOR'S COURTS.

Chief Executive Officer of City—Not Subject to Corporation Court.—The mayor, when acting as chief executive officer of the city, is in no sense or to any degree the inferior of the corporation court, nor is he in any wise subject to its superintendence. They are distinct and co-ordinate departments of the corporate government. *Burch v. Hardwicke*, 23 Gratt. 51.

Same—Investigation of Charges against Chief of Police.—Under art. 6, § 20, Constitution of Virginia, the mayor of a city is the chief executive officer of his city, and as such is authorized to supervise the other officers thereof in the execution of their duties. In investigating charges against the chief of police, he acts as the chief officer of the city, and not as a court; and he cannot be restrained by prohibition from proceeding with the investigation. *Burch v. Hardwicke*, 23 Gratt. 51.

Same—Same—Cannot Remove State Officers.—Although § 20, art. 6, of the Constitution, authorizes the mayor to remove officers of the municipality, it

does not invest him with power to remove state officers, although they are elected by the people of the municipality, or are appointed by its authorities, and are paid by them. The chief of police of a city is such an officer. If a mayor removes such officer he exceeds his power and is responsible to that officer in a civil action for damages. *Burch v. Hardwicke*, 30 Gratt. 24. See this case distinguished in *Johnston v. Moorman*, 80 Va. 131.

Not Authorized to Appoint Special Policeman for Railroads.—The mayor of a city is not authorized by law (§ 1230, Code 1887, amended by Acts 1893-4, p. 302) to appoint a special policeman for a railroad company. *Norfolk, etc., R. Co. v. Galliher*, 80 Va. 639, 16 S. E. Rep. 935.

Continuances by Statute—Does Not Apply to Mayors.—Code W. Va. ch. 50, § 58, providing for continuances in actions before a justice does not apply to proceedings before the mayor under ch. 47, § 39, making it the special duty of the mayor to preserve the peace and good order of the town. *Town of Davis v. Davis*, 40 W. Va. 464, 31 S. E. Rep. 907.

Petersburg—Election to Fill Vacancy.—The constitution authorizes the general assembly to declare the mode of filling vacancies in office, when not otherwise specially provided for, and vacancies in the office of mayor are not provided for. The charter of Petersburg provides for an election of a qualified person by the common council to fill any vacancy in the office of mayor; and when such a person was so elected, and duly qualified, the former mayor who held over, was thereby removed from office. *Vaughan v. Johnson*, 77 Va. 300.

Richmond—Violation of City Ordinance.—The mayor of the city of Richmond has authority to try cases in which a party is prosecuted for the violation of a city ordinance. *Mayo v. James*, 12 Gratt. 17.

Lynchburg—Concurrent Jurisdiction—Petit Larcenies.—The mayor of the city of Lynchburg, by § 1, Act March 30, 1871, has concurrent jurisdiction with the corporation court, of all petit larcenies, and his sentence of a person convicted of such offence is legal. *Thomas v. Com.*, 22 Gratt. 912.

VI. COUNTY COURTS.

1. FORMATION.

By Legislature.—Where two counties were joined because they had less than 8,000 inhabitants and were consequently under the jurisdiction of the same county court, it is within the power of the legislature to detach one county and take it out of the jurisdiction of that court, if the census indicates a sufficient number of inhabitants. *Foster v. Jones*, 79 Va. 642, 52 Am. Rep. 687.

In West Virginia in 1881—Commissioners.—The county courts of West Virginia, as they existed on the 12th day of October, 1880, notwithstanding the amendment of art. 8, of the Constitution, continued in existence with the limited jurisdiction prescribed by § 24 of said amendment, until the 1st day of January, 1881, after which day they were no longer composed of a president and two justices of the peace, but of the three commissioners mentioned in said amendment, and until the 1st day of January, 1881, they could exercise the limited jurisdiction prescribed by the amendment, at the regular terms of the courts, and in accordance with the laws then in force. *Fowler v. Thompson*, 23 W. Va. 106.

2. POWER AND AUTHORITY.—See sec. 4, "Jurisdiction," *infra*.

Derived from Statutes.—The entire authority of the county courts is derived from the enumerated

powers conferred by the statutes giving them jurisdiction. *Jackson v. Maxwell*, 5 Rand. 636.

Constitutional Limitations in West Virginia.—For all matters that remain vested in county courts by the limitation of their jurisdiction, in consequence of the adoption of the amendment of art. 8 of the Constitution, on the 12th of October, 1880, see *Fowler v. Thompson*, 22 W. Va. 106.

To Admit to Record Foreign Power of Attorney in 1824.—A county court of Virginia, or its clerk, had no authority in the year 1824, to admit to record a power of attorney executed in Kentucky, where its execution was acknowledged before a notary public, and certified by him. *Johnston v. Griswold*, 8 W. Va. 240.

Purchase of Salt—Special Authority.—A county court exercises a special ministerial authority when it acts under a statute which authorizes it to purchase salt, and the record must show that the justices were summoned, or that a majority were present when the bond was executed, or it will be null and void. *Chesterfield Co. v. Hall*, 80 Va. 231; *Dinwiddie Co. v. Stuart*, 28 Gratt. 526; *Pulaski Co. v. Stuart*, 28 Gratt. 572.

Execution of Negotiable Notes for Debt by County.—It was held in *Exch. Bank v. County of Lewis*, 28 W. Va. 273, that a county court had no authority to execute negotiable notes for a debt due by the county, as the power conferred upon the county courts of Virginia by the provisions of ch. 53, Code 1849, to provide for the payment of sums chargeable on the counties out of the county levies, prohibits the receiving of money for that purpose in any other way.

To Lease County Property—Statutes.—The judge of a county court has no authority to authorize or assent to a lease of county property in his control for other purposes than those provided by law, and any exercise of powers not prescribed is void, and the county may recover the property. *Franklin County v. Gills*, 96 Va. 330, 31 S. E. Rep. 507; *Franklin County v. Saunders*, 96 Va. 335, 31 S. E. Rep. 1007.

To Borrow Money to Erect Buildings.—It was held in *Exch. Bank v. County of Lewis*, 28 W. Va. 273, that the county courts of Virginia in 1855 and 1857, had no power or authority to borrow money for the erection of courthouses or other public buildings for the use of their counties.

To Admit Surveyor's Report to Record.—It is the duty of a county court, acting under § 15, ch. 37, Code 1849, in relation to land sold for taxes, to admit to record the report of the surveyor, if it conforms to the act. It has no authority to inquire into the regularity or validity of the sale of the sheriff. *Randolph v. Stalnaker*, 13 Gratt. 523.

The county court in passing upon any question under § 15, ch. 37, Code 1849, acts purely in a ministerial capacity. In such case on motion by the purchaser to order the surveyor's report to be recorded, it has no authority to render a judgment overruling the motion with costs. *Delaney v. Goddin*, 13 Gratt. 266.

To Make Contract for Repairing Buildings.—Where a county court makes an agreement with a party, for making repairs to the public buildings of a county, it acts as a board of police in its ministerial capacity, and does not act judicially, and its obligations are distinct from its powers as a county court in its judicial capacity. After making said contract as a board, it had no authority as a court to make any alterations in it. *Despard v. County of Pleasants*, 23 W. Va. 318.

3. TERMS.

Held by Judge of Another County—Inability to Preside.—Section 3049, Code 1887, provides that when a judge of any county court be unable to preside by reason of absence, death or any other cause, or be so situated as to render it improper for him to preside, the judge of another county may hold the term. And where the judge of another county presides without entering upon the record that the regular judge who was present was so situated as to make it improper for him to preside, the judgment is void. *Gresham v. Ewell*, 85 Va. 1, 6 S. E. Rep. 700.

Where it appears from the record that the judge of a county court opened the court, and on the second day thereof entered an order that it was improper for him to preside, and thereupon another judge took his seat and proceeded with the term, signing the orders of that day, this was a regular and valid session of the court. *Combs v. Com.*, 90 Va. 88, 17 S. E. Rep. 881.

Same—Constitutional.—Section 14, ch. 154, Code 1778, which provides that in certain cases the court of one county or district may be held by the judge of another county, is constitutional. *Smith v. Com.*, 75 Va. 904.

Change of Commencement—All Justices Present—Notice.—Under § 2, ch. 157, Va. Code 1849, authorizing the county court to change the day of the commencement of its terms, all the justices of the county having been first summoned, and a majority concurring, such change may be made without the summons having been served, all the justices being present at the time the change is proposed and having an opportunity to be heard. *Jackson v. Com.*, 18 Gratt. 795.

4. JURISDICTION.—See sec. 2, "Power and Authority," *supra*.

a. AMOUNT IN CONTROVERSY.

General Statement.—The pecuniary amount necessary to give the county court jurisdiction, or the amount which will take the cause out of its jurisdiction, depends entirely upon statute. This amount has been frequently changed, and no attempt has been made to trace it through the various statutes.

In West Virginia Amount Must Exceed Twenty Dollars—Test.—Under the Acts 1872-3, ch. 13, § 2, giving the county court original jurisdiction in all actions at law, where the amount in controversy exceeds \$20, the amount claimed by the plaintiff, as shown by the pleadings, and not the verdict of the jury, is the test of the jurisdiction of the court. *Marion Mach. Works v. Craig*, 18 W. Va. 559.

Under Virginia Code 1860.—The same amount was necessary to authorize county courts in Virginia, by Rev. Code 1860, p. 663. *Shelton v. Jones*, 26 Gratt. 891.

Sale and Division in 1862—No Jurisdiction When Dividends Exceeded Three Hundred Dollars.—In a suit brought in 1862 for the purpose of having dower assigned, the court *sponte sua* decreed sale of the residue of the land for the purpose of making a division of the proceeds among the infant heirs, they being parties to the suit. The decree of sale was void because the county court transcended its jurisdiction, as the dividend of each exceeded \$300. See Va. Code 1860, p. 581, § 3; *Seamster v. Blackstock*, 83 Va. 232, 2 S. E. Rep. 36. See also, *Woodhouse v. Fillbates*, 77 Va. 317; *Wimblish v. Breeden*, 77 Va. 334.

Monthly Term—Amount Was Twenty Dollars in 1826.

—A county court has no jurisdiction at a monthly term in any suit at law where the value in controversy exceeds \$20, and therefore a confession of judgment for a debt of a larger amount, entered at a monthly term of a county court, is of no effect whatever. *Wynn v. Scott*, 7 Leigh 63.

b. COURT OF GENERAL JURISDICTION.

General Jurisdiction at Quarterly Terms—Monthly Terms.—The county or corporation courts at quarterly terms, may, in their discretion, receive the probate of deeds, or wills, or decide on controversies concerning mills, etc., or indeed transact any business embraced by the general jurisdiction of such courts; but at a monthly session they cannot take jurisdiction of any case expressly and exclusively assigned to a quarterly term. *Wilkinson v. Mayo*, 3 H. & M. 555.

Same as Circuit Courts as to Judicial Powers.—With respect to powers vested in the county courts, which are purely judicial in their nature, whether exercised according to the course of common law or by statute, they are courts of general jurisdiction to the same extent as the circuit courts. *Chesapeake, etc., R. Co. v. Wash., etc., R. Co.*, 99 Va. 715; *Pennybacker v. Switzer*, 75 Va. 671. See *Ballard v. Thomas*, 19 Gratt. 14; *Lancaster v. Wilson*, 27 Gratt. 629; *Hutcheson v. Priddy*, 18 Gratt. 90; *Ferguson v. Teel*, 83 Va. 690; *Hill v. Woodward*, 78 Va. 765.

Prior to Code of 1873—Same as Circuit Courts—Exceptions.—Until the enactment of §§ 2, 3, ch. 124, Code 1873, the county court was a court of general and concurrent jurisdiction with the circuit court, except in respect to suits for the sale or partition of the lands of infants, or for the sale of the lands of insane persons, as to which the law gave exclusive jurisdiction to the circuit courts. *Litterall v. Jackson*, 80 Va. 604.

Constitutional Limitation in West Virginia.—The county courts of both Virginia and West Virginia were formerly courts of general jurisdiction, but by Const. art. 8, § 24, the jurisdiction for the courts of the latter state was restricted to matters of probate, the appointment of guardians and the settlement of their accounts, all matters relating to apprentices, to the superintendence and administration of the internal police and fiscal affairs of their counties, including the establishment of roads, ways, bridges, public landings, ferries, and mills, with authority to levy and disburse the county levy, and in all cases of contest to judge of the election, qualification and returns of their own members, and of all county and district affairs, subject to such regulations by appeal or otherwise, as may be prescribed by law. *Mayer v. Adams*, 27 W. Va. 244.

Proceedings to Assign Dower—Presumptions.—County courts are courts of general jurisdiction, and in a proceeding under § 9, ch. 110, Code 1860, for the assignment of dower, it is to be presumed that it had jurisdiction of the case, and proceeded regularly, in the absence of proof to the contrary. *Devaughn v. Devaughn*, 19 Gratt. 556.

Laying County Levy.—The county court which lays the county levy is not a special tribunal erected for that purpose, but it is the ordinary county court, and that court is a court of general jurisdiction. *Ballard v. Thomas*, 19 Gratt. 14.

Code Va. 1860—Minimum Amount \$20.—Under Rev. Code 1860, p. 663, authorizing county courts to hear and determine all cases involving more than \$20, except certain criminal cases, a county court is

a court of general jurisdiction. *Shelton v. Jones*, 26 Gratt. 891.

Same—Sale of Decedent's Land—Partitions When Shares Exceed \$300.—The county courts had jurisdiction in 1860, to sell real estate of a decedent for the purpose of paying the debts of the ancestor from whom it descended, and being a court of general jurisdiction for this purpose, every presumption must be made in favour of its proceedings when collaterally attacked. They did not have, however, jurisdiction of suits brought by guardians to sell the real estate of infants, nor of suits brought for the purpose of making partition where the shares of such infants exceed in value the sum of \$300. *Woodhouse v. Filibates*, 77 Va. 317; *Wimblish v. Breeden*, 77 Va. 324. See *Seamster v. Blackstock*, 83 Va. 232, 2 S. E. Rep. 36; also, Code 1860, p. 581, § 2.

c. OF ADMINISTRATIONS.—See monographic note on "Executors and Administrators" appended to *Rosser v. Depriest*, 5 Gratt. 6.

Limitations—What Gives Jurisdiction.—Under 1 Rev. Code, ch. 104, §§ 12, 23, the county courts have jurisdiction to grant administrations within certain limits. The place of the intestate's residence gives jurisdiction to the local courts. If he had no known place of residence, then the place of his death, or the place where his estate lies, gives jurisdiction. *Ex parte Barker*, 2 Leigh 719.

Removal of Executor.—The county courts in which an executor has qualified, in the exercise of the power vested in it by statute (Code 1873, ch. 128, § 18), may remove him from office. *Reynolds v. Zink*, 37 Gratt. 29; *Snaveley v. Harkrader*, 29 Gratt. 128; *Lance v. McCoy*, 34 W. Va. 420, 13 S. E. Rep. 728.

Investment of Fiduciary Money.—Under § 24, Code 1860, a county court is not authorized to make any order for investing or loaning out the money or fund referred to in that chapter, unless the commissioner who settles the accounts of the fiduciary has previously conformed to the provisions of § 16 of that chapter. And if the county acts without the report, the county court has jurisdiction on the motion of the parties whose money is invested upon notice to the other parties to annul the order. *Whitehead v. Whitehead*, 23 Gratt. 376.

Grant to Sheriff—Application of Distributee—Discretion.—After administration has been granted to a sheriff, on application of a distributee to be given the administration, the county court may exercise its discretion in the matter. *Hutcheson v. Priddy*, 12 Gratt. 85.

Same—Same—Notice.—After a county court has granted administration of an estate to the sheriff, it cannot grant it to a distributee, without notice to the sheriff. *Hutcheson v. Priddy*, 12 Gratt. 85.

Same—Voidable within Three Months of Death of Testator.—When a county court commits an estate to the sheriff for administration, before the expiration of three months from the death of the testator, the act is not void but voidable. *Hutcheson v. Priddy*, 12 Gratt. 85; *Gibson v. Beckham*, 16 Gratt. 326; *Ballard v. Thomas*, 19 Gratt. 14; *Andrews v. Avery*, 14 Gratt. 236, and note.

d. OF INJUNCTIONS.—See monographic note on "Injunctions" appended to *Claytor v. Anthony*, 15 Gratt. 518.

Code of 1873—General Power—Jurisdiction.—By the Code 1873, ch. 175, § 6, authority is given to every judge of a county court to award injunctions where the act or proceeding to be enjoined, is apprehended, or is to be done, or is doing, in his county or district. *Rosenberger v. Bowen*, 84 Va. 660, 5 S. E. Rep. 697.

Cannot Enjoin Superior Court.—A county court in chancery has no jurisdiction to stay proceedings at law on a judgment of a circuit court, by injunction; and if the county court issue such injunction, the circuit court ought to disregard it. *Gholson v. Kendall*, 4 Leigh 612.

Cannot Enjoin Enforcement of Judgment of Superior Court.—The county court has no power to make an order to restrain the collection of a judgment at law obtained in a superior court. *Hite v. Fitz-Randolph*, 1 Va. Cas. 269.

e. OF BRIDGES, ROADS AND FERRIES.

Bridges—Statute Must Be Followed.—A bridge can only be established by a county court in the mode prescribed by state. *Sampson v. Goochland Justices*, 5 Gratt. 241.

Same—Same—Erected by Individual for Public.—A bridge, erected by an individual for the public benefit, may be established by the county court as a public bridge, but only in the mode prescribed by statute. *Sampson v. Goochland Justices*, 5 Gratt. 241.

Same—Same—Repairs and Maintenance.—The county court is not bound to repair or maintain a bridge erected by an individual, though dedicated by him to the public and so used, unless it has been adopted by the county court in the mode prescribed by statute. *Sampson v. Goochland Justices*, 5 Gratt. 241.

Roads—Limitation of Power Depends on Degree of Accommodation.—No limitation to the power of the county court to establish a road is to be found in the degree of accommodation which it may afford to the public at large. This is a matter which addresses itself to the discretion of the court. *Lewis v. Washington*, 5 Gratt. 265.

Same—Right of Mill Owner.—The owner of a mill may apply to a county court, as of right, to appoint viewers of a road proposed to be established to his mill. *Maddox v. Ewell*, 2 Va. Cas. 59.

Same—Execution of Court Order by Surveyor.—County courts having jurisdiction to establish and maintain public roads in their counties, a surveyor is justified in executing an order of the county court requiring him to open a road, though such order be irregularly made. *Yeager v. Carpenter*, 8 Leigh 464.

Same—May Be Opened by Individual.—The county court having established a proposed road, may authorize a particular individual to open it. *Lewis v. Washington*, 5 Gratt. 265.

Same—Summary Alteration of Road—Re-establishment.—A county court without petition or any of the proceedings required by the statute concerning roads, makes an order summarily on motion for the alteration of a public road. The court having no jurisdiction to make such order may at a subsequent term at the instance of the party injured and on hearing set aside the order and re-establish the old road. *Hollins v. Patterson*, 6 Leigh 457.

Same—May Be Discontinued before Opened.—A county court having made an order establishing a public road and directing it to be opened, may entertain and act upon an application to discontinue the road before it has been opened. *Senter v. Pugh*, 9 Gratt. 260.

Same—Notice to Discontinue—Police Order.—When a county court discontinues a public road, or any part thereof, without giving the public notice required by law, the order is a mere police order, which may be set aside at a future term on the

motion of any citizen of the county. *Conrad v. County of Lewis*, 10 W. Va. 784.

Same—No Discontinuance of Road Turned Over to State.—A county court has no right to discontinue any portion of a turnpike which had been turned over to the county by the state. *Conrad v. County of Lewis*, 10 W. Va. 784.

Ferries—Statute.—Jurisdiction to establish ferries in Virginia is conferred by statute, §§ 12, 13, ch. 64, Code 1878, on the county court. *Wimblish v. Breeden*, 77 Va. 324.

Same—Same—When River Is Boundary of State.—The acts of the assembly (2 Rev. Code 1806, ch. 105, and 2 Rev. Code 1819, ch. 238, p. 361) in reference to the establishment of ferries, does not authorize a county court to establish a ferry over the river which is the boundary of a state. *Zane v. Zane*, 3 Va. Cas. 63.

f. OF TAVERN AND LIQUOR LICENSES.—See monographic note on "Intoxicating Liquors" appended to *Thon v. Com.*, 31 Gratt. 887.

Construction of Statute.—The substitution of the word "may" for "shall" by the act of March 6, 1882, amending the act of March 8, 1880, was not designed to leave the application to sell liquor to the arbitrary discretion of the county courts. The words "may grant the license" mean that in a proper case the court must grant it. *Ex parte Lester*, 77 Va. 663; *Leighton v. Maury*, 76 Va. 865.

Discretionary with Court—Action Final.—A county court has a discretion to grant or refuse a certificate for obtaining a license to retail ardent spirits to a person who has obtained a license to keep an eating house, and its action is final and conclusive on the question. *French v. Noel*, 22 Gratt. 454.

In *Hein v. Smith*, 13 W. Va. 358, it was said that in at least two Virginia cases it has been held that the action of the county court in granting or refusing to grant licenses for the retailing of liquors, was final and conclusive. The cases cited were *Ex parte Yeager*, 11 Gratt. 655, and *French v. Noel*, 22 Gratt. 454.

Same—Must Act but Action Uncontrolled by Circuit Court.—County courts are invested by § 3, ch. 96, Code 1849, with a discretion as to granting licenses to keep taverns. It is bound to act, and is liable to be coerced to this extent, but in its action it cannot be controlled by the circuit court. *Ex parte Yeager*, 11 Gratt. 655.

g. CIVIL SUITS IN GENERAL.

At Quarterly Terms—General Jurisdiction.—The county courts at quarterly terms may in their discretion, receive the probate of deeds or wills or decide on controversies concerning mills, etc., or transact any business embraced in its general jurisdiction, but at a monthly session they cannot take jurisdiction of any case expressly and exclusively assigned to a quarterly term. *Wilkinson v. Mayo*, 3 H. & M. 565.

Elections—Costs.—In cases of contested elections before the county court, under the Act of 1853, ch. 71, the county court has no authority to give a judgment for costs to either party. *West v. Ferguson*, 16 Gratt. 270; *Gresham v. Ewell*, 85 Va. 7, 6 S. E. Rep. 700; *Wilkinson v. Hoke*, 39 W. Va. 405, 19 S. E. Rep. 520. See generally, monographic note on "Costs" appended to *Jones v. Tatum*, 19 Gratt. 720.

Same—Removal of Judge of Election.—The county courts have authority to remove a judge of election for malfeasance in office or gross neglect of duty, though he has not been convicted by the verdict of a jury for any offence. *McDougal v. Guilgon*, 27

Gratt. 133; *Lewis v. Whittle*, 77 Va. 423; *Neims v. Vaughan*, 84 Va. 698, 5 S. E. Rep. 704.

Same—Vacation of Election.—Under § 60, Acts 1870, which is an act to provide for general elections, the county courts have authority to vacate an election. *Ex parte Ellyson*, 20 Gratt. 10.

Attachments—Jurisdiction Only at Quarterly Terms.—It was held in *Withers v. Fuller*, 30 Gratt. 547, that the county court has no jurisdiction at a monthly term of the court to render judgment in favor of an attaching creditor against his debtor, but such judgment could only be had at the quarterly term of such court. The court being without jurisdiction its judgment is absolutely void. See *Clafin v. Steenbock*, 18 Gratt. 842; *Wynn v. Scott*, 7 Leigh 63; Va. Code 1873, ch. 154, §§ 3, 12; monographic note on "Attachments" appended to *Lancaster v. Wilson*, 27 Gratt. 624.

Same—Abatement at Monthly Term.—Where an attachment has been sued out under § 2, ch. 151, Code 1860, in a suit pending in a county court, though the defendant has given a forthcoming bond, the court has jurisdiction at a monthly term to abate the attachment. *Clafin v. Steenbock*, 18 Gratt. 842. See *Withers v. Fuller*, 30 Gratt. 552.

To Try Validity of Will.—Although a will has been admitted to record in a district court, a county court in chancery has jurisdiction to try its validity, and may direct an issue to be tried on the common-law side of the same court. *Ford v. Gardner*, 1 H. & M. 72. See monographic note on "Wills."

In Condemnation Proceedings by Railroad.—It was held in *Chesapeake, etc., R. Co. v. Hoard*, 16 W. Va. 370, that the provisions in ch. 88, Acts 1872-3, in reference to the condemnation of land by railroad companies was not repealed nor abrogated by ch. 114, Acts 1875, and ch. 8, Acts 1879, amending the same, and that therefore the circuit court has no jurisdiction in a case where a railroad company seeks to condemn lands, the jurisdiction in such cases being confined to the county court, as decided in *Railroad Co. v. Patton*, 9 W. Va. 648.

To Determine Qualification to Hold Office.—A county court has jurisdiction to try on notice the qualification of a person to hold an office, which notice was given in the month of October and returned to a day of the October term of the court, § 32, ch. 118, Acts 1872-73, not requiring that it should be returnable to a day during the November term or the next succeeding term; this section only directing when the case was to be tried, and not when it should be docketed. *Dryden v. Swinburn*, 15 W. Va. 234.

Motion on Sheriffs' Bonds.—It was held in *Carr v. Meade*, 77 Va. 142, that § 5, ch. 173, Code 1873, providing remedy by motion on the bonds of sheriffs, etc., was not repealed by § 9, ch. 395, Acts 1872 and 1873, and that motions were properly cognizable in the county court in such cases, in 1879.

h. CRIMINAL CASES IN GENERAL.

Exclusive Original Jurisdiction.—Section 4016 of the Code was amended by Acts 1893-94, p. 270, and the provision, under which indictments for felonies punishable by death, which had theretofore been removed upon motion of the prisoner to the circuit court, was omitted, and the county courts were clothed, except where otherwise provided, with exclusive original jurisdiction for the trial of all presentments, indictments, and informations for offences committed in their respective counties. *Gilligan v. Com.*, 99 Va. 816, 37 S. E. Rep. 962, 7 Va. Law Reg. 178.

No Jurisdiction of Felonies in 1860.—An indictment

for petit larceny which charges that the person indicted had been previously convicted of another petit larceny, is an indictment for a felony, and a county court has no jurisdiction to try the prisoner. *Rider v. Com.*, 16 Gratt. 499.

Recognizance to Keep the Peace.—A county court has authority to require a party to enter into a recognizance to keep the peace; certainly where the proceeding was commenced before the Acts 1847-48, ch. 14. *Welling's Case*, 6 Gratt. 670.

Felonies by Free Negroes and Mulattoes—Exceptions—Statute of 1831-32.—Under the construction of the statute of 1831-32, ch. 22, § 11, free negroes and mulattoes are to be tried by the county courts of oyer and terminer, in the same manner in which slaves are tried, in all cases of felony, except homicide and such crimes as were punishable with death before the statute. *Com. v. Weldon*, 4 Leigh 652.

VII. CORPORATION, HUSTINGS AND MUNICIPAL COURTS.

1. IN GENERAL.

Acts of Clerk in Presence of Court—Effect.—The acts of the clerk of a corporation court done in the presence of the court and under its supervision, must be taken to be done by direction of the court, and it is the act of the court. *Mesmer v. Com.*, 36 Gratt. 976.

Judge is State Officer—City Has No Authority.—The judge of the hustings court of Richmond is a judge of the state, and the city has no authority to control his actions. *Belvin v. City of Richmond*, 85 Va. 574, 8 S. E. Rep. 378.

When Jury Summoned from Outside of Limits.—A corporation court has authority to direct jurors to be summoned from without the limits of the corporation for the trial of a prisoner indicted in that court, when an impartial jury cannot be obtained within the corporation. *Craft v. Com.*, 24 Gratt. 602.

Declaration Must Lay Cause of Action in Jurisdiction.—Where a suit is brought in a corporation court, the declaration must lay the cause of action to have arisen within the jurisdiction of the court. *Thornton v. Smith*, 1 Wash. 81.

Jurisdiction of Municipal Court of Huntington.—The municipal court of Huntington created by the act of March 4, 1879, is a court of limited jurisdiction. *Rutter v. Sullivan*, 25 W. Va. 427.

2. DURATION OF TERM.

Code 1873—Continuation of Term.—Under §§ 26, 36, ch. 154, Code 1873, corporation courts have authority to continue a term from day to day into the next succeeding month, and consequently change the day for the beginning of the succeeding term. *Cluverius v. Com.*, 81 Va. 787.

Acts 1869-70—Duration Unrestrained.—Under Acts 1869-70, p. 35, the organization and jurisdiction of the corporation courts of the state was completely changed, and with it was abolished the limitation of the term to twenty days. The new court being unrestrained as to the duration of its terms, each of its terms must be held to be only terminated by the commencement of the next succeeding monthly term, unless sooner closed by the order of the presiding judge. *Moses v. Cromwell*, 78 Va. 671.

Same—Constitutional Provisions.—Section 14, art. 6, of the Constitution, which directs a corporation court to be held as often and as many days in each month as may be prescribed, does not require that the whole term shall be held in the same month. Hence under acts 1869-70, p. 44, the term of the corporation court of Richmond which begins on the first Monday may continue until the first Monday

in the succeeding month. *Chahoon v. Com.*, 21 Gratt. 823; *Sands v. Com.*, 21 Gratt. 871.

3. JURISDICTION.

a. CONSTITUTIONAL PROVISIONS.

Co-ordinate with Circuit Courts.—By virtue of § 14, art. 6, of the Constitution of Virginia, corporation and hustings courts are vested with similar jurisdiction to the circuit courts, and are of co-ordinate dignity with them; and any act of the legislature so far as it undertakes to confer appellate power on a circuit court to review an action of a corporation or hustings court is unconstitutional and void. *Watson v. Blackstone*, 98 Va. 618, 36 S. E. Rep. 930.

Jurisdiction Enlarged—Felony Cases.—Section 14, art. 6, of the Constitution of Virginia, which provides that corporation courts shall have similar jurisdiction which may be given by law to the circuit courts of the state, was not intended to restrict, but to enlarge, the jurisdiction of these courts, and to elevate them to the grade and dignity of circuit courts. And it was competent, therefore, for the legislature to give to the corporation courts jurisdiction to try cases of felony, though the jurisdiction in such cases was taken away from the circuit courts. *Chahoon v. Com.*, 21 Gratt. 822, and *note*.

b. CIVIL SUITS IN GENERAL.

Removal of Judge of Election.—The corporation courts have authority to remove a judge of election for malfeasance in office or gross neglect of duty, though he has not been convicted by the verdict of a jury for any offence. *McDougal v. Guilgon*, 27 Gratt. 133; *Lewis v. Whittle*, 77 Va. 423; *Nelms v. Vaughan*, 84 Va. 698, 5 S. E. Rep. 704.

Probate of Wills—Controversy Concerning Mills, etc.—The corporation courts at a quarterly term may in their discretion, receive the probate of deeds or wills or decide controversies concerning mills, etc., but at a monthly session, they cannot take jurisdiction of any case expressly and exclusively assigned to a quarterly term. *Wilkinson v. Mayo*, 3 H. & M. 565.

Vacating an Election.—Under § 69, Acts 1870, p. 97, which provides for the general election, the corporation courts have jurisdiction to vacate an election. *Ex parte Ellyson*, 20 Gratt. 10.

Attachment—Abatement.—Where an attachment has been sued out under § 2, ch. 151, Code 1860, in a suit pending in a corporation court, though the defendant has given a forthcoming bond, the court has jurisdiction at a monthly term to abate the attachment. *Claffin v. Steenbock*, 18 Gratt. 842. See *Withers v. Fuller*, 30 Gratt. 552.

Hustings Court of Richmond—When Judge Can Act for Chancery Court.—By the Act of 1869-70, p. 437, the judge of the hustings court of the city of Richmond is authorized in certain cases to perform the duties of the judge of the chancery court. Where cause pending in the chancery court was by consent submitted to its judge in vacation, and a decree was entered by the judge of the hustings court acting for the judge of the chancery court, it was held that under § 53, ch. 167, Code 1873, the decree was valid. *Morris v. Va. Ins. Co.*, 85 Va. 598, 8 S. E. Rep. 393.

Municipal Court of Wheeling—Recovery of Taxes.—Section 12, ch. 51, Acts 1865, establishing the municipal court of Wheeling, grants that court jurisdiction of cases, in which the city seeks to recover taxes due it. *City of Wheeling v. Hawley*, 18 W. Va. 472.

c. CRIMINAL CASES IN GENERAL.

Similar Jurisdiction to Circuit and County Courts.—Under the Act of April 2, 1870, ch. 38, §§ 6, 7, Sess.

Acts 1869-70, corporation courts in cities and towns having a population of more than five thousand have the same jurisdiction to try offences committed within their respective limits as circuit and county courts had; and the act of April 2, 1878, to regulate and define the jurisdiction of the county and circuit courts does not apply to or affect the jurisdiction of said corporation courts. *Tremaine v. Com.*, 25 Gratt. 967.

No Jurisdiction of Felonies in 1860.—An indictment for petit larceny which charges that the person indicted had been previously indicted, tried and sentenced for another petit larceny, is an indictment for felony, and a corporation court has no jurisdiction to try the case. *Rider v. Com.*, 16 Gratt. 499.

Indictment—Prisoner in Custody—Examination before Justice.—A prisoner in custody is indicted in the hustings court. He is not entitled to be sent before a justice for examination, but the court may proceed to try him upon the indictment. *Shelly v. Com.*, 19 Gratt. 653.

Same—Felony—Removal from County Court.—An indictment for a felony was found against the prisoner in the county court of Alexandria, and it was removed to the corporation court of Alexandria. The corporation court had no jurisdiction to try it. See § 4, ch. 38, Acts 1868-70; *Marshall v. Com.*, 30 Gratt. 845.

Proceedings against Master for Allowing Slave to Hire Himself Out.—By the provisions of 1 Rev Code, ch. 111, § 81, the court of hustings has jurisdiction to proceed against the master who permits a slave to go at large and hire himself out contrary to the provisions of the above act. *Abrahams v. Com.*, 1 Rob. 675.

Hustings Court of Richmond—Extent of Jurisdiction.—The criminal jurisdiction of the hustings court of the city of Richmond, conferred by the acts of 1808 and 1842, extends one mile beyond the city limits. *Jordan v. Com.*, 25 Gratt. 943.

Same—Jurisdiction of Felony Cases.—In *Chahoon's Case*, 21 Gratt. 825, the point was made by counsel, that under the constitution in force at that time the hustings court of Richmond could not be given jurisdiction to try cases of felony. The court said since the case of *Boswell v. Com.*, 20 Gratt. 800, *Bird's Case*, 21 Gratt. 800, and *Smith's Case*, 21 Gratt. 809, all proceed upon the tacit admission of the existing jurisdiction of the corporation courts to try such cases, the court was of opinion that the hustings court of the city of Richmond had jurisdiction over the case. *Boswell v. Com.*, 20 Gratt. 800.

Same—Forgery—Civil Proceedings in County of Henrico.—Though a suit at law was brought in the county court of Henrico upon a forged note and judgment recovered, and a suit in equity to enforce this judgment was brought in the circuit court of Henrico, yet as both these courts were held in the limits of the city of Richmond where the prisoner lived, the hustings court of the city had jurisdiction to try him for the offence. *Chahoon v. Com.*, 20 Gratt. 733; *Sands v. Com.*, 20 Gratt. 800.

Municipal Court of Wheeling—Violation of Revenue Laws—Constitutional Law.—An act relative to the municipal court of Wheeling was unconstitutional where it attempted to confer sole jurisdiction on that court of cases involving a violation of the revenue laws by selling spirituous liquors on the Sabbath. It did not take away the jurisdiction of the circuit court in such cases, and is in violation of § 6, art. 6, of the Constitution, which provides that the circuit court shall have original jurisdiction of

all crimes and misdemeanors. *Eckhart v. State*, 5 W. Va. 515.

Hustings Court of Roanoke—No Jurisdiction Prior to Incorporation.—Prior to the incorporation of Roanoke, act January 31, 1884, and to the creation of the hustings court of that city, act Feb. 25, 1884, the county court of Roanoke county had jurisdiction of all cases committed in what afterwards became the city limits. The hustings court had no jurisdiction of a murder committed there January 27, 1884. *Ryan v. Com.*, 30 Va. 385.

VIII. CIRCUIT COURTS.

1. JURISDICTION IN GENERAL.

Court of General Jurisdiction.—The circuit court is the court of general jurisdiction, taking cognizance of all actions at law between individuals, with authority to pronounce judgments and to issue executions for their enforcement. Where its jurisdiction is questioned it must decide the question itself. *Cox v. Thomas*, 9 Gratt. 323.

In Vacation.—The circuit court can make in vacation only such decrees or judgments as are authorized by statute. *Tyson v. Glazie*, 23 Gratt. 799.

After Final Decree.—Section 2451, Code 1887, providing that the circuit court may reverse a judgment or decree for certain mistakes and errors for which an appellate court might reverse it, does not authorize it, after entering a final judgment remanding a cause to the county court, at a subsequent term to assume jurisdiction and to dispose of the case upon its merits. *Thompson v. Carpenter*, 38 Va. 702, 14 S. E. Rep. 181.

Judgment Rendered on Day General Court Held.—A judgment is rendered in the superior court of Chesterfield on the 15th of November, the day on which the general court is directed by law to be held at the capitol; the distance is judicially known to be not more than three hours moderate ride from one place to the other. It does not appear on the record but that the judgment might have been rendered in time to enable the judge to close that court, and attend at the capitol to his duties as one of the general court, on the same day. The superior court had jurisdiction to render the judgment on that day. *Mendum v. Com.*, 6 Rand. 704.

2. JURISDICTIONAL AMOUNT.

Former Rule—Usury.—It was formerly the rule that a superior court of chancery had jurisdiction only where the subject in controversy exceeded \$150. But when a bill was brought for relief against usury, it had jurisdiction, although the usury was for less than that sum, as it and the principal exceeded it. *Stone v. Ware*, 6 Munf. 541. For the jurisdictional amount in the circuit courts, see § 3058, Va. Code 1887, and § 2, ch. 112, W. Va. Code 1899.

Reduction by Set-Off—By Payment.—Thus it was held that the superior court had no jurisdiction of cases where the demand was less than \$100, but the reduction by a set-off did not affect its jurisdiction. The rule was otherwise when it was reduced by payment. *Larowe v. Binns*, 2 Va. Cas. 308; *Ferguson v. Highley*, 2 Va. Cas. 255.

Damages Uncertain—Verdict.—Where the damages for breach of contract were uncertain, and therefore unknown until ascertained by verdict, the superior court had jurisdiction although the verdict is for less than \$100. *Newsom v. Pendred*, 2 Va. Cas. 93.

Penalty of Sufficient Amount.—The defendant, in an action upon a penal bill for \$100, conditioned to pay \$47.77, moved for a stay in the proceedings,

because the penalty was inserted for the purpose of giving the court jurisdiction not passed by law. It was held that the court had jurisdiction. *Heath v. Blaker*, 2 Va. Cas. 215. See *Newell v. Wood*, 1 Munf. 555, which holds that the *penalty* decides the jurisdiction.

3. PLACE.

Functions Exercised Only at Places Fixed by Law.—

It is a fundamental principle that courts of general and original jurisdiction may exercise their functions only at such times and places as are fixed by law, and that the judge in vacation can enter no orders except such as are expressly authorized by statute, and he is restricted by its very terms. *Chase v. Miller*, 88 Va. 791, 14 S. E. Rep. 545.

Judge May Sue in His Circuit.—Section 3214 of the Code, re-enacted and amended by chaps. 329, 736, Acts 1899-00, provides that if a judge of a circuit court be interested in a case, it "may" be brought in an adjoining circuit. It was held in *Harrison v. Wissler*, 98 Va. 597, 36 S. E. Rep. 982, that the word "may" was permissive, and that it does not preclude a judge from suing in his own circuit.

Removal of Court.—Where a courthouse is undergoing repairs and is not in a fit condition to be occupied, the circuit court may remove to another place, and continue its sessions there. *Caperton v. Bowyer*, 4 W. Va. 176.

Of Henrico at State Courthouse.—The act of 1852 which provided that the circuit court of Henrico county should be held at the state courthouse in Richmond, does not violate art. 6, § 6, Const., providing that the circuit court shall be held by the judge of each circuit at least twice a year, the constitution being silent as to the place of holding such court. *Com. v. Scott*, 10 Gratt. 749.

The Granting of Administrations.—Under 1 Rev. Code, ch. 104, §§ 12, 32, the circuit courts have jurisdiction to grant administrations within certain limits. The place of the intestate's residence gives jurisdiction to the local courts. If he has no known place of residence, then the place of his death, or the place where his estate lies, gives jurisdiction. *Ex parte Barker*, 2 Leigh 719.

4. WHEN STATE OR STATE OFFICIAL PARTY.

Administration—Claim against State.—A resident of Kentucky dies intestate there, having no estate in Virginia but a claim on this commonwealth for money. It was held that the circuit court of Henrico county, wherein is the seat of government, has jurisdiction to grant administration of such decedent's estate. *Com. v. Hudgin*, 2 Leigh 248.

Circuit Court of Richmond—State Treasurer Party—Exclusive Jurisdiction.—Code 1873, ch. 44, §§ 7, 8, conferring exclusive original jurisdiction on the circuit court of Richmond in cases where the state treasurer is a party, is mandatory, and ousts all jurisdiction in such cases from every other court. *Taylor v. Williams*, 78 Va. 422.

Same—Exclusive Equitable Jurisdiction.—By Acts of Assembly 1869-70, p. 42-3, the circuit court of the city of Richmond has no equitable jurisdiction except in certain specified cases, in which the state is interested, or some of the officers and boards, representing the state, are necessary and proper parties, and in such cases its jurisdiction is exclusive. *Ragland v. Broadnax*, 29 Gratt. 401.

Same—Suit by Commonwealth.—Under § 1, ch. 166, Code 1873, the circuit court of the city of Richmond alone has jurisdiction of any suit to enjoin or affect any judgment or decree in behalf of the commonwealth, and no such suit can be maintained in any

other court of the state. *Com. v. Latham*, 85 Va. 682, 8 S. E. Rep. 488.

Same—Commissioner of Agriculture.—By § 4, ch. 155, Code 1873, the circuit court of the city of Richmond has no chancery jurisdiction, except in suits in which it may be necessary or proper to make certain enumerated officers or public corporations parties defendant. The commissioner of agriculture is not within the exception. *Blanton v. Southern, etc., Co.*, 77 Va. 335; *Ragland v. Broadnax*, 29 Gratt. 401.

5. JURISDICTION IN CIVIL SUITS GENERALLY.

To Grant License for Retail of Ardent Spirits.—The statute, Acts 1879-80, p. 148, in regard to license for retail of ardent spirits, provides that the county court "shall grant the license" if the one applying therefor shall bring himself within its requirements, and that the circuit court "may grant the license." The latter words mean that the circuit court shall have jurisdiction to grant the license, and must grant it if the applicant conforms to its requirements. *Leighton v. Maury*, 76 Va. 865.

Condemnation Proceedings—Removal—Report of Commissioners.—Where commissioners are appointed under § 1, ch. 174, Code 1880, for the purpose of ascertaining compensation to landowners for land proposed to be taken by a railroad company, which cause has been removed to the circuit court, if it is set aside by the court, it should not send the case back to the county court; but should take jurisdiction of the case, and proceed in it with the same powers that are vested in the county court by the statute. *Virginia, etc., R. Co. v. Campbell*, 23 Gratt. 437.

Same—West Virginia Practice.—It was held in *Chesapeake, etc., R. Co. v. Hoard*, 16 W. Va. 270, that the provisions in ch. 88, Acts 1873-3, in reference to the manner in which lands shall be condemned by railroad companies, is not repealed nor abrogated, by ch. 114, Acts 1875, and the amendatory Act of 1879, ch. 8, and that therefore the circuit court has no jurisdiction in a case where a railroad company seeks to condemn land; but that jurisdiction in such cases is confined to the county court, as was decided in *Railroad Co. v. Patton*, 9 W. Va. 648. See generally, on this subject, monographic note on "Eminent Domain" appended to *James River, etc., Co. v. Thompson*, 3 Gratt. 270.

To Sell Real Estate Devised.—Under § 20, ch. 112, Code 1873, the circuit courts have jurisdiction to sell real estate devised by a testator to his two children for life, with remainder to their issue, if any be living at the time of their deaths; and if either should die without issue living, then to go to the issue of the other. *Troth v. Robertson*, 78 Va. 46.

To Rehear Remanded Cause.—When the court of appeals, in pursuance of § 5, ch. 171, Act 1869-70, sends a cause to a circuit court, which had been pending in a district court of appeals, that act was constitutional, and the circuit court has jurisdiction to rehear and decide the case. *Cowan v. Doddridge*, 32 Gratt. 458; *Kent v. Dickinson*, 26 Gratt. 817; *Cowan v. Fulton*, 23 Gratt. 579.

To Compel Supervisors by Mandamus to Permit Treasurer to Qualify.—Section 4, art. 7, of the Const., provides that board of supervisors shall be the judges of the election, qualifications, and returns of their own members, and of all county and township officers. Under this provision the circuit court of a county has no jurisdiction to compel the board of supervisors by *mandamus* to permit a person to

qualify and give bond as treasurer of that county. This function involves discretion and is not a ministerial act. *Board of Supervisors v. Minturn*, 4 W. Va. 300.

Mandamus, Prohibition and Certiorari—Restraint.—Section 12, art. 8, W. Va. Const. 1872, giving to circuit courts the jurisdiction over all inferior tribunals, by *mandamus*, *prohibition* and *certiorari*, is restrained and limited by § 29 of the same article, which provides that in certain cases the county courts shall have jurisdiction of all appeals from justices, and their decision shall be final. *Poe v. Machine Works*, 24 W. Va. 517.

Quo Warranto.—Held in *Bland and Giles County Judge Case*, 33 Gratt. 443, that the writ of *quo warranto* was not abolished in Virginia, and that the circuit courts had jurisdiction of the same.

Recovery of Money by Motion—Section 3211, Va. Code, authorizes a remedy by motion in the circuit court in those cases in which the plaintiff is entitled to recover money by action on contract, and where the proceeding is founded upon a tort, it has no jurisdiction of the case. *West Union Tel. Co. v. Bright*, 90 Va. 778, 20 S. E. Rep. 146; *West Union Tel. Co. v. Pettyjohn*, 88 Va. 296, 13 S. E. Rep. 431. See material changes in procedure to recover money by motion, in the amendment of § 3211, by Acts 1895-96, p. 140.

Injunctions—Proceedings Out of Circuit.—Section 41 of the circuit superior court law, Supp. Rev. Code, ch. 109, giving jurisdiction to each of the judges of that court to award injunctions to judgments rendered or proceedings apprehended out of his own circuit, but directing that the order shall be directed to the clerk of the county in which the judgment is rendered or the apprehended proceeding is to be had, gives the judge jurisdiction only to award the injunction, not to hear and determine the cause. *Randolph v. Tucker*, 10 Leigh 655.

Same—Entry on Land.—By § 3436, of the Code, the jurisdiction of a suit for injunction is in the circuit court of the county in which the act or proceeding is to be done, or is done or apprehended. Thus where an entry on land is sought to be restrained by injunction, it cannot be maintained in a county other than that in which the land is situated. *Norfolk, etc., R. Co. v. Postal Tel. Cable Co.*, 88 Va. 932, 14 S. E. Rep. 689; *Norfolk, etc., R. Co. v. Postal Tel. Cable Co.*, 88 Va. 936, 14 S. E. Rep. 690.

Over Church Trustees.—While the circuit courts have general powers as courts of law and chancery, their jurisdiction in a summary proceeding under § 9, ch. 76, Code 1873, is special, and limited to the appointment and removal of church trustees, but it does not extend to the regulation of their conduct in administration of the trust under the instrument creating it. *Wade v. Hancock*, 76 Va. 620.

Lunatics—Mandamus against Superintendent of Asylum.—The circuit court of the county in which a lunatic resides has jurisdiction of *mandamus* proceedings brought to prevent the superintendent of the asylum, in which she had been confined, from retaking the lunatic, and where that is the place in which it is apprehended that the act will be done. *Statham v. Blackford*, 89 Va. 771, 17 S. E. Rep. 233.

Same—Concurrent Jurisdiction to Appoint Committees—Question of Insanity.—By §§ 1697, 1698, 1700, of the Va. Code 1887, circuit courts are given concurrent jurisdiction with county and corporation courts to appoint committees for lunatics, after they have been adjudged insane by three justices, or by the county or corporation court of the county or cor-

poration of which they are inhabitants. The circuit courts are nowhere given the power to try the question of insanity, and the power to appoint a committee does not include such power. *Harrison v. Garnett*, 86 Va. 768, 11 S. E. Rep. 123.

Bastardy Cases—Maintenance of Child.—When the act of December 9, 1873, entitled "An act to amend and re-enact chap. 80 of the Code, concerning the maintenance of illegitimate children," went into operation, it did not oust the jurisdiction of the circuit courts to hear and determine cases of bastardy, where recognizance had theretofore been given, requiring the defendant to appear at the next term of the circuit court and answer the charge. After the passage of this act proceedings in the circuit court should conform as far as practicable to its requirements. *Tennant v. Brookover*, 12 W. Va. 337.

6. JURISDICTION IN CRIMINAL CASES GENERALLY.

Jurisdiction by Election of Prisoner—No Power to Remand.—Where a circuit court acquired jurisdiction by the election of the prisoner to be tried there, it has no power to remand the case to the county court for any purpose not even on the motion of the prisoner himself, and an order to that effect is a nullity. *Nicholas v. Com.*, 91 Va. 741, 21 S. E. Rep. 364.

Same—Same—Exclusive Jurisdiction—Not an Appellate Tribunal.—Where one arraigned for murder in a county court elects under § 4016, of the Va. Code, to be tried in the circuit court, the latter has exclusive jurisdiction to try the case, and cannot sit as an appellate tribunal to consider supposed errors of the county court, where the record is not transmitted to it; and an order by it remanding the cause to the county court for trial is erroneous, and confers no jurisdiction on the latter. *Howell v. Com.*, 86 Va. 817, 11 S. E. Rep. 238.

Same—Same—Jurisdiction of Horse Stealing.—It was held in *Price v. Com.*, 21 Gratt. 846, where a person was indicted for receiving a stolen horse and also for the larceny of the horse, and had elected to be tried in the circuit court, he could not on trial there move the court to send him back to the county court for trial, on the ground that the circuit court had no jurisdiction to try him. The act of February 16, 1866, making horse stealing punishable with death or confinement in the penitentiary at the jury's discretion, had not been repealed and the circuit court had jurisdiction of the case.

Same—Record Must Be Certified.—When on his arraignment the prisoner demanded to be tried in the circuit court and the record of the indictment and proceedings in a county court were not certified to the circuit court, as required by § 4016 of the Code, that court is without jurisdiction to try the prisoner. *Mitchell v. Com.*, 89 Va. 826, 17 S. E. Rep. 480.

Same—Cannot Elect in Corporation Court.—A prisoner indicted in a corporation court for murder, is not entitled to elect to be tried in the circuit court. See Acts 1860-70, p. 35; *Boswell v. Com.*, 20 Gratt. 860, and *note*.

Circuit Court of Richmond—Jurisdiction of Convicts.—In *Ruffin v. Com.*, 21 Gratt. 790, a penitentiary convict was hired to work on a railroad, and in Bath county, in attempting to escape, he killed his guard. It was held that he may be tried for the offence before the circuit court of the city of Richmond, and by a jury summoned from that city.

Disturbance of Religious Worship.—The circuit superior courts have jurisdiction to try offences against

the statute, 1 Rev. Code, ch. 141, forbidding the disturbance of congregations assembled for the purpose of religious worship. *Com. v. Jennings*, 3 Gratt. 624.

Entitled to Examination before a Justice—Acts 1867.

—A prisoner is indicted for felony in the circuit court, being in custody at the time. The circuit court has no jurisdiction to try him on this indictment, but he must be sent before a justice for examination and commitment for trial in the county court, under the act of the assembly of April 27, 1867. *Wright v. Com.*, 19 Gratt. 626.

On the 24th of June, 1867, the prisoner was committed by a justice of the peace for examination upon the charge of murder. The examining court which commenced on the 2d of July, sent him on for trial before the circuit court. At the October term of the latter court he was indicted for murder, and when arraigned tendered a plea to the jurisdiction of the court. It was held that the court had jurisdiction to try him, as the act passed April 27, 1867 (Acts 1866-67, p. 916), to revise and amend the criminal procedure, provided that it should go into operation on the 1st of July, 1867, and it repealed the law in relation to examining courts. Still a prisoner committed on charge of murder prior to that time must be committed for examination, and it was proper to proceed under the former law in the examination of the prisoner before an examining court, and his trial before the circuit court. *Phillips v. Com.*, 19 Gratt. 485. See *Chahoon's Case*, 20 Gratt. 785.

Homicide by Free Negroes and Mulattoes.—Under the construction of § 11, ch. 22, Acts 1831-32, free negroes and mulattoes are still to be tried by jury in the circuit superior courts for homicide and such crimes as were punishable with death before the statute. *Com. v. Weldon*, 4 Leigh 662.

Transfer to Another Court—Time of Trial.—When the circuit court of Warwick sends an indictment to the circuit court of York to be tried at its June term, 1831, the circuit court of York can try it at any term, and the circuit court of Warwick had no power to direct it be tried at any particular time. *Brooks v. Com.*, 4 Leigh 669.

IX. COURT OF APPEALS.

1. IN GENERAL.

First Court Was Legislative Organization.—The first court of appeals was a legislative court only, and it was not necessary that the judges should produce any commissions, or that the executive be present when they qualified; for the act constituting the court had not directed commissions to be issued, or the oaths to be taken in the presence of the executive; and the judges by construction of law knew each other to be judges of the courts to which they respectively belonged. *First Case of the Judges*, 4 Call 1.

Effect of Mandate of Supreme Court of United States.

—The court of appeals will consider whether a mandate issued by the United States supreme court, directing it to enter a judgment, reversing one which it had pronounced before, be authorized by the constitution or not, and being of opinion that such mandate is not so authorized, will disobey it. *Hunter v. Martin*, 4 Munf. 1. See *Hunter v. Martin* (U. S.), 1 Wheat. 304, and *Cohens v. Virginia* (U. S.), 6 Wheat. 264, where the United States supreme court overruled the above case.

Cannot Review Decisions of Preceding Court.—The enabling act of March 5, 1870, which authorized the court of appeals under the new constitution to

rehear such judgments and decrees as were rendered after the restoration of the state to the Union, is unconstitutional, being an invasion of judicial authority. The legislature has no power to authorize a court to review the decisions of the court that preceded it. *Griffin v. Cunningham*, 20 Gratt. 31; *Teel v. Yancey*, 23 Gratt. 691.

Decree of Pretended Court in 1861 Invalid.—Where a case was pending under the lawful court of appeals of Virginia, on April 17, 1861, a decree rendered by the pretended court on November 17, 1861, acting under authority of citizens then in insurrection against the United States, is not binding on the parties. *Snider v. Snider*, 3 W. Va. 200.

Decree Entered under Color of Authority Valid.—The judgments and decrees of the judges of the court of appeals, who were in office under military appointment, and who held over and continued to exercise the duties of their office after the state was restored to the Union, are valid and binding because they acted under color of authority. *Griffin v. Cunningham*, 20 Gratt. 31.

2. TRANSFER OF CAUSES.

From One Place of Session to Another—Consent.—The supreme court of appeals has the right to transfer a case from one place of session to another by § 3023, of the Va. Code 1887, which provides that by consent of parties, or for reasons appearing to the court, any case pending in said court may be transferred to another place of session. *Lillienfeld v. Com.*, 92 Va. 818, 23 S. E. Rep. 882. See *Gilbert v. Washington, etc., R. Co.*, 33 Gratt. 586.

From District Court to Circuit—Constitutional.—Acts 1869-70, p. 227, in relation to the transfer by the court of appeals of cases pending in the district court of appeals to the circuit court, to be heard there as by an appellate court, are constitutional. *Cowan v. Fulton*, 23 Gratt. 579.

3. SPECIAL COURT.

Act Establishing Constitutional.—The act of March 31, 1848, establishing a special court of appeals, constituted of judges of the circuit courts, is constitutional. *Sharpe v. Robertson*, 5 Gratt. 518.

Same—Decision Binding.—The act of February 22, 1872, to provide a special court of appeals, which creates one consisting of three judges of the circuit courts, is constitutional, and the decisions of the courts are valid and binding on the parties in the cause. *Bolling v. Lersner*, 26 Gratt. 36.

Is Not a Supreme Court.—The special court of appeals is not a supreme court of appeals, but belongs to the class of superior courts provided for in the constitution of Virginia. *Sharpe v. Robertson*, 5 Gratt. 518.

Proper Cases to Be Decided.—The proper cases to be decided by the special court of appeals are all cases on the docket of the court of appeals, not involving a constitutional question, and not decided in the lower court by one of the judges of the special court. It is the duty of the judges of the court of appeals to select the cases to be tried by the special court. *Bolling v. Lersner*, 26 Gratt. 36.

To Decide Election Contests—Limited Jurisdiction.—The court created by § 13, ch. 6, W. Va. Code 1885, to determine the election of certain state officers therein named has no common-law jurisdiction, and therefore cannot permit amendments of notices and specifications after the time has passed within which the parties may correct omissions and supply defects. *Loomis v. Jackson*, 6 W. Va. 612.

4. JURISDICTION.

a. IN GENERAL.

Errors in Lower Court Not Corrected by Original Suit—Fraud.—The supreme court of chancery cannot correct errors in a decree of an inferior court by an original suit, although in that way it may impeach such a decree for fraud, and under peculiar circumstances would lend its aid to carry a decree of an inferior court into effect. *Banks v. Anderson*, 3 H. & M. 20.

Judges May Award Injunctions.—The judges of a court of appeals, or any one of them out of court, have power to award injunctions, which have been refused by the judge of any superior court of chancery, but this power is not possessed by the court of appeals. *Mayo v. Haines*, 2 Munf. 423.

Interlocutory Decree—When Set Aside.—An interlocutory decree, which is entered at one term of the court of appeals, may be set aside at a subsequent term. *Com. v. Beaumarchais*, 3 Call 122.

b. CRIMINAL JURISDICTION.—In *Bedinger v. Com.* (1808), 3 Call 461, it was held that the court of appeals had no jurisdiction in criminal cases, and therefore no appeal would lie to it from a judgment of the district court.

The general court continued to be the supreme criminal court until its abolishment by the constitution of 1861, when its appellate jurisdiction was given to the supreme court of appeals, which had no jurisdiction prior to that time. Va. Code 1887, § 4052, as amended by Acts 1897-98, p. 622. But the court of appeals had jurisdiction in criminal cases adjourned from general court. See *Com. v. Caton* (1782), 4 Call 5.

c. ORIGINAL JURISDICTION.

(1) In General.

Criminal Orders for Unappropriated Land.—A court of appeals had exclusive jurisdiction of cases concerning the orders of council, before the revolution, in favor of companies for tracts of unappropriated land, under the act of 1779. *Hamilton v. Maze*, 4 Call 195.

Application to Open Decree against Infant.—Section 7, ch. 132, W. Va. Code, authorizing one, against whom a judgment was rendered while an infant, to apply for an opening thereof within six months after attaining his majority, does not give the supreme court of appeals original jurisdiction of such application. *Ewing v. Winters*, 39 W. Va. 469, 20 S. E. Rep. 572.

Former Rule—No Original Jurisdiction.—In *Mayo v. Clarke*, 2 Call 399, it was held that the court of appeals had no original jurisdiction, and could not decide the merits of any case, until they had been passed upon by the district court.

(2) Mandamus, Prohibition and Habeas Corpus.

Constitutional Provisions.—By § 2, art. 6, Va. Const., and § 8, art. 6, W. Va. Const., original jurisdiction is conferred upon the court of appeals in cases of *habeas corpus*, *mandamus* and *prohibition*. *Taylor v. Williams*, 78 Va. 422; *Com. v. Latham*, 85 Va. 632, 8 S. E. Rep. 488; *Douglass v. Loomis*, 5 W. Va. 542; *Fleming v. Commissioners*, 31 W. Va. 608, 8 S. E. Rep. 267.

Same—West Virginia Rule.—By a rule adopted in West Virginia by its court of appeals, it will not take such original jurisdiction unless special reasons appear therefor; when such reasons appear it will unhesitatingly exercise its jurisdiction. *Fleming v. Commissioners*, 31 W. Va. 608, 8 S. E. Rep. 267.

Same—Virginia Decisions.—In Virginia it is firmly established that the Constitution, § 2, art. 6, does

not *proprio vigore* confer jurisdiction upon the court of appeals, but it was intended to give the legislature power to do so. In other words, it provides that the court shall have appellate jurisdiction only, except in the cases enumerated, but it does not provide that it shall have original jurisdiction in every case where *habeas corpus*, *mandamus*, or *prohibition* is the appropriate remedy; but leaves the jurisdiction in those cases to be regulated by law. *Gresham v. Ewell*, 84 Va. 784, 6 S. E. Rep. 134; *Barnett v. Meredith*, 10 Gratt. 650; *Prison Assoc. v. Ashby*, 93 Va. 607, 25 S. E. Rep. 893; *Cook v. Daugherty*, 99 Va. 590, 39 S. E. Rep. 223; *Page v. Clopton*, 30 Gratt. 417; *Price v. Smith*, 93 Va. 14, 24 S. E. Rep. 474. See §§ 2454-55, Va. Code.

Mandamus—Inspection of Poll Books.—Under § 133, Va. Code, the right clearly exists to inspect the poll books, and under § 3586 of the Code, the court of appeals has jurisdiction to issue a writ of *mandamus* to compel the custodian of such books to allow such inspection, and take proper notes therefrom. See § 84 of the Code; *Keller v. Stone*, 96 Va. 607, 32 S. E. Rep. 454. See *Gleaves v. Terry*, 97 Va. 491, 25 S. E. Rep. 552.

Same—Compelling Inferior Court to Sign Exceptions.

—The jurisdiction of the court of appeals by *mandamus* to compel an inferior court to sign and seal bills of exceptions, or to amend such bills according to the truth of the case, is well settled in this state. *Collins v. Christian*, 93 Va. 1, 24 S. E. Rep. 472; *Page v. Clopton*, 30 Gratt. 415, with *foot-note* containing full list of authorities on this question.

Same—Where Tried—Statute.—Section 3004 of the Code provides that a writ of *mandamus* shall issue and be tried at the place of session of the court of appeals at which writs of error to such court are to be tried. Section 3091 names Staunton as the place at which writs of error from the hustings court of Staunton shall be heard. The court of appeals sitting in Richmond has no jurisdiction to issue a *mandamus* to compel the judge of said hustings court to issue a writ for a special election, and the filing of an answer by the judge, in which the question of jurisdiction was not raised, did not confer jurisdiction. *Hotchkiss v. Grattan*, 90 Va. 642, 19 S. E. Rep. 165.

Same—To Compel Circuit Judge to Try Cause.—Neither under the constitution nor by statute has the supreme court of appeals jurisdiction to issue a *mandamus* to a judge of the circuit court, to compel him to try a cause therein pending. *Barnett v. Meredith*, 10 Gratt. 650.

Same—Effect of Similar Jurisdiction of Circuit Court.

—Section 3086, Va. Code, giving the supreme court of appeals original jurisdiction to issue writs of *mandamus* in cases in which a *mandamus* may issue according to the principles of the common law, does not take a case of which the circuit court also has jurisdiction out of the original jurisdiction of the said court on the ground that, since the circuit court has jurisdiction, the interposition of the court of appeals is not necessary to prevent a failure of justice. *Clay v. Ballard*, 87 Va. 787, 13 S. E. Rep. 262.

Prohibition—No Jurisdiction over County Courts.

—Section 4, ch. 156, Code 1873, provides for the issuance of the writ of prohibition from the court of appeals to the circuit and corporation courts, and to the hustings and chancery courts of the city of Richmond. The county courts are not mentioned, and it is clear that the legislature intended to restrict the jurisdiction of the court to issuing the

writ to the courts mentioned in the act. *Gresham v. Ewell*, 84 Va. 784, 6 S. E. Rep. 134.

X. DISTRICT COURT.

Indictment for Felony—No Jurisdiction without Examination.—The district court has no original jurisdiction to receive and sustain an indictment for felony, before an examination before a court of justices in the manner prescribed by law. *Anonymous*, 1 Va. Cas. 143.

Same—Prior to 1804.—Before the act of 1804, a person might be tried in the district court for a felony, notwithstanding there had been no enquiry before a court of examination. *Com. v. Blakeley*, 1 Va. Cas. 129.

Jurisdictional Amount.—A judgment in a district court in an action of assumpsit was arrested upon a verdict for less than \$100, because the record did not show that the plaintiff's demand was reduced below \$100 by a set-off offered at the trial on the part of the defendant. *Maitland v. M'Dearman*, 1 Va. Cas. 131.

The special counts in an action of assumpsit claimed less than \$100, but the general count claimed \$200, and the damages were laid at \$500. The jury being unable to agree the case was submitted to arbitration, the award to be the judgment of the court. The award was for less than \$100. *Held*, that the district court had jurisdiction. *Neff v. Talbot*, 1 Va. Cas. 140.

Judgment of Former Term Final.—A district court has no power or jurisdiction to reverse, alter, or amend a judgment given at the former terms of the state court, which had been entered on the order book, and signed by a judge in open court. *Halley v. Baird*, 1 H. & M. 25.

Execution of Decrees of Court of Appeals.—It was held in *Scott v. Graves*, 4 Call 373, that the state district courts were obliged to execute the decrees of the court of appeals, reversing those of the old court of admiralty, after the dissolution of that court by the organization of the government of the United States, in cases in which the former court of admiralty had jurisdiction by law, at the time of passing the "act establishing district courts, and for regulating the general court," and which was not taken away by the constitution of the United States.

XI. GENERAL COURT.

Jurisdictional Amount.—In *Tutt v. Freeman*, Jefferson 24, it was held that the jurisdiction of the general court did not depend upon the amount of the judgment given, but upon the amount of damages laid in the declaration, if it was for as much as ten pounds sterling.

Ecclesiastical Jurisdiction.—The general court was held in *Godwin v. Lunan*, Jefferson 96, to be possessed of ecclesiastical jurisdiction in general, and as an ecclesiastical court it had the power to censure or deprive a minister in charge of a church, if there should be sufficient cause.

Jurisdiction to Decide Questions of Law from Superior Court.—The general court has no jurisdiction to consider matters of law certified to it for opinion by the higher court of chancery. *Com. v. Henning*, 1 Va. Cas. 324.

If a superior court decides upon a question at law in a criminal court, and afterwards refers it to the general court for its opinion, the general court has no jurisdiction to consider the question. *Com. v. Henning*, 1 Va. Cas. 325. But see *M'Caul's Case*, 1 Va. Cas. 271.

Same—Consent of Accused.—If a question of law in a criminal prosecution be adjourned from a circuit superior court to the general court, it must appear by the record, that it was adjourned with the consent of the accused. *Com. v. Reynolds*, 1 Leigh 663.

Same—Same—Outlawry.—In an indictment against a party who has been proceeded against to outlawry, a question cannot be adjourned to the general court, without his consent appearing in the record. *Com. v. Pearce*, 6 Gratt. 669.

Same—Regular under Rev. Code.—It was held in *Com. v. Nix*, 11 Leigh 636, that under 1 Rev. Code, ch. 69, § 14, that it was regular to adjourn questions in a criminal case in regard to the effect of the evidence produced, from the circuit court to the general court and the latter court ought to decide them.

Bail in Murder Case—Concurrent Jurisdiction.—It was held in *Com. v. Semmes*, 11 Leigh 665, that the general court had original concurrent jurisdiction with the circuit superior court to admit a prisoner to bail for good cause, where he is confined in jail upon an indictment for murder.

Habeas Corpus—Judgment of Oyer and Terminer Court.—A prisoner confined in the penitentiary under the judgment of a court of oyer and terminer, for an offence which said court had no jurisdiction to try, may be discharged by the general court upon a writ of *habeas corpus*. *Cropper v. Com.*, 3 Rob. 842.

Felonies—Committed beyond Territorial Limits.—By cl. 1, § 7, Act, 1 Rev. Code 1792, ch. 136, all treasons, etc., and other offences against the commonwealth, except piracies and felonies on the high seas, though committed beyond the territorial limits of the state, are indictable and punishable in the general court. *Com. v. Gaines*, 2 Va. Cas. 172.

Same—Committed on Bays, Rivers, Creeks, etc.—The federal courts of admiralty established under the articles of confederation, had power to try piracies and felonies on the high seas only; the Virginia court of admiralty was excluded from the jurisdiction in all capital cases, and hence it also follows that the general court as one of common law had jurisdiction in 1786, to try all felonies committed on the bay, rivers, creeks, etc. *Com. v. Gaines*, 2 Va. Cas. 172.

Prior to the Revolution, the commissioners of admiralty appointed under the great seal of England, had jurisdiction to try all treasons, felonies, and piracies committed, not only on the high seas, but on the bays and rivers. Those powers ceased with the revolution. By the act of 1777, the general court was vested with the power of trying those offences within the limits of the commonwealth, on the bay and rivers, as well as on the land. *Com. v. Gaines*, 2 Va. Cas. 172.

Larceny of Horse in District of Columbia.—Under Act, 1 Rev. Code 1792, ch. 136, § 7, if a citizen of Virginia steal a horse from another citizen in the District of Columbia, he may under said law be indicted, tried, convicted and sentenced in the general court. *Com. v. Gaines*, 2 Va. Cas. 172.

XII. FEDERAL COURTS.

Decision of Highest State Court Construing Statutes Controls.—The decision of the highest court of a state in the construction of its statutes, and as to the validity or invalidity of contracts dependent only on such statutes, is the controlling rule of decision in federal courts, where there is no federal ques-

tion. *Clarksburg, etc., Co. v. City of Clarksburg*, 47 W. Va. 739, 35 S. E. Rep. 994.

Effect of Mandate in State Court.—The court of appeals of Virginia will consider whether a mandate issued by the supreme court of the United States directing it to render a judgment, reversing one which it had pronounced before, be authorized by the constitution or not, and being of opinion such mandate is not so authorized will disobey it. *Hunter v. Martin*, 4 Munf. 1. See *Hunter v. Martin* (U. S.), 1 Wheat. 804, and *Cohens v. Virginia* (U. S.), 6 Wheat. 204, when the United States supreme court overruled the above case.

Right of Foreign Corporation to Resort to Federal Courts.—A state cannot by mere legislative declaration deprive a foreign corporation of its right to resort to the federal courts, in cases where such right is conferred by the constitution and laws of the United States. *Rece v. Newport News, etc., Co.*, 32 W. Va. 164, 9 S. E. Rep. 212.

Suit to Wind Up Bank—Debtor Entitled to Be Sued in State Court.—In a suit in the federal circuit court for the district of Virginia, brought by the citizens of Maryland, against a Virginia bank, to have its assets disbursed, upon the petition of the plaintiffs and upon notice to a debtor of the bank who was a citizen of Virginia, the court rendered judgment against him. It was held that the debtor being a citizen of Virginia, the court had no jurisdiction in the case to render the judgment against him, as he was entitled to be sued in the courts of his own state. *Nulton v. Isaacs*, 30 Gratt. 726.

Court of Conciliation—Not Obligatory on Party Not Consenting.—The decision of the court of conciliation, established after the war, to adjust disputes during the suspension of the civil authority is not obligatory upon a party who did not consent to its hearing. *Myers v. Whitfield*, 22 Gratt. 780.

Rule of Practice—Conflict with Act of Congress.—If a rule of practice prescribed to the circuit courts by the supreme court of the United States, is in conflict with an act of congress, the rule is void. *Suckley v. Botchford*, 12 Gratt. 60, 65 Am. Dec. 240.

XIII. GENERAL POWER AND JURISDICTION OF STATE COURTS.

1. IN GENERAL.

To Close Streets in Interest of Justice.—By order of a judge of a state court, the street in front of a courthouse is closed with ropes to prevent travel, as the noises occasioned thereby disturb the court, and interfere with the administration of justice. He has power to do so, and the city is not liable for an injury occasioned thereby to a traveler, whose injury is caused by his own imprudence. *Belvin v. City of Richmond*, 85 Va. 574, 8 S. E. Rep. 378.

No Discretionary Power to Refuse Aid.—A court of law possesses no discretionary power to refuse its aid, out of deference to any supposed policy forbidding the assertion of a state demand. *Hutsonpiller v. Stover*, 12 Gratt. 579.

Can Recommend but Not Direct Nonsuit.—It is within the power of the court to recommend a nonsuit, but it cannot direct it to be entered against the will of the plaintiff. *Ross v. Gill*, 1 Wash. 87. And on motion for a nonsuit it may give its opinion that the plaintiff has no cause of action, or it may refuse its opinion. *Thweat v. Finch*, 1 Wash. 217.

Guard Execution of Process.—Every court has the power to watch over the execution of its process, and where it has been irregularly, or fraudulently executed, to quash it. *Hendricks v. Dundass*, 2 Wash. 50.

Cannot Instruct as to Weight of Evidence.—The court has no right to instruct the jury as to the weight of evidence, that being a subject only proper for the decision of that body. *Keel v. Herbert*, 1 Wash. 203.

Can Decide Admissibility of Evidence.—It is the province of the court to decide on the admissibility of testimony, and of the jury, to decide on its weight. *Bogle v. Sullivan*, 1 Call 561.

Effect on State Court by Appointment of a Trustee Receiver by Federal Court.—A trustee of a bank in liquidation transfers a note due the bank to one of its creditors. Afterwards an order was made in a suit in a federal court, in which the trustee was a defendant, appointing him receiver in the cause. The transfer being made before the appointment of the trustee as receiver, the state court has jurisdiction of the case. *Alexandria, etc., R. Co. v. Burke*, 22 Gratt. 354.

2. ABSTRACT QUESTIONS.

Legislature Can Give No Power to Decide.—It is the province of courts to decide what the law is, and determine its application to particular facts in the decision of causes. They cannot be empowered by the legislature to pass upon the constitutionality or validity of a legislative act or city ordinance as a general and abstract question; the question must be whether the act or ordinance furnishes the rule to govern the particular case before the court. *Shepherd v. City of Wheeling*, 30 W. Va. 479, 4 S. E. Rep. 635.

While a mandamus was pending in the supreme court to determine a petitioner's right to an office, the legislature passed on this right, it was held that the court would not decide an abstract question. *Flanagan v. Central Lunatic Asylum*, 79 Va. 564.

3. CONTEMPTS.

Inherent Power to Punish.—In the courts of the state created by the constitution there is an inherent power to punish for contempt, which may be regulated, but not destroyed, or so far diminished by legislative enactment as to be rendered ineffectual. This is a power necessary to be exercised by the court itself, and an act which deprives the court of this power by giving its exercise to a jury is unconstitutional. *Carter's Case*, 96 Va. 791, 33 S. E. Rep. 780; *Wells v. Com.*, 21 Gratt. 503; *Dandridge's Case*, 2 Va. Cas. 408; *State v. McClaugherty*, 33 W. Va. 250, 10 S. E. Rep. 407; *State v. Frew*, 34 W. Va. 416; *State v. Hansford*, 43 W. Va. 773, 28 S. E. Rep. 792; *State v. Irwin*, 30 W. Va. 404, 4 S. E. Rep. 413; *Elam v. Com.*, 4 Va. Law Reg. 520.

4. PATENTS.

Contract Concerning Patent Rights—Validity Arising Collaterally.—The state courts have jurisdiction over questions arising out of contracts made concerning patent rights, where the validity of the patent arises collaterally, and is not directly involved. *Hotchkiss v. Fitzgerald, etc., Co.*, 41 W. Va. 357, 23 S. E. Rep. 576.

When the validity of a patent right is directly adjudicated, it is within the exclusive jurisdiction of the federal courts, yet a cause of action may relate to the subject-matter of the patent right which does not involve directly the validity of it, then it is within the jurisdiction of the state court. *Maurice v. Devol*, 23 W. Va. 247.

5. WHEN STATE IS INTERESTED.

Suits by Commonwealth.—Except when it is otherwise specially provided, any of the courts have jurisdiction over suits by the commonwealth, in cases in which other parties may prosecute like

suits. See, ch. 166, Code Va. 1873; Com. v. Ford, 29 Gratt. 688.

Suits against Agents of Government.—The true owner of property, found in possession of agents or officers of the government under a void title, may bring an action against such agents and officers for its recovery, and it is no answer to say that the state has an interest in or claim to the property. In such cases jurisdiction is neither given nor ousted by the relative situation of the parties concerned in interest, but by the relative situation of the parties named on the record. Board of Public Works v. Gantt, 76 Va. 455. See full discussion of this question by CHIEF JUSTICE MARSHALL in Osborn v. U. S. Bank, 9 Wheat. (U. S.) 738, 856.

6. OVER FEDERAL AFFAIRS.

Execution of Decree of Federal Court.—A state court has no jurisdiction to enjoin the execution of a decree of a federal court. Dorr v. Rohr, 82 Va. 359.

Offences by Acts of Congress.—The courts of this commonwealth have no jurisdiction to try offences created by acts of congress. Com. v. Feely, 1 Va. Cas. 321.

Penal Laws of Congress.—The penal laws of congress cannot be enforced in the state courts, as they do not have any of the judicial powers of the United States. Jackson v. Rose, 2 Va. Cas. 34.

Judicial Power of the United States.—By the constitution, the judicial power of the United States is vested in the supreme court, and inferior courts to be ordained and established by congress. Therefore state courts have no right to exercise that judicial power. Jackson v. Rose, 2 Va. Cas. 34.

State Constitution in Violation of United States Constitution.—A state court has jurisdiction to decide that a provision in the constitution of the state is in violation of the constitution of the United States. The Homestead Cases, 22 Gratt. 266.

Federal Officers Cannot Be Garnished in Federal Property.—Where the land on which a federal corporation has its buildings was purchased by the United States with consent of the state legislature, it is under the exclusive jurisdiction of the federal government. A state court cannot attach or garnish funds in the hands of its officers. Foley v. Shriver, 81 Va. 568.

7. EFFECT OF BANKRUPT PROCEEDINGS.—See monographic note on "Bankruptcy and Insolvency" appended to Dillard v. Collins, 25 Gratt. 348.

Liens Prior to Petition—Enforcement in State Court.—Where judgments were rendered and docketed, and liens acquired, against a debtor before he filed his petition in bankruptcy, and before his homestead right existed, it was competent for the judgment-lien creditors to seek enforcement in a state court, as the plaintiffs were not parties to the bankruptcy proceedings, and no question was raised there as to the liens on the land allotted as a homestead. McAllister v. Bodkin, 76 Va. 809. See Spilman v. Johnson, 27 Gratt. 88; Ferrell v. Madigan, 76 Va. 195.

A state court has jurisdiction to enforce a lien against the land of a debtor, but for a proceeding in bankruptcy, and if that jurisdiction is not ousted by the interference of the bankrupt court, the state court may lawfully proceed to enforce the lien. Beall v. Walker, 26 W. Va. 741.

When a bankrupt court orders property sold subject to its liens thereon, there is no reason why a state court should not proceed to enforce the lien. Beall v. Walker, 26 W. Va. 741.

Where neither a bankrupt court, the assignee nor any creditor objects, a state court has jurisdiction

to proceed with a suit to enforce prior liens on the property assigned. Beall v. Walker, 26 W. Va. 741.

Lien Creditor May Decline to Appear in Bankrupt Court.—A lien creditor of a bankrupt may either decline to appear in the bankrupt court, or he may proceed there to establish his debt, and rely upon his security. But if he takes an active part in those proceedings, he cannot afterwards go in a state court to satisfy his judgment. Spilman v. Johnson, 27 Gratt. 88.

Jurisdiction of State Court Not Ousted by Defendant's Going in Bankruptcy.—When a state court has possession of a case, and makes a decree therein, its jurisdiction cannot be ousted by the defendant's going in bankruptcy; he can only proceed in the state court to protect his rights. Barr v. White, 20 Gratt. 531.

Same—Creditors' Suit.—After a creditors' suit has been brought in a state court, its jurisdiction over the parties cannot be ousted by the defendant going into bankruptcy and being adjudged a bankrupt by a federal court. Sively v. Campbell, 23 Gratt. 898.

Same—Lien Creditor Not a Party—Effect of Notice to Creditors and Proof of Debt.—The jurisdiction of a state court to enforce a lien, in which suit the lien debtor is made a party and defends, is not divested by subsequent proceedings by him in bankruptcy, to which the lien creditor is not made a party, the assignee not becoming a party to the suit in the state court; and the creditor does not become a party to the bankruptcy proceedings because of notice to creditors to prove their debts, nor does he by proving his debts. The rule is that the court that first takes jurisdiction of the parties and the subject-matter retains it. Francisco v. Shelton, 35 Va. 779, 8 S. E. Rep. 789.

Bankrupt Court Has No Jurisdiction over Lands Conveyed Prior to Adjudgment.—A bankrupt court has jurisdiction over all the property of a bankrupt, including that which has been conveyed by him in fraud of his creditors or in fraud of the law. But it has no jurisdiction over land which has been ~~conveyed~~ *conveyed* before he was adjudged a bankrupt, and the state court has jurisdiction over such aliened lands at the suit of a creditor. Parker v. Dillard, 75 Va. 418.

Bankrupt Act 1841—Fraudulent Conveyance Prior to Petition.—Under the bankrupt act, August 19, 1841, it was held that creditors who had not proved their debts in bankruptcy, might institute suits to set aside fraudulent conveyances of their debtor before he filed his petition in bankruptcy, and might impeach his discharge on the ground of fraud or concealment of property, contrary to the provisions of the act, and that such suit might be instituted in any court, state or federal, in which independent of the act, a suit may be properly brought against the bankrupt. Tichenor v. Allen, 13 Gratt. 15; Beall v. Walker, 26 W. Va. 746.

845 *Brooks v. The Commonwealth.*

December, 1843.

Penitentiary Convict—Former Conviction—Continuance.†—A report being made to the circuit court of

*For monographic note on Penitentiary, see end of case.

*For monographic note on Identity, see end of case.

†See monographic note on "Juries" appended to Chahoon v. Com., 20 Gratt. 738.

Henrico by the superintendent of the penitentiary, pursuant to the statute 1 Rev. Code, ch. 171, § 16, that a convict received into the penitentiary is the same person mentioned in the record of a former conviction, and that he has not been sentenced to the punishment prescribed by law for his second offence, the court continues the case at several successive terms, in the absence and without the consent of the convict; after which he is brought into court for the first time, and his identity being duly ascertained, he is sentenced to the proper punishment of his second offence: HELD, such continuance of the case furnishes no ground of objection to the judgment.

Same—Same—Jurors—Peremptory Challenge.—Upon an enquiry, in pursuance of the statute 1 Rev. Code, ch. 171, § 16, whether a convict received into the penitentiary be the same person mentioned in the record of a former conviction, the prisoner has no right to challenge peremptorily any person called as a juror.

On the 18th of April 1829, Elijah W. Brooks, having been convicted, in the superior court of law for Rockbridge county, of murder in the second degree, was sentenced by the court to imprisonment in the penitentiary for twelve years, the period ascertained by the jury in their verdict.

On the 28th of May 1842, Elijah Anderson, having been convicted, in the circuit superior court of law and chancery for Kanawha county, of grand larceny, was sentenced by that court to imprisonment in the penitentiary for two years, the period ascertained by the jury in their verdict.

On the 22d of July 1842, Charles S. Morgan, superintendent of the penitentiary, made a report to the circuit superior court for the county of Henrico and city of Richmond, setting forth, that Elijah W. Brooks, mentioned in the record of the first conviction, was one and the same person with Elijah Anderson, mentioned in the record of the second conviction; that it appeared, *from the face of the record of the last trial and sentence, that the said Elijah W. Brooks, alias Elijah Anderson, had not been sentenced to the punishment prescribed by law for his second offence aforesaid; and that he was now in the custody of the said superintendent, ready to be proceeded against according to law.‡

‡ See (†) on page 838.

§The proceedings in this case were had in pursuance of the 16th section of the penitentiary law, 1 Rev. Code, ch. 171, p. 619, 20, which provides, that "whenever any person shall be received into the said jail and penitentiary house, having been a second or third time convicted and sentenced to confinement therein, and it shall appear upon the face of the record of the last trial and conviction, that such person hath not been sentenced to the punishment above prescribed for such second or third conviction, and that the question of such former conviction or convictions hath not been made and decided on such last trial; it shall be the duty of the keeper of such jail and penitentiary house to give information, without delay, to the superior court of law for Henrico county, that such person

847 *Whereupon, on the motion of the attorney for the commonwealth, it was ordered that the case be continued till the next term to be holden for the trial of criminal causes.

No other proceeding was had in the case until the 25th of April 1843; when, at the instance of the attorney for the commonwealth, and for reasons appearing to the court, the case was again continued till the next term to be holden for the trial of criminal causes.

On the 4th of November 1843, the prisoner was brought into court by the superintendent of the penitentiary; whereupon the attorney for the commonwealth filed an information against him, setting forth the proceedings and conviction had for each of the offences aforesaid, and charging that the said Elijah W. Brooks, alias Elijah Anderson, is the same identical person mentioned in each of the several records; that he has not been sentenced to the punishment by law prescribed for his said second offence; and that the question of his former conviction before the superior court of Rockbridge was not made and decided on his last trial before the circuit superior court of Kanawha. The prisoner being thereupon required to say whether he is the same person mentioned in each of the records of conviction in the information set forth, or not, pleaded that he is not the same person so mentioned in each of the said records. A jury of bystanders being then impaneled and sworn to try the ques-

so convicted hath been received. It shall thereupon be the duty of such court, at the same term, by warrant directed to the said keeper, to cause such convict to be brought before the court; and, upon an information filed, setting forth the several records of conviction, and alleging such convict to be the same identical person mentioned in each, such convict shall be required to say whether he is the same person so mentioned in each of the said records or not: if he plead that he is not, or remain silent and will not plead at all, his plea or his silence shall be entered of record; and thereupon a jury of bystanders shall be impaneled and sworn to enquire and say, whether such convict be or be not the same identical person mentioned in each of the said records of conviction. If, upon such enquiry, the jury find that such convict is not the person mentioned in the records as aforesaid, he shall be remanded to the said jail and penitentiary house, to be confined as if he had not been removed as aforesaid: but if the said jury shall find that the said convict is the same person mentioned in the said records of conviction, or if the said convict, in open court, shall acknowledge, after being duly cautioned, that he is the same person mentioned as aforesaid, then the said superior court of law shall pronounce sentence upon the said convict, of confinement in the said jail and penitentiary house as is herein provided; and such sentence shall be executed, as all other like sentences of the said court. Nothing herein contained shall be construed to inhibit the said superior court of law from granting continuances of any case so brought before them."

—Note in Original Edition.

tion of identity, found that the said Elijah W. Brooks, alias Elijah Anderson, was the same identical person mentioned in each of the said records of conviction; and they ascertained the term of his imprisonment in the penitentiary to be fourteen years and ten months, to commence from the 15th of June 1842.

At the trial, Henry A. Holmes, a bystander, being called and about to be sworn as a juror, the prisoner offered to challenge him peremptorily; but the court 848 *refused the prisoner the right of peremptory challenge, and put him to his challenge for cause: to which opinion he excepted.

Being brought into court on a subsequent day of the term to receive his sentence, the prisoner prayed the court to arrest judgment on the verdict aforesaid, for the following reasons: "Because he says it will appear from an inspection of the record in this cause, that he has not had, as by law he ought to have had, a trial of the issue made up on the information aforesaid, without delay, as is required by the provisions of the act. Because it appears by the record in this cause, that before any notice had been given to the said prisoner, without any warrant issued, before his arraignment or appearance in court by counsel or in person, on Friday July 22d 1842, the superintendent of the public jail and penitentiary house made a report in writing to this court, stating that the prisoner had been received into the said jail and penitentiary house, having been a second time convicted and sentenced to confinement therein; and on the same day and year last aforesaid, on the motion of the attorney for the commonwealth, this court ordered this cause to be continued until the next term thereafter to be holden for the trial of criminal causes; the said prisoner having had no notice whatever of any proceedings theretofore had against him, nor of the said motion for a continuance of his said cause. And the said prisoner further saith, that it appears from the record in this cause, that on Tuesday the 25th day of April 1843, his said case was, on the motion of the attorney for the commonwealth and for reasons appearing to the court, continued till the next term thereafter to be holden for the trial of criminal causes; which said continuance was had and ordered in the absence of the said prisoner, before his arraignment, without any warrant having been issued to bring him into court. And it does 849 not appear that *in this cause any warrant has ever been issued, or any notice given the said prisoner of the pending prosecution, before the present term of the court, at which for the first time he has been arraigned to plead to the information aforesaid; so that, in this indirect way, great delay has been operated in bringing on the trial of the issue made in this cause, without his knowledge or consent."

After argument of the errors filed in arrest of judgment, the court overruled the same, and pronounced sentence against the prisoner according to the verdict.

He now applied by petition to the general court for a writ of error to the judgment.

Munford for the petitioner.

SMITH, J., delivered the opinion of the court.—The petitioner assigns two errors, as cause to entitle him to a reversal of the judgment of the circuit court: 1st. that the case was continued by the circuit court in his absence and without his consent; 2. that he was denied the right of peremptory challenge to the jurors sworn to enquire whether he was the same identical person mentioned in the several records of conviction.

As to the first point it may be remarked, that it is only where a party is ruled into trial improperly, that an error of the court in deciding on a motion for a continuance can be corrected by a superior court. If the error be in continuing the case improperly, the only effect of it is the delay of the case: it is not a discontinuance; nor could it be a good reason for setting aside a judgment at a subsequent term, when a full and fair trial had been given to the prisoner. This objection, therefore, affords no ground for reversal of the judgment.

As to the second point, it will be found that at common law a peremptory challenge is not allowed in any 850 *case except upon the plea of not guilty, and no peremptory challenges are ever allowed on the trial of collateral issues. So we find it stated by the elementary writers: see 1 Chitty's C. L. 535; 3 Bac. Abr. Juries, E. 9, p. 762. The case of *The king v. Radcliffe*, 1 W. Black. 6, may also be referred to as precisely similar to this case. The prisoner had been convicted of high treason; and upon a collateral issue, that he was not the same person, a peremptory challenge was insisted upon, which was refused by Lee, C. J. Other cases might be referred to; but it is deemed unnecessary. It seems very clear that there was no error in the decision of the circuit court upon this point.

The writ of error is therefore refused.

PENITENTIARY.

Guaranties in Bill of Rights Not Applicable to Convicts.—The guaranties included in the bill of rights have reference to freemen, and are not applicable to persons convicted of crime and confined in the state penitentiary. A convicted felon has only such rights as the statutes may give him. *Ruffin v. Com.*, 21 Gratt. 790. See monographic note on "Constitutional Law" appended to *Com. v. Adcock*, 8 Gratt. 661.

Offences Committed by Convicts—Where Triable.—A person convicted of felony and sentenced to confinement in the penitentiary, is, until the time of his imprisonment has expired or he has been pardoned, in contemplation of law, in the penitentiary, though he may have been hired out to work on a railroad, or the like, in a distant county; and the law relating to convicts in the penitentiary still applies to him. Thus in a case in which a convict was hired to work on a railroad in Bath county, and in attempting to escape he killed the man placed by the contractor

to guard him, it was held that he might be tried before the circuit court of the city of Richmond, and by a jury summoned from that city. *Ruffin v. Com.*, 21 Gratt. 790.

Proceedings against Escaped Convicts.—The proceedings against an escaped convict must be by indictment. *Com. v. Ryan*, 2 Va. Cas. 467 (1824).

Punishment for Escaped Convicts.—The punishment for convicts escaping from the penitentiary is prescribed by § 64 of the penitentiary act. The punishment consists in such additional confinement and hard labor, and such additional corporal punishment, not extending to life and limb, as the court before whom such person shall be convicted of such escape shall, in the exercise of a sound discretion, adjudge and direct. *Com. v. Ryan*, 2 Va. Cas. 467.

Proceedings to Sentence Convicts for Increased Punishment for Second Offence.—Sections 4179, 4182, Va. Code 1887, provide that if a person sentenced to the penitentiary and received therein shall have been before sentenced to like punishment, and the record of his conviction does not show that he was sentenced under §§ 3906, 3906, requiring sentence for an increased term in such case, the superintendent of the penitentiary shall file an information in the circuit court of Richmond to require the convict to say whether he is the person formerly convicted and sentenced; and if he remain silent, or deny such identity, a jury of bystanders shall be summoned to try the issue thus raised, and upon a verdict against him the prisoner shall be sentenced to such further confinement as is prescribed by chapter 190. Such provisions are constitutional, as the prisoner is not in the position of one charged with crime in the first instance, with all the presumptions of law in favor of his innocence, and a writ of *habeas corpus* asking for his discharge from such additional punishment will be denied. *King v. Lynn*, 90 Va. 345, 18 S. E. Rep. 439.

Upon an inquiry, in pursuance of the statute (1 Rev. Code, ch. 171, § 16), whether a convict received in the penitentiary be the same person mentioned in the record of the former conviction, the prisoner has no right to challenge peremptorily any person called as a juror. *Brooks v. Com.*, 2 Rob. 845.

Same—Continuance in Absence of Convict Does Not Invalidate Judgment.—Where a report was made to the circuit court of Henrico by the superintendent of a penitentiary, pursuant to the statute (1 Rev. Code, ch. 171, § 16), that a convict received into the penitentiary was the same person mentioned in the record of a former conviction, and that he had not been sentenced to the punishment prescribed by law for the second offence, and the court continued the case at several successive terms, in the absence and without the consent of the convict, after which he was brought into court and sentenced to proper punishment for his second offence, it was held, that such continuance of the case furnished no grounds of objections to the judgment. *Brooks v. Com.*, 2 Rob. 845.

Same—Sentence to Solitary Cells.—A convict in the penitentiary, against whom an information is filed in superior court of law for Henrico, under § 16 of the penitentiary act, charged with having been received a second time into that prison for a second offence, may, on being identified either by verdict or by confession, be sentenced by the court to a portion of confinement in the solitary cells. *Com. v. Bryant*, 2 Va. Cas. 465 (1824).

Convict Working on Road—Liability of County for

His Torts.—An action cannot be maintained against a county for personal injuries, caused by the negligence of a convict of the state penitentiary, while working on a public road under the direction of the county, because the county, being a part of the sovereign power, cannot be sued in the absence of a statute giving right to sue in such case. *Fry v. County of Albemarle*, 86 Va. 195, 9 S. E. Rep. 1004.

Liability of Present Government for Purchases by Penitentiary Agent of Richmond Government.—Where the store-keeper of the penitentiary, elected prior to 1861, purchased leather to be manufactured by the convicts in the penitentiary—the store-keeper and the seller both recognizing the authority of the Richmond government—it was held that the seller, not having been able to obtain payment from the Richmond authorities, could not recover from the present government of Virginia in a suit instituted in 1866. *Com. v. Chalkley*, 20 Gratt. 404. See also, *De Rothschilds v. Auditor*, 22 Gratt. 41.

Liability of Sureties of Agent for Debts Contracted with His Predecessors.—By § 57, ch. 206, Code 1873, it is provided that the general agent of the penitentiary and his sureties shall be responsible for the amount of all debts for goods or work contracted with him on his authority, and for all money received by him as such agent, except as therein provided. There is no law making it a part of his duty to collect debts contracted with his predecessors, and moneys so collected are not covered by his bond, and are not chargeable to his sureties. *Loving v. Auditor*, 76 Va. 942.

Funds Received by Agent in Excess of Appropriations—Sureties Not Liable.—The constitution of Virginia (art. 10, § 10) declares that no money shall be paid out of the treasury except in pursuance of appropriations by law. Where the general agent of the penitentiary receives \$12,500 pursuant to appropriations made before or after receipts, and \$5,000 in excess of appropriations, the sureties are liable for the first, but not for the last, sum. *Loving v. Auditor*, 76 Va. 942.

Purchases by Penitentiary Agent—Liability of Sureties.—Where the general agent of the penitentiary buys raw material for the state and gives therefor his note signed by himself with the letters "G. A." (meaning general agent) appended, but the state assumes the liability and pays the notes, the general agent and sureties are entitled to no credit therefor, as for material purchased on his individual responsibilities. *Loving v. Auditor*, 76 Va. 942.

Statutory Provisions in Regard to Signing Drafts Drawn by Penitentiary Agent.—If, by the provisions of the Code 1873, ch. 206, § 58, the legislature intended all drafts drawn by the general agent of the penitentiary to be certified by the superintendent and countersigned by the governor, a failure to certify and countersign the drafts does not affect the liabilities of the sureties for money so drawn and received by him. These provisions are merely directory to such officers, and form no part of the contract with the sureties. *Loving v. Auditor*, 76 Va. 942.

Reduction of Compensation of Penitentiary Agent—Statute.—The legislature having reduced the salary of the general agent of the penitentiary, he and his sureties are entitled to credit for the reduced compensation, and not for the compensation at the rates allowed by law in force at the dates of the official bonds. But as by act, which became law July 1, 1878, the legislature restored the compensa-

tion as allowed by Code 1873, ch. 13, § 23, credit must be allowed after that date at the original rates. *Loving v. Auditor*, 76 Va. 942.

Misappropriation of Private Funds by Penitentiary Agent.—Where the agent of a penitentiary receives funds from private parties for the purpose of building a chapel for convicts, his sureties are not chargeable for a misapplication of these funds. *Loving v. Auditor*, 76 Va. 942.

IDENTITY.

I. Identity of Names.

1. Presumption from Identity of Names.

2. Difference in Mode of Spelling Names.

II. Identity of Accused in Criminal Cases.

1. Must Be Established.

2. Examining Person or Garments of Accused.

3. Opinion Evidence.

4. Hearsay Evidence.

5. Burden of Proof.

III. Identity of Persons Making Admissions.

I. IDENTITY OF NAMES.

1. PRESUMPTION FROM IDENTITY OF NAMES.

—From the fact that the names of two persons are the same, the presumption of the identity of the persons will arise. Thus in a case in which the names of the plaintiff and of the defendant appeared from the record to be identical, the court held that this was sufficient to raise the presumption that the same person was both plaintiff and defendant in the case. *Sweetland v. Porter*, 43 W. Va. 189, 27 S. E. Rep. 352. In another case in which the name of the trustee in a deed of trust and that of the notary public, who took the acknowledgment, were the same, it was held that the presumption that they were the same person would have in some way to be rebutted or denied in order for the acknowledgment to be valid. *Tavener v. Barrett*, 21 W. Va. 656.

2. DIFFERENCE IN MODE OF SPELLING NAMES.—In identity cases the courts attach but little importance to the concurrence or difference in the mode of spelling a name. Thus in a case in which the heirs of a Scotchman, who died in Virginia, were seeking to establish their identity, and their claim to the estate, the court said: "Much reliance has been placed upon the different spelling of the name. We should attach but little importance to the dropping of a single letter in the spelling of the name were the spelling uniform in one way in Virginia, and uniform the other way in Scotland. Such changes are too common to be of much weight in questions like that before us. But the spelling of the name in this case is not uniform in either country. * * * The diversity in the spelling of the name existed in both countries, and no importance should be attached to it." *Adie v. Com.*, 25 Gratt. 712.

II. IDENTITY OF ACCUSED IN CRIMINAL CASES.

1. MUST BE ESTABLISHED.—The question of identity is presented in every criminal prosecution. That is, it devolves upon the commonwealth to show that the accused is the person who committed the crime. This it may do in several ways, the simplest of which is by the testimony of persons who saw the crime committed. It is most frequently done, however, by the means of circumstantial evidence. For example, where it is shown that a crime has been committed by the use of certain tools and instruments, it is always pertinent to show, as one element connecting the accused with

the crime charged, that he possessed such tools and instruments. *Nicholas v. Com.*, 91 Va. 741, 21 S. E. Rep. 364; *McBride v. Com.*, 95 Va. 818, 30 S. E. Rep. 454.

But the mere failure of the evidence to disclose any other criminal agent than the person accused is not a circumstance which may be considered by the jury in determining whether he is or is not the person who committed the crime; for the prisoner is presumed to be innocent until his guilt is established and he is not to be prejudiced by the inability of the commonwealth to point out any other criminal agent. *McBride v. Com.*, 95 Va. 818, 30 S. E. Rep. 454. See also *Smith v. Com.*, 21 Gratt. 609; monographic note on "Homicide" appended to *Souther v. Com.*, 7 Gratt. 678.

2. EXAMINING PERSON OR GARMENTS OF ACCUSED.

—While the defendant in a criminal case cannot be compelled to connect himself with the crime by act or words, by the better doctrine he, or his garments, may be examined for evidence of the crime. Thus in *State v. Baker*, 33 W. Va. 319, 10 S. E. Rep. 639, it was held proper for the jury to take into consideration the fact that the trousers of the accused, which had been delivered to the sheriff by the prisoner without objection, contained blood stains. See monographic note on "Constitutional Law" appended to *Adcock v. Com.*, 8 Gratt. 661.

3. OPINION EVIDENCE.—A witness who testifies that he knows the person in question may be asked his belief as to the identity of such person. It is not a case of expert testimony, but depends upon the observation and knowledge of the particular witness in the given case, to go to the jury for what it is worth, no matter what his science, skill or experience may be in identifying persons. Indeed it is the constant practice to receive in evidence the belief of any witness as to the identity of a person, provided he has any knowledge of such person. *State v. Harr*, 38 W. Va. 58, 17 S. E. Rep. 794; *Hopper v. Com.*, 6 Gratt. 684, and *foot-note*.

4. HEARSAY EVIDENCE.—It is generally held that hearsay evidence is inadmissible in order to establish the identity of a person; and in criminal cases it is well settled that hearsay evidence is inadmissible to show that the accused is the person who committed the crime. Hence statements of the deceased made on the day before the homicide, to a third person in the absence of the prisoner, as to where deceased was then going, are irrelevant and should not be received. *McBride v. Com.*, 95 Va. 818, 30 S. E. Rep. 454.

The court, in applying this rule in a criminal case, held that a witness who identified a certain piece of wearing apparel would not be allowed to repeat what he had heard, as confirming his statement. *Hopper v. Com.*, 6 Gratt. 684.

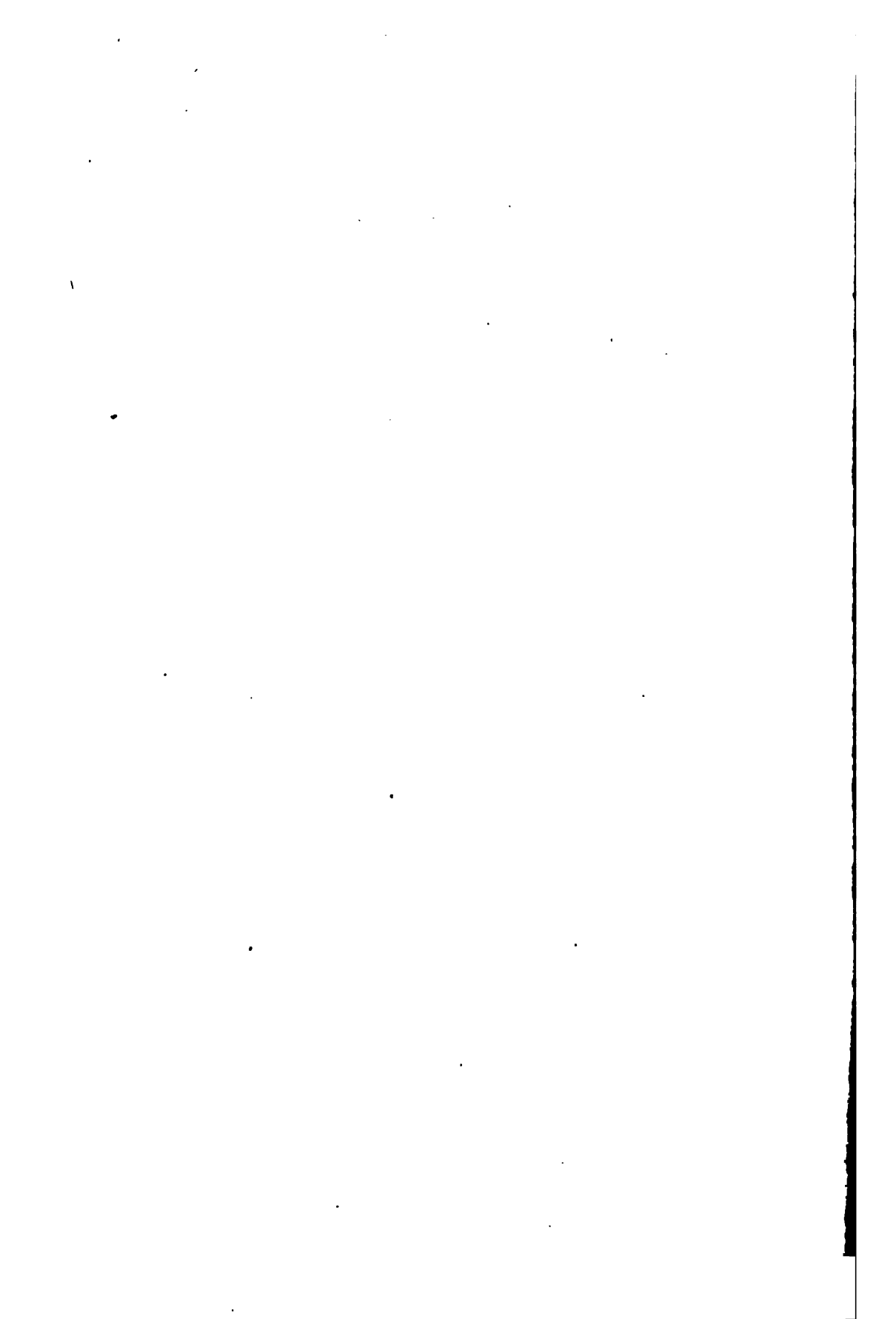
5. BURDEN OF PROOF.—The burden of proving the identity of the accused rests upon the commonwealth, and the court should instruct the jury, if the accused so requests, that the identity of the accused with the perpetrator of the offense should be proved beyond a reasonable doubt. To refuse such instruction and to give in lieu thereof one which is calculated to create the impression upon the minds of the jury that the identity of the accused with the perpetrator of the crime may be established by a lesser degree of proof is reversible error. *Waller v. Com.*, 84 Va. 492, 5 S. E. Rep. 364.

III. IDENTITY OF PERSONS MAKING ADMISIONS.

In *George v. Pilcher*, 28 Gratt. 299, the deposition

of a witness, since deceased, was offered, whereby it was sought to show that one of the defendants, in the presence of the other, had, in an interview at Richmond, made to the witness certain admissions material to the issue. These defendants were strangers to the witness, and upon cross-examination describing them he said: "They were not black negroes. I think the brother-in-law had the lightest skin of the two. I think they were not bright mulattoes, but dark mulattoes." It was proved by other witnesses that the brother-in-law

spoken of was a white man, and that the other was so bright that he could hardly be distinguished from a white man. It was further proved that about the time when the witness said he had the interview with the two men they were both in the city inquiring for him. Upon an objection to the reading of the deposition on the ground that the witness did not sufficiently identify the persons whose admissions were sought to be proved by him, it was held that the evidence was *prima facie* sufficient to authorize the deposition to go to the jury.



INDEX.

ABATEMENT.

1. Within what time the plea of several tenancy should be pleaded in a writ of right. *Walkers v. Boaz & others*, 485
2. Nonjoinder of a demandant in a writ of right must be pleaded in abatement. See Writ of right No. 2, and S. C., 485
3. Matter of abatement either shews the action to be abatable, or that it is de facto abated. The former usually exists at the time of the suit; the latter for the most part occurs during its progress. The first must be pleaded in technical form, and at a proper stage of the cause. The last may be, but need not be, pleaded; and when apparent, or made known to the court, will be declared by its order in any stage of the suit. Examples illustrating this distinction, stated in the opinion of Baldwin, J.
May &c. v. State bank of North Carolina, 56
4. Concerning effect of extinction of corporation plaintiff in abating the suit, see Corporation, and S. C., 56

ABSENT DEFENDANTS.

- When assignee's plea that debtor was a resident is demurrable. See Foreign attachment, and
Smith v. Hunt and others, 206

ACCIDENT.

- Relief in equity where conveyance of land has been accidentally destroyed. See Specific execution No. 1, and
Wade's heirs v. Greenwood & wife, 474

ACCOUNT.

1. When production of bond may be dispensed with on account between grantor in trust deed and cestui que trust. See Trusts &c. No. 4, and
Miller v. Trevilian and others, 1, 2
2. Account between principal and agent, on bill by the former impeaching purchase of land by the latter. See Principal and agent No. 3, and
Buckles v. Lafferty's legatees, 293
3. What laches will preclude dower from right to account. See Dower No. 7, and
Macaulay's ex'or v. Dismal swamp land co., 507
4. When enquiry before commissioner, to ascertain what would be a reasonable provision for wife out of her equitable interest assigned by husband, may be dispensed with. See Husband and wife No. 7, and
Browning v. Headley, 341, 2

ACQUIESCENCE.

See Admission and Laches.

ADMINISTRATION.

See Executors and administrators and Legatees and distributees.

ADMISSION.

1. What judgment recovered by corporation will estop from alleging previous extinction of plaintiff. See Corporation, and
May &c. v. State bank of N. Carolina, 56
2. What defence of a former recovery for the same cause of action is not sustained. See Former recovery, and
Weaver v. Vowles, 438, 9
3. Concerning estoppel by deed, see Estoppel No. 4, and
Radcliff &c. v. High, 271
4. The general rule, that the admission of one person cannot be given in evidence against another, adverted to by Baldwin, J.
Pettit v. Jennings and others, 676

AD QUOD DAMNUM.

Who may apply for the writ, and what notice is sufficient. See Mills No. 1, and
Pitzer v. Williams, 241

852 *AFFIRMANCE.

See Appellate jurisdiction No. 8, Mortgages &c. No. 6, and
Williamson's ex'or v. Howard, 39, 40

AGENT.

See Principal and agent.

ANNUITY.

Mode of calculating present value. See Dower No. 6, and
Wilson and others v. Davisson, 384, 5

ANSWER.

- I. Bringing in defendant.
 1. Case in which a defendant was brought in by a messenger to answer interrogatories.
Johns v. Davis's ex'or and others, 729
 - II. Weight of answer as evidence.
 2. It is a rule in equity that the answer of a defendant denying the allegations of the bill must be taken as true unless disproved by two witnesses, or by one witness and circumstances in his support: it is not in the power of a plaintiff to make his case an exception to this rule by stating in his bill that he expects to prove its allegations, and disclaiming a discovery from the defendant.
Thornton v. Gordon &c., 719
 3. A bill is filed to injoin the sale of property conveyed to secure a debt alleged to be usurious, and the plaintiff avers that he expects to make full proof of his allegations, and disclaims all benefit of any discovery from the defendant. The injunction is awarded. But afterwards the defendant files an answer denying the allegation of the bill. And the plaintiff relies on the testimony of a single witness, unsustained by any corroborating circumstances: *held*, the injunction must be dissolved and the bill dismissed.
S. C., 719

III. Answer of codefendant.

4. Answer of assignor of bond is no evidence against assignee codefendant, to prove gaming consideration. See Codefendants No. 1, and

Pettit v. Jennings and others, 676

IV. Setting for hearing after replication.

5. At what time after replication to answer, a chancery suit may be set for hearing. See Hearing of cause No. 1, and

Poling v. Johnson, 255

APPELLATE JURISDICTION.

I. Appellate court.

1. What court may revise decision of auditor disallowing claim against commonwealth. See Banks, and

Commonwealth v. Farmers bank, 737

II. What may be appealed from.

2. What is a final proceeding or order of county court, to which a supersedeas lies. See Supersedeas, and

Farneyhough's ex'ors v. Dickerson &c., 582

3. An appeal lies to the court of appeals from an order of a circuit court overruling a motion to dissolve an injunction which was improvidently granted.

Talley v. Tyree, 500

III. What objections will be disregarded.

4. What objection to decree does not lie for the party appealing. See Codefendants No. 2, and

Chappell v. Robertson, 590

5. When objection that sheriff is no party to bill for satisfaction out of insolvent's estate will not avail in appellate court. See Codefendants No. 2, and S. C., 590

IV. Reversal.

6. A decree being rendered against the sureties of an executor, and the appellate court being of opinion that they are not liable, decree reversed and bill dismissed as to all of them, although only one had appealed. But though a sum, (less than 100 dollars) was erroneously decreed against a succeeding administrator, as to whom the bill ought to have been dismissed, yet he not having appealed, no correction was made by the appellate court in this part of the decree, the appellant being in no wise interested therein.

Arrington v. Cheatham & wife, 492

V. Affirmance.

7. Affirmance of decree enforcing lien of trust deed, with addition thereto of direction for sale of the property. See Mortgages &c. No. 6, and

Williamson's ex'or v. Howard, 39

8. Case in which it was considered in the appellate court, that a guardian, who had been culpably in default in failing to render any account of his receipts or disbursements, was allowed by the court below more for *the board and clothing of his ward than he was entitled to; but as a particular sum payable by the ward had not been charged in the court below, it was

deemed best to consider that as an equivalent for the excess of the charge for board and clothing, and (saving the parties the delay and expense of restating the guardian's account) to terminate the case by affirming the decree.

VI. Jurisdiction in criminal cases.

9. See Criminal jurisdiction and proceedings.

APPLICATION OF PAYMENT.

Right of debtor to apply payment to principal instead of interest. See Payment No. 1, Trust &c. No. 4, and

Miller v. Trevilian & others, 1

APPORTIONMENT.

When rent may be apportioned in equity. See Rent, and

Mason &c. v. Moyers, 606, 7

ARBITRATION.

See Award, and

Boyd's heirs v. Magruder's heirs, 761

ASSETS.

What will be regarded in equity as unadministered. See Legatees &c. No. 6, and

Burnley's representatives v. Duke and others, 102

ASSIGNMENT.

I. Evidence of consideration.

1. A share of the proceeds of a testator's estate being bequeathed to a feme covert, and her husband having assigned the same, a bill is filed by the assignee, which alleges that the assignment was in consideration of 1500 dollars. The executor and the feme both answer, but the answers do not deny the consideration, or call for proof of it; and the deed of assignment purports on its face to be in consideration of 1500 dollars. It seems, there being no such denial or call for proof, the deed is prima facie evidence of the allegation in the bill. Accord. Scott & wife &c. v. Gibbon & co. &c., 5 Munf. 86.

Browning v. Headley, 342

2. Answer of assignor of bond is no evidence against assignee codefendant, to prove gaming consideration. See Codefendants No. 1, and

Pettit v. Jennings and others, 676

II. Liability and rights of obligor in assigned gaming bond.

3. When obligor in gaming bond is liable to assignee, and for what amount. See Gaming No. 2, and

Pettit v. Jennings and others, 676

4. Decree over for obligor in assigned gaming bond against obligee assignor. See Gaming No. 3, and S. C., 676

III. Rights of wife against husband's assignee.

5. Concerning rights of wife surviving the coverture against husband's assignee of her personalty, see Husband and wife No. 3, 4, 5, 6, 7, and

Browning v. Headley, 340, 41

IV. Assignee of absent debtor.

6. What plea to foreign attachment, by party claiming as assignee of absent debtor, is demurrable. See Foreign attachment, and *Smith v. Hunt &c.* 206

ATTACHMENT.

What plea to foreign attachment, by party claiming as assignee of absent debtor, is demurrable. See Foreign attachment, and *Smith v. Hunt &c.*, 206

ATTORNEY.

1. Construction and effect of power of attorney. See Power of attorney, and *Calwells v. Shields & Somerville*, 305

2. Concerning validity of contract between attorney at law and client, see *Laches No. 3*, and

Hendricks &c. v. Compton's ex'or, 192

AUDITOR.

What claim against commonwealth may be presented to first auditor, and what court may revise his decision disallowing it. See Banks, and

Commonwealth v. Farmers bank, 737

AWARD.

I. What submission is binding and entitles to specific execution of award.

1. An equitable title to land of which an intestate died seized being set up 854 *against his heirs, some of the heirs and the claimants enter into an agreement under seal, referring the matter to arbitration, and the arbitrators award in favour of the claimants, and direct a conveyance by the heirs of their interest in the land to the claimants: *held*, it was competent for the adult heirs who were *sui juris* to enter into the submission, notwithstanding there were other heirs interested in the subject who were not parties; that the award made in pursuance of such submission is binding on the parties to such submission, according to the terms thereof; and that, upon a bill in equity for the purpose, specific execution may be decreed against such parties to the submission, and a conveyance compelled of such legal title to the land as has descended to them respectively. Accord. *Smith and others v. Smith &c.*, 4 Rand. 95.

Boyd's heirs v. Magruder's heirs, 761

II. Specific execution in part.

2. Such decree will be without prejudice to the right of the plaintiffs to proceed at law for a failure to comply with the submission and award in any other respect.

S. C., 761

BAIL.

What is no ground for letting to bail.

A prisoner having been examined by the county court and remanded for trial for the offence of feloniously passing two counterfeit half eagles, one of them to J. C. and the other to W. M., two indictments are found against him, in one of which he is charged with passing one of the counterfeit coins to

J. C. on the 13th of October 1842, in the other with passing the other coin to W. M. on the same day. Upon a trial of one of the indictments, the jury find the prisoner not guilty: *held*, his acquittal in that case does not entitle him to be let to bail in the other. *Summerfield v. Commonwealth*, 767

BANKS.

When not entitled to credit with commonwealth for premium on specie.

The banks of this commonwealth in which the public moneys were on deposit, paid the interest falling due in January 1840 upon public loans, in specie or its equivalent. Under the proviso to the second section of the act of March 28, 1838, (Sess. Acts of 1838, p. 27, ch. 13,) they claimed credit in account with the commonwealth for the premium which they had to pay to the public creditors for the then difference between specie and the notes of the banks: *held*, 1. That under the acts in 2 R. C. of 1819, ch. 174, § 6, p. 2, and in Sess. Acts of 1838, p. 27, ch. 14, the claim of any bank for such premium may properly be presented to the first auditor. 2. That upon the disallowance of such claim, the bank may file a petition for redress to the court of chancery for Henrico and Richmond, created by the act of March 13, 1841, in Sess. Acts of 1840-41, p. 65, ch. 48. 3. That according to the true construction and effect of the act of December 11, 1839, in Sess. Acts of 1839-40, p. 52, ch. 63, (especially of the first proviso thereto) the claim of any bank for the premium so paid must be disallowed; *dissentiente Brooke, J.*, on the last point.

Commonwealth v. Farmers bank, 737

BOND.

I. Merger of simple contract.

1. Concerning the extinguishment of simple contract of partnership by bond of one partner, see Partnership, and *Ward v. Motter*, 536

II. What endorsement is evidence to repel presumption of payment.

2. An endorsement of credit on a bond, made by the obligee within the period that raises the legal presumption of payment, is evidence for him for the purpose of repelling that presumption.

Dabney's ex'ors v. Dabney's adm'r, 622

3. In an action of debt brought in 1837 by an administrator against an executor, upon a bond of the 10th of January 1833, payable the first of January 1834, the defendant offered as a setoff a bond of the plaintiff's intestate to the defendant's testator, dated the 5th of April 1820 and payable on demand, with two endorsements thereon, admitted by the plaintiff to be in the handwriting of the defendant's testator, one of which credited a sum paid in part on the 855 *first of June 1828, and the other credited another payment in part on the 5th of May 1829. The circuit court, at the instance of the plaintiff, instructed the jury, that after the lapse of 16 years from the date of the said bond, the jury might, from this

aided by other circumstances, presume it paid; and, at the instance of the defendant, instructed the jury, that such presumption of payment might be repelled by other circumstances. The defendant relying upon the endorsements aforesaid upon the bond, and there being no proof of the time at which they were made, except that it appeared the defendant's testator died in 1833, the circuit court, at the instance of the plaintiff, instructed the jury, that the said endorsements were not circumstances to be taken into consideration by the jury to repel the presumption: *held*, as the endorsements must have been made within the period of about 13 years from the time the bond was due, the circuit court clearly erred in its last instruction. S. C., 622

CASE.

Concerning declaration and proof in action on the case by ferry owner for disturbance of his franchise, see *Ferry No. 3, 4*, and *Patrick v. Ruffners*, 209

CHALLENGES.

1. When no right of peremptory challenge exists. See *Penitentiary convict No. 2*, and *Brooks v. Commonwealth*, 845

2. Who shall be deemed impartial jurors for the trial of felony. See *Jurors No. 3*, and

M'Cune v. Commonwealth, 771

CHANCERY.

See *Equitable jurisdiction and Practice in suits in equity*.

CHATTELS.

I. Registry of trust deed.

1. What registry of trust deed conveying personal property to secure debts is invalid. See *Registry*, and *Cocke v. Haxall's ex'x*, 470

II. Discharge of trust deed.

2. A slave conveyed by a deed of trust is sold, in the absence of the trustee, by the debtor with the concurrence of the trust creditor, to another creditor not secured by the deed, for a consideration compounded of the balance remaining due upon the trust, other debts claimed by the trust creditor, and a debt due to the purchasing creditor: *held*, that by this arrangement the trust deed was discharged, and the title of the trustee, so far as concerns the personal property embraced in the deed, divested; for in a conveyance of chattels personal the law disregards mere formalities of the instrument, and the payment of the debt secured thereupon completely extinguishes the incumbrance. *Tavener v. Robinson*, 280

CODEFENDANTS.

I. Answer of one no evidence against another.

1. It is a general rule, that the answer of one defendant in chancery is not evidence against his codefendant. From this rule there is no exception of the answer of an assignor; not even though the bond assigned be alleged to have been given on a

gaming consideration. The fact of its being on such consideration cannot be established against a defendant who is the assignee, by the answer of his codefendant the obligee and assignor. *Accord. Hoomes v. Smock*, 1 Wash. 389; *Dade's adm'r v. Madison*, 5 Leigh 401.

Pettit v. Jennings &c., 676

II. Decree against one in favour of another.

2. A party having covenanted to pay a sum of money in trust for the benefit of the covenantee and his wife and children, the covenantee afterwards takes the oath of insolvency, and transfers to the sheriff, for the benefit of the creditor, his interest under the covenant. Upon a bill by the creditor against the covenantor, the covenantee, and the wife and children of the latter, (the sheriff not being made a party), the court decrees that the covenantor pay to a trustee, appointed by consent of the other defendants and the plaintiff, the money secured by the covenant, and directs the trustee to 856 invest the same, and out of the interest pay the plaintiff the amount of his debt. From this decree the covenantor alone appeals: *held*, 1. The objection that the sheriff was no party to the suit, not having been taken in the court below, cannot be made a ground in the appellate court for reversing the decree. 2. The decree was properly rendered in favour of the codefendants of the covenantor, as well as in favour of the plaintiff. 3. The appellant, being bound by his covenant to pay the money has no interest in the question how it shall be applied, and therefore is not entitled to make the objection that the fund secured by the covenant was not liable to the creditor of the covenantee.

Chappell v. Robertson, 590

COMMONWEALTH.

1. When the banks are entitled to credit with the commonwealth for premium on specie paid to public creditors. See *Banks*, and *Commonwealth v. Farmers bank*, 737

2. Relinquishment of commonwealth's title to land settled thirty years. See *Patent No. 1, 2*, and

Tichanal v. Roe, 288

CONFESSION OF JUDGMENT.

What is the record of a judgment confessed, and how far evidence aliunde is admissible to shew the power and action of attorney confessing the same. See *Judgment No. 1*, and

Calwells v. Sheilda & Somerville, 305

CONSTABLES.

Effect of constable's receipt as evidence.

In an action against a constable and the sureties in his official bond, for failing to pay over debts entrusted to the constable and received by him from the debtors, the receipt of the constable for the debts, signed in his official character, is, according to the true construction of the act passed March 8, 1826, concerning constables and their securities, prima facie evidence, as well against the sureties as against the constable, of the

receipt of the money; provided six months have elapsed between the date of the receipt and the commencement of the action. Per Allen and Baldwin, J. But the fact that the receipt of the constable was signed in his official character, must appear in some way on the face of the paper itself; if it do not, the party claiming under the receipt cannot obtain the benefit of the act by oral testimony of the character in which the receipt was signed. Per totam curiam.

Smith &c. v. The governor, 229

CONTINUANCE.

What continuance of criminal cause is no ground to reverse judgment of conviction. See Penitentiary convict No. 1, and

Brooks v. Commonwealth, 845

CONTRACT.

I. Construction.

1. What grantor has no right of redemption. See Mortgages &c. No. 2, and

Floyd v. Harrison &c., 161

2. What marriage settlement makes the husband a mere trustee for the wife, and precludes all individual interest in her personalty. See Husband and wife No. 1, and Matthews & co. v. Woodson & others, 601

II. Validity.

3. What submission is binding and entitles to specific execution of the award. See Award No. 1, and

Boyd's heirs v. Magruder's heirs, 761

4. What sale of chattels is fraudulent as to creditors of vendor. See Fraud No. 2, and

Tavener v. Robinson, 280

5. What vendee of land, after conveyance by vendor delivered as escrow, is a freeholder qualified to serve as a grand juror. See Freehold, and

Commonwealth v. Burcher, 826

6. How far husband's assignment of wife's personalty is valid against the wife surviving the coverture. See Husband and wife No. 3, 4, 5, 6, 7, and

Browning v. Headley, 340, 341

7. Effect of deed by one joint tenant, conveying by metes and bounds a portion of the land held jointly. See Joint tenants, and

Robinet v. Preston's heirs, 273

8. Concerning validity of contract between attorney and client, see Laches No. 3, and

Hendricks &c. v. Compton's ex'or, 192

9. Whether a power of sale given to mortgagee by the deed of mortgage is valid. See Mortgages &c. No. 3, and

Floyd v. Harrison &c., 162

857 *10. What purchase by agent from principal will be set aside. See Principal and agent No. 2, 3, and

Buckles v. Lafferty's legatees, 292

11. When decree for specific execution, and what decree, will be rendered against heirs of vendee. See Specific execution No. 1, 2, 3, and

Wade's heirs v. Greenwood and wife, 474, 5

III. Extinguishment.

12. Concerning extinguishment of legal remedy on joint contract, see Joint obligors No. 1, Partnership, and

Ward v. Motter, 536

CONTRIBUTION.

Concerning contribution, after death of grantor, between realty and personalty conveyed in trust for payment of debts, see Mortgages &c. No. 8, and

Perrin &c. v. Lomax &c., 133

CONVERSION.

Contribution between realty and personalty conveyed in trust for payment of debts, where conversion takes place after grantor's death. See Mortgages &c. No. 8, and

Perrin &c. v. Lomax &c., 133

CONVEYANCE.

See Contract—Deed—and Mortgages and trusts.

CONVICT.

Proceedings against convict received into penitentiary under second or third sentence. See Penitentiary convict, and

Brooks v. Commonwealth, 845

CORPORATION.

I. Effect of extinction of corporation plaintiff; and what judgment estops from alleging previous extinction.

1. If a corporation become extinct by the expiration of the term of its corporate existence, pending a suit at law for a corporate demand, and that fact be brought regularly before the court in which the suit is pending, the action must terminate. It is equally clear that if, after judgment in favour of a corporation, the corporation becomes extinct by the expiration of the term of existence granted by the charter, no execution on such judgment can regularly be sued out in the name of the corporation, and if one be sued out, it is liable to be quashed, on shewing the fact of the extinction of the corporation before the emanation of the execution. On the other hand, if an original judgment be rendered in favour of a corporation, as it could not be regularly rendered unless the existence of the corporation continued, the necessary intentment from the rendition of it is, that the continued existence of the corporation was either proved or admitted; and if execution be sued out on the judgment, the defendant, being by this intentment estopped to deny the existence at the time of the judgment, would not, on a motion to quash the execution, be admitted to controvert this intentment, and proof on such motion of the extinction of the corporation before judgment, would be inadmissible or unavailing. Per Stanard, J.

May &c. v. State bank of N. Carolina, 56

II. What judgment does not estop from alleging previous extinction.

2. In an action by a corporation, a special verdict was rendered, which found, that by the act creating the corporation, it was to continue until the 1st of January 1830, and

that by a subsequent act the charter was extended until the first of January 1835. Other facts were found in relation to the merits of the claim, upon which the circuit court, on the 24th of October 1831, gave judgment for the defendants. An assignment of the claim was made by the corporation on the 6th of December 1831. Whereupon, to wit in June 1832, a supersedeas was obtained to the judgment, upon a petition in the name of the corporation. In April 1837, the court of appeals reversed the judgment, and entered judgment for the plaintiffs; and in May 1837, judgment was entered in the circuit court in pursuance thereof. Execution being then issued, one of the defendants gave a forthcoming bond with surety, which was forfeited. Upon this bond a motion was made for award of execution in the name of the corporation, and the defendants produced the acts before mentioned, to shew 858 that the charter expired on the 1st of January 1835; and this *prima facie* evidence of the extinction of the corporation was not met by any countervailing proof on the other side; but it was insisted that the judgment of the appellate court imported that the corporation was in existence at that time, and estopped the defendants from shewing the contrary: *held*, that according to *The Bank of Alexandria v. Patton* and others, 1 Rob. 499, had the attempt been made, when this case was in the appellate court, to arrest further proceedings therein on the ground that the charter had expired, it would have been fruitless; and as the judgment of the appellate court could not have been prevented by shewing that the charter had expired, so there cannot be a legal intendment of the existence of the corporation, from the fact of the judgment being rendered. The forthcoming bond and the execution under which it was taken were therefore quashed, and the assignee left to proceed in equity to obtain the benefit of the judgment: *dissentiente Baldwin, J.*

May &c. v. State bank of N. Carolina, 56

COSTS.

1. When dismissal of bill by legatees to recover legacies will be without costs. See *Legatees &c. No. 6*, and

Burnley's representatives v. Duke and others, 102, 3

2. When vendor obtaining specific execution will be decreed to pay costs. See *Specific execution No. 1*, and

Wade's heirs v. Greenwood & wife, 474

3. Costs to party substantially prevailing in appellate court. See *Mortgages &c. No. 6*, and

Williamson's ex'or v. Howard, 39

COUNTY AND CORPORATION COURTS.

1. What grants of administration, original and *de bonis non*, are valid. See *Legatees &c. No. 6*, and

Burnley's representatives v. Duke and others, 102

2. What is a final proceeding or order of county court. See *Supersedeas*, and

Farneyhough's ex'ors v. Dickerson &c., 582

3. Under the act of March 15, 1832, (Acts of 1831-2, ch. 22, § 9,) a free negro or mulatto, for simple larceny to the value of 20 dollars or less, must be tried by a justice of the peace of the county or corporation, and a court of oyer and terminer has no jurisdiction of the case.

Cropper v. Commonwealth, 842

4. A prisoner confined in the penitentiary under the judgment of a court of oyer and terminer, for an offence which such court had no jurisdiction to try, may be discharged by the general court upon a writ of *habeas corpus*. S. C., 842

COVERTURE.

See Husband and wife.

CRIMINAL JURISDICTION AND PROCEEDINGS.

I. Grand jury.

1. Who is a freeholder qualified to serve as a grand juror. See *Freehold*, and *Commonwealth v. Burcher, 826*

II. Bail.

2. What is no ground for admitting prisoner to bail. See *Bail*, and *Summerfield v. Commonwealth, 767*

III. Penitentiary convict.

3. Proceedings against convict received into penitentiary under second or third sentence. See *Penitentiary convict*, and *Brooks v. Commonwealth, 845*

IV. Oyer and terminer.

4. Of what offence court of oyer and terminer has no jurisdiction, and how prisoner in penitentiary under illegal sentence of such court may be discharged. See *County and corporation courts No. 3, 4*, and *Cropper v. Commonwealth, 842*

V. Indictment and process.

5. What indictment for perjury is insufficient. See *Perjury*, and *Thomas v. Commonwealth, 795*

6. Process on indictment for playing at unlawful game. See *Gaming No. 5*, and *Wright v. Commonwealth, 800*

VI. Petit jury.

7. Who shall be deemed impartial jurors for the trial of felony. See *Jurors No. 3*, and

M'Cune v. Commonwealth, 771

*VII. Competency and sufficiency of evidence.

8. What witness for commonwealth on prosecution for perjury has no disqualifying interest. See *Witness No. 2*, and

Commonwealth v. Hart, 819

9. On trial for forgery, party whose signature is alleged to be forged need not be called as a witness. See *Forgery No. 2*, and *Foulkes v. Commonwealth, 836*

10. When secondary evidence of contents of forged instrument is admissible. See *Forgery No. 3*, and S. C., 836

11. What is not a writing in respect whereof forgery can be committed. See *Forgery No. 1*, and S. C., 837

12. Construction of act of March 26, 1842, concerning recoveries thereafter had for violations of the gaming laws. See Gaming No. 4, and

Pitman v. Commonwealth, 800

13. What trespass on land is no misdemeanor under the statute of February 14, 1823. See Trespass, and

Campbell &c. v. Commonwealth, 791

14. What verdict of conviction will not be set aside by appellate court as contrary to the evidence. See New trial, and

Parsons v. Commonwealth, 772

DECLARATION.

What declaration in case by ferry owner for disturbance of his franchise is sufficient on general demurrer. See Ferry No. 3, and Patrick v. Ruffners, 209

DEED.

1. How far statement in deed of assignment is evidence of the consideration. See Assignment No. 1, and

Browning v. Headley, 342

2. What vendee of land, after conveyance by vendor delivered as escrow, is a freeholder qualified to serve as a grand juror. See Freehold, and

Commonwealth v. Burcher, 826

3. Effect of deed by one joint tenant, conveying by metes and bounds a portion of the land held jointly. See Joint tenants, and Robinett v. Preston's heirs, 273

4. Relief in equity against estoppel at law by deed acknowledging payment. See Estoppel No. 4, and

Radcliff &c. v. High, 271

5. Relief in equity where deed conveying land has been accidentally destroyed. See Specific execution No. 1, and

Wade's heirs v. Greenwood & wife, 474

6. See Mortgages and trusts.

DEPOSITIONS.

Time allowed parties in chancery for taking depositions. See Hearing of cause No. 1, and

Poling v. Johnson, 255

DESCENTS.

Concerning inheritance of infant's land derived by descent from his mother, see Writ of right No. 2, and

Walkers v. Boaz &c., 485

DISTRIBUTEE AND DISTRIBUTION.

See Legatees and distributees.

DIVORCE.

Effect of dissolution of marriage on right to choses in action of the wife. See Husband and wife No. 5, and

Browning v. Headley, 341

DOWER.

I. When precluded by sale under vendor's lien.

1. The vendor of land conveys the same to the vendee in fee simple, and receives part of the purchase money, but no security for the residue. On a bill in equity against the

vendee to enforce the implied equitable lien of the vendor, a decree is made for the sale of the land, and the proceeds are more than sufficient to satisfy what remains due to the vendor. The surplus is claimed by creditors of the vendee who have obtained judgments against him, and taken him in execution, from which he escaped. With the vendee's assent, a decree is made in favour of those creditors for the surplus. Afterwards, the vendee dying, a bill is filed by his widow against those in possession of the land, to wit, one to whom the purchaser at the sale under the decree had aliened the whole, and two others to whom that one had aliened a part, claiming to be endowed: *held* by two judges (Stanard and Baldwin) that the land *in the hands of the purchasers is not chargeable to the widow, and that her bill must be dismissed; *dissentiente* Allen, J., whose opinion was, that the widow was entitled to dower in the surplus which remained after satisfying the vendor's lien, and that the amount to which she was entitled constituted a charge upon the land in the hands of the purchaser at the sale under the decree, and of those claiming under him.

Wilson &c. v. Davisson, 384

II. Dower in insured property.

2. Lien of the Mutual Assurance society on dower interest in property insured, and personal responsibility of dowress. See Mutual Assurance society No. 2, and Shirley v. Mut. Ass. society, 705

III. Right to dower in woodland.

3. A husband dies seized of land incapable of cultivation, and no otherwise productive or valuable than by working the timber and making sale thereof when converted into shingles. It appears that previous to as well as after the husband's death, the timber was worked, and large profits derived from the sale of shingles. Parties coming into possession after the husband's death, under a deed of trust made by him in his lifetime, admit his widow's right as dowress to one third of the timber worked, and for several years pay her one third of the proceeds of the same. Payment is afterwards stopped: *held*, those in possession of the land after the husband's death shall account to the widow or her administrator for one third of the profits received by them during her life, subject to credit for the payments made by them to the widow.

Macaulay's ex'or v. Dismal swamp land co., 507

IV. Right to recover profits from husband's death.

4. Where a husband makes a deed of trust conveying land with power to the trustees to sell the same for payment of debts, and they allow the husband to remain in possession during his life, and make no sale under the deed until after his death, the husband is to be considered as having died seized of the land subject to the deed of trust, so that his widow, if she did not join in the deed, and is entitled to dower in the land, may recover

rents and profits from the husband's death in like manner as if the deed had not been made. In case the widow die before recovering such rents and profits, the same may be recovered to the period of her death by her administrator.

Macaulay's ex'or v. Dismal swamp land co., 507

V. Mode of enjoying dower in proceeds of land sold.

5. The principle laid down in *Herbert and others v. Wren and others*, 7 Cranch 380, that where land in which there is a right of dower is sold in a suit to which the tenant in dower is a party, the other parties interested "have a right to insist that instead of a sum in gross, one third of the purchase money shall be set apart, and the interest thereof paid annually to the tenant in dower during her life," approved.

Wilson &c. v. Davisson, 384

VI. Mode of calculating present value of dower interest.

6. The table of longevity referred to, which was made by professor Wigglesworth of Cambridge university, and published in the *Transactions of the American academy*, vol. 2, p. 133, and also republished in the *Ameri-Jurist*, vol. 11, p. 492, and in 2 Rob. Pract. p. 381. When the present value of a dower interest is to be calculated, the probable duration of the life by which it is limited and the sum derived from it annually, are first to be ascertained, and then the calculation is to be made, not by discounting simple interest, but by discounting compound interest. For the present value of an annuity is that sum which, being improved at compound interest, will be sufficient to pay the annuity.

Wilson &c. v. Davisson, 384, 5

VII. What laches will preclude right to account.

7. Under a deed of trust of land made by a husband, the trustees after his death sell the land, and the purchaser conveys it away to others. A bill is afterwards filed by the widow against the trustees, the purchaser's executor, and those in possession, claiming dower in the land, and an account of profits; pending which suit the widow dies.

861 The bill *upon its face shews a delay, without excuse, of more than 20 years in calling the trustees and the purchaser's executor to an account. The surviving trustee swears positively that he has paid over to the widow every dollar for which he and his cotrustee were accountable, and exhibits vouchers in proof of his allegation. The widow, by her own shewing in the bill, prosecuted to recovery a suit against the executor of the purchaser, for her share of the profits received by him; and the only pretext for a further demand, and that without a shadow of proof, is that she did not recover enough: *held*, the plaintiff is entitled to no account as regards the trustees and the purchaser's executor, and the bill was properly dismissed as to them.

Macaulay's ex'or v. Dismal swamp land co., 507

EJECTMENT.

What ejectment on demise of insolvent debtor cannot be sustained. See *Insolvent No. 3*, and

Syrus &c. v. Allison, 200

ELEGIT.

Lien of elegit on land conveyed in trust, and rights of elegit creditor against purchaser under the deed.

1. Under a deed of trust conveying land with general warranty to secure debts, the land is sold for more than enough to pay those debts. The purchaser institutes a proceeding against the grantor for unlawful detainer, and obtains a judgment against him. And then the purchaser insists, 1. that he was not bound to pay his purchase money (and therefore cannot be charged with interest on the same) until he obtained possession; and 2. that he may retain part of the surplus of the purchase money to pay the costs recovered by the judgment on his complaint for unlawful detainer. The claims of the purchaser are objected to by a creditor of the grantor, who obtained a decree against him after the deed of trust, and sued out an elegit within the year: *held* (per totam curiam) the claims so made by the purchaser cannot be allowed.—The purchaser further claims to apply other parts of the surplus to extinguish a dower right in the property existing at the time of the warranty, and to pay taxes assessed on the property before the sale was made: *held* by two judges (dissentiente Stanard, J.) these claims also must be disallowed.

Findlay v. Toncray, 374

2. The case of *Foreman v. Loyd and others*, 2 Leigh 284, recognized as a binding authority. S. C., 374

EMANCIPATION.

The decision in *Maria and others v. Surbaugh*, 2 Rand. 228, still adhered to.

Ellis v. Jenny and others, 597

ENTRY.

1. What is not a forcible entry. See *Forcible entry*, and

Pauley v. Chapman, 235

2. Invalidity of entry or location on land settled thirty years, on which taxes have been paid within that time. See *Patent No. 1, 2*, and

Tichanal v. Roe, 288

EQUITABLE JURISDICTION.

1. To relieve against estoppel at law. See *Estoppel No. 4*, and

Radcliff &c. v. High, 271

2. To relieve reversioner of slave removed pending injunction. See *Slaves No. 2*, and *Johns v. Davis's ex'or &c.*, 729

3. To relieve cestui que trust of bond secured by trust deed. See *Trusts &c. No. 4*, and

Miller v. Trevilian &c., 1, 2

4. To relieve where a deed conveying land has been accidentally destroyed. See *Specific execution No. 1*, and

Wade's heirs v. Greenwood & wife, 474

5. When rent may be apportioned in equity. See Rent, and

Mason &c. v. Moyers, 606, 7

6. What submission is binding and entitles to specific execution of the award. See Award No. 1, and

Boyd's heirs v. Magruder's heirs, 761

7. Concerning suit by distributee's donee of a slave against executor, to injoin sale under execution against distributee for his purchases from executor, and to set off distributable share against the judgment, see Legatees &c. No. 8, and

Hickerson's adm'r v. Helm, 628
862 *8. When mill owner cannot be in-

joined from rebuilding dam. See Mills No. 2, and

Talley v. Tyree, 500

9. Denial of relief in equity against judgment, where the party neglected to make defence at law. See Laches No. 3, and

Hendricks &c. v. Compton's ex'or, 192

EQUITY OF REDEMPTION.

1. What grantor has no right of redemption. See Mortgages &c. No. 2, and

Floyd v. Harrison &c., 161

2. Whether mortgagee may sell under power given by the mortgage deed. See Mortgages &c. No. 3, and S. C., 162

ESCROW.

What vendee of land, after conveyance by vendor delivered as escrow, is a freeholder qualified to serve as a grand juror. See Freehold, and

Commonwealth v. Burcher, 826

ESTOPPEL.

I. By judgment.

1. What judgment recovered by a corporation will estop from alleging previous extinction of such corporation. See Corporation, and

May &c. v. State bank of N. Carolina, 56

2. How far evidence aliunde is admissible to shew the power and action of attorney in fact by whom judgment was confessed. See Judgment No. 1, and

Calwells v. Shields & Somerville, 305

3. What defence of a former recovery for the same cause of action is not sustained. See Former recovery, and

Weaver v. Vowles, 438

II. Relief in equity against estoppel at law.

4. A deed conveying land contains an acknowledgment on its face that the purchase money has been paid, though in truth no payment thereof has been made. In an action of assumpsit for the purchase money, the defendant, by way of estoppel, relies upon the acknowledgment in the deed; and the plaintiffs, believing that the estoppel will prevent their recovery at law, dismiss their action, and file a bill in equity against the purchaser: *held*, they are entitled to the aid of a court of equity. Accord. Wilson's curator v. Shelton's adm'r, 9 Leigh 342.

Radcliff &c. v. High, 271

EVIDENCE.

I. Competency.

1. In an action brought by keepers of a boarding school against a guardian, for board, tuition, and other necessities furnished to the ward, the administrator of a previous guardian is a competent witness for the plaintiffs.

Young v. Warne &c., 420

2. What witness for commonwealth on prosecution for perjury has no disqualifying interest. See Witness No. 2, and

Commonwealth v. Hart, 819

3. Party whose signature is alleged to be forged need not be called as a witness for the prosecution. See Forgery No. 2, and

Foulkes v. Commonwealth, 836

4. When secondary evidence is admissible to prove contents of forged instrument. See Forgery No. 3, and S. C., 836, 7

5. The general rule, that the admission of one person cannot be given in evidence against another, adverted to by Baldwin, J. Pettit v. Jennings &c., 676

6. Answer of assignor no evidence against assignee codefendant to prove gaming consideration of bond. See Codefendants No. 1, and S. C., 676

7. How far evidence aliunde is admissible to shew the power and action of attorney in fact by whom judgment was confessed. See Judgment No. 1, and

Calwells v. Shields & Somerville, 305

8. What endorsement on bond is evidence to repel presumption of payment. See Bond No. 2, 3, and

Dabney's ex'ors v. Dabney's adm'r, 622

9. What evidence is competent for tenant in writ of right to disprove constructive seisin of demandant. See Writ of right No. 3, and

Dawson v. Watkins, 259

10. What receipt of constable is evidence against him and his sureties of the collection of the debt. See Constables, and

Smith &c. v. The governor, 229

II. Effect and sufficiency.

11. What is prima facie proof of the consideration of assignment. See Assignment No. 1, and

Browning v. Headley, 342

12 Estoppel at law by deed acknowledging payment. See Estoppel No. 4, and

Radcliff &c. v. High, 271

13. What judgment recovered by corporation will estop from alleging that such corporation had previously become extinct. See Corporation, and

May &c. v. State bank of N. Carolina, 56

14. What defence of a former recovery for the same cause of action is not sustained. See Former recovery, and

Weaver v. Vowles, 438

15. Weight and effect of inquisition on application to establish ferry. See Ferry No. 1, and

Muire &c. v. Smith, 458

16. What proof will maintain action by ferry owner for disturbance of his franchise. See *Ferry No. 4*, and *Patrick v. Ruffners*, 209

17. Effect of return on *fi. fa.* as evidence in action against sheriff. See *Fieri facias No. 1*, and *Lathrop v. Lumpkin &c.*, 49

18. Effect of constable's receipt as evidence of the collection of the claim. See *Constables*, and *Smith &c. v. The governor*, 229

19. What facts are insufficient to prove a seisin in deed by *pedis positio*. See *Writ of right No. 4*, and *Dawson v. Watkins*, 259

20. Concerning the weight and effect of an answer in chancery as evidence for respondent, see *Answer No. 2, 3*, and *Thornton v. Gordon &c.*, 719

21. What conviction of murder in the second degree is warranted by the evidence. *Parsons v. Commonwealth*, 772, 777

EXECUTION.

See *Fieri facias*.

EXECUTORS AND ADMINISTRATORS.

I. Commissions and other charges.

1. As a general rule, an executor is not entitled to commission on the amount of debt due from him to the testator, and credited to the estate in the executorial account. *Accord. Carter's ex'ors v. Cutting and wife*, 5 *Munf. 227*.

Farneyhough's ex'ors v. Dickerson &c., 582

2. The commission of an executor should not be on the amount of his disbursements. He ought generally to be allowed a commission on the amount of the credits in his account, except on a credit for a debt due from him to the testator. Though some of the credits are for bonds due the estate, that were passed over by the executor to legatees, and voluntarily received by the latter, commissions will nevertheless be allowed the executor on the amount of such bonds. S. C., 582

3. An item of \$21, paid by executors for services rendered by a clerk, being allowed by commissioners, the same was excepted to by legatees, upon the ground that what the clerk did ought to have been done by the executors, and therefore that he should be paid out of their commissions. The record contained no evidence on the subject, except that the date of the item was a few days after the date of a large credit for sales at public auction, which furnished some ground for the inference that the clerk was employed during those sales: *held*, the court of probate did not err in overruling the exception. S. C., 582

II. Suit by ex'or against legatee.

4. When overpaid legatee cannot be compelled by executor to refund. See *Legatees &c. No. 11, 12*, and *Davis &c. v. Newman*, 664

III. Suits by legatees and distributees against ex'or.

5. What purchase by executor's agent at his own sale of land will be set aside at the suit of legatees, and what decree will be rendered in their favour. See *Principal and agent No. 3*, and *Buckles v. Lafferty's legatees*, 292

6. What grants of administration are valid; what payments by representative of deceased adm'r to succeeding adm'r are good against legatees; for what assets succeeding adm'r and his sureties are liable to legatees. See *Legatees &c. No. 6*, and *Burnley's representatives v. Duke & others*, 102

7. Setoff by distributee of his share against judgment for purchases at executor's sale. See *Legatees &c. No. 7*, and *Hickerson's adm'r v. Helm*, 628

8. Injunction by distributee's donee of a slave to sale under execution for distributee's debt to the estate, and setoff of distributable share against the judgment. See *Legatees &c. No. 8*, and S. C., 628

9. Measure of credit to distributee for slave sold under execution on judgment for his purchases at executor's sale. See *Legatees &c. No. 8*, and S. C., 628, 9

864 *10. Measure of widow's rights where slaves of husband liable to her dower have been sold by executor. See *Widow No. 3*, and S. C., 629

11. What legacy is a charge upon the executor as legatee, and does not render his sureties responsible. See *Will No. 4*, and *Arrington v. Cheatham & wife*, 492

12. When executor guardian *de facto* shall not be charged with interest on ward's legacy. See *Guardian and ward No. 2*, and S. C., 492

13. Decree on guardianship account only, in suit by ward distributee against guardian administrator. See *Guardian and ward No. 3*, and *Williamson's ex'or v. Howard*, 39

14. Supersedeas lies for legatee exceptor to order of county court admitting executor's account to record. See *Supersedeas*, and *Farneyhough's ex'ors v. Dickerson &c.*, 582

EXTINGUISHMENT.

How legal remedy on joint contract may be extinguished. See *Joint obligors No. 1*, *Partnership*, and *Ward v. Motter*, 536

FEME COVERT.

See *Husband and wife*.

FERRY.

I. Effect of inquisition on application to establish ferry.

1. Construction of the act in 2 R. C. 1819, p. 261, ch. 238, which provides for the impanelling of a jury to say whether, in their opinion, public convenience will result from the establishment of a proposed ferry, and for the return of this opinion to the county court, "who thereupon, as well as upon any other evidence that may be offered, shall have full

power to establish such ferry." The finding of the jury in which a case is merely evidence, and the weight of it, under all the circumstances, a matter for the discretion of the court.

Muire &c. v. Smith, 458

II. What is no ground for quashing such inquisition.

2. Upon the return of the certificate of a jury, that, in their opinion, public convenience would result from the establishment of a proposed ferry, evidence is introduced. 1. Of one of the jurors, who proved, that before he was sworn, he had made up an opinion that the ferry would be a public convenience; that he thought it probable he might have expressed this opinion, though he did not recollect to have done so; that he had, before he was sworn, signed a petition for the said ferry; and that, at the time he was sworn, he was uninfluenced by the said opinion, and prepared to render an impartial verdict. 2. Of another juror, who proved the like facts with regard to himself, and also that he had expressed his opinion. 3. Of another juror, who proved the same facts with regard to himself that the second had proved with regard to himself, and also that he had circulated a petition for the ferry. Upon this evidence the county court quashed the finding of the jury, and the circuit court reversed the judgment of the county court: *held*, the judgment of the circuit court is right.

Muire &c. v. Smith, 458

III. Declaration in case for disturbance of franchise.

3. A declaration in case by the owner of a ferry for the disturbance of his franchise, contains two counts, each of which is demurred to. The first count sets forth, in substance, that the plaintiff was possessed of a legally established ferry; that there were good and convenient roads, ways and landings for the use of the same; and that there was, and of right ought to have been, a free and uninterrupted passage for the water flowing in and down the river, so as not to affect or injure the landings, ways or roads at the ferry: and it charges that the defendants wrongfully placed obstructions in the river near the ferry and landings, by which the current of the stream was checked and diverted, and thrown from and upon the landings (in modes particularly described); thereby occasioning the plaintiff great labour and expense, destroying or injuring the roads and landings, rendering the embarkation and debarkation difficult, and preventing the transportation of persons and property. The second count is the same, except that, instead of alleging a possession of the ferry by 865 the plaintiff, it avers his right to the reversion thereof, expectant upon the term of his tenant, in whom the possession, use and enjoyment are charged to be, and that the grievance complained of is, to the prejudice of the plaintiff's reversionary estate: *held*, both counts are good on general demurrer: dissentiente Allen, J., who was of opinion as to the second count, that it not being for the accruing damages consequent

upon the obstruction, but by the reversioner for an injury to the inheritance, it could not be sustained without an averment in it of possession of the landings, or of some right to their use.

Patrick v. Ruffners, 209

IV. What proof will maintain such action.

4. In an action by the grantee of a ferry against a wrongdoer who disturbs the enjoyment of his franchise, the grant of the franchise from the public, the use of the ferry with its appurtenant landings and outlets, and the fact of such disturbance, are all that need be established. Nor is it material whether the disturbance is by invading the plaintiff's right to the exclusive transportation and tolls, or by obstructing or impairing his navigation, or by destroying or injuring the landings and outlets. Per Baldwin, J.

Patrick v. Ruffners, 209

FIERI FACIAS.

I. Effect of return as evidence in action against sheriff.

1. In debt on a sheriff's official bond, two breaches are assigned: 1. that the sheriff had levied an execution of the relator against an administrator, on slaves of the decedent, but negligently suffered them to be eloiigned and carried off: 2. that the sheriff might have levied the execution on such slaves, but neglected so to do. At the trial, the plaintiff, to shew the issuing of the execution, and the reception and disposition thereof by the sheriff, was under the necessity of giving in evidence not only the execution with the return originally made thereon, but also an amendment of that return, made by leave of court. This amendment had been made not by obliterating the first return and substituting another in its place, but in a more proper manner by making an addition to the first return; and the return thus constituted of that originally made, and of what was afterwards added, was upon its face contradictory in itself: *held*, that the defendant had a right to rely upon said return as *prima facie* evidence in his favour; that the plaintiff, on the other hand, was at liberty to disprove any part of it, as well by intrinsic evidence furnished by the return itself, as by evidence aliunde; that it was competent for the defendant in like manner to sustain any part of the return; and it was the province of the jury to decide, upon the whole evidence furnished by the return or otherwise, whether or not the execution was levied by the sheriff upon the property of the intestate in the hands of the administrator, and the same thereafter eloiigned and lost by the negligence of the sheriff; or whether or not the sheriff might have levied upon such property in the hands of the administrator, but neglected so to do.

Lathrop v. Lumpkin &c., 49

II. Effect of sale under second of two *fi. fas.*

2. Whilst on the one hand, where an officer holding two executions sells under the second, the title of the purchaser is good against

the plaintiff in the first, and the remedy of the latter is against the officer, so on the other hand the purchaser at such sale cannot invoke the lien of the first execution, in aid of a title acquired at a sale made under the second. Therefore, where a slave was levied upon under a fi. fa. delivered to a constable before any conveyance of the slave by the debtor, and other executions issued after such conveyance, under which (and not under the first fi. fa.) the evidence tended to prove that the slave was sold, it was *held*, in an action brought by the grantee in the conveyance against the purchaser at the sale, that the title of the purchaser must be referred to the process under which the sale was made. *Accord. Eckhols v. Graham & others, 1 Call 492.*

M'Key &c. v. Garth, 33

III. Action against sheriff purchasing at his own sale under fi. fa.

3. The owner of a slave sells her, but remains in possession. The slave is afterwards levied upon under execution, 866 *and the vendee forbidding the sheriff to sell, the creditor gives an indemnifying bond with security, and then the slave is sold by the sheriff, and the sheriff becomes himself the purchaser, though at the time in the name of another. In an action of detinue by the first vendee against the sheriff so purchasing, *held*, the question whether a sheriff can acquire title by a purchase at his own sale does not arise, but the proper enquiry is whether the title of the plaintiff is valid against the execution creditor.

Tavener v. Robinson, 280

IV. Injunction to sale of slave under execution.

4. Injunction by distributee's donee of a slave to sale under execution for distributee's debt to the estate. See *Legatees &c. No. 8, and*

Hickerson's adm'r v. Helm, 628

FINALITY.

Of proceeding or order of county court. See *Supersedeas, and*

Farneyhough's ex'ors v. Dickerson &c., 582

FORCIBLE ENTRY.

Case in which, on a complaint by a party under the statute in 1 R. C. of 1819, ch. 115, p. 455, that another had forcibly turned him out of possession of a tenement, the jury returned a special verdict finding the facts, and upon those facts the court considered that the entry was not "with strong hand or with multitude of people," and rendered judgment that the complaint be dismissed.

Pauley v. Chapman, 235

FOREIGN ATTACHMENT.

When assignee's plea that the debtor was resident is demurrable.

In a suit in equity in the circuit court of Russell, against an absent debtor having lands within the commonwealth, after a valuation of the lands had been made and returned, two persons filed petitions, setting forth that they had purchased the lands

from the debtor and received conveyances of the same, and praying to be made defendants. The court ordered the plaintiff to amend his bill and make them parties, which was accordingly done. Whereupon they filed a plea alleging, that at the time the subpoena was sued out, the debtor was a resident of the county of Russell and state of Virginia, subject to the process of the common law courts of said county, and possessed of personality sufficient to discharge the debts due by him to the plaintiff. To this plea the plaintiff demurred: *held*, the demurrer should be sustained: for the petition is only a part of the case for the purpose of having the petitioners made defendants; and so far as the record discloses, they may have been mere strangers, having no right to intermeddle. Whether the debtor was nonresident or not, was a question foreign to them, until by their answers they had shewn they had an interest in the controversy.

Smith v. Hunt &c., 206

FORGERY.

I. Of what writing forgery cannot be committed.

1. Indictment for forging, with intent to defraud W. & W., a letter in the following terms: "Nottaway, April 24, 1841. Gent., Agreeable to mr. Wm. I. Watkins' request, I take pleasure in making you acquainted with his name, and would say to you that he is very extensively engaged in the manufacturing of tobacco, and has made some large purchases, and says that he wishes to patronize you (on my recommendation). You may be assured that whatever he engages to do he will certainly perform. He says it is probable he will want 1000 dollars by the 1st of May, to meet his engagements, and if he apply for the amount, I have no doubt but you will accommodate him. The roads are in such a condition that it is impossible to get any produce to market. Write me a few lines by mr. Watkins, and say what the chance is for a rise in tobacco. Your compliance with the above will very much oblige your ob't servant, Joseph M. Foulkes.—P. S. Mr. Watkins prefers giving a negotiable note payable in Petersburg Exchange bank, where he can always have an opportunity to send at the shortest notice and draw. He is not a gentleman of a low mean degree, but one that is a perfect gentleman in every sense of the term. I am confident, as I have observed to him, that you will either *let him have the money, or endorse for him. J. M. F." : *held*, this is not a writing in respect whereof forgery can be committed, either at common law or under the statute.

Foulkes v. Commonwealth, 837
II. Party whose signature is forged need not be called.

2. Upon a trial for forgery of a written instrument, the commonwealth may, without producing as a witness the party by whom the instrument purports to be signed, and without accounting for his absence, prove by the evidence of other witnesses that the instrument is not genuine; such evidence

not being in its nature secondary to that of the party whose signature is in question.

Foulkes v. Commonwealth, 836

III. Secondary proof of forged instrument

3. On trial of indictment for forgery of a letter of credit with intent to defraud W. & W., the commonwealth proves that a draft, presented by the prisoner to W. & W. at the same time with the letter of credit, had been filed, together with an indictment against the prisoner for forging the same, with the clerk of the court, who, on making search for the draft among the papers in his office, has been unable to find it; and thereupon the commonwealth offers secondary evidence of the contents of the draft; no notice having been given to the prisoner, before the jury was impaneled, of any intention to offer such evidence: *held*, the foundation so laid for the admission of the secondary evidence is sufficient.

Foulkes v. Commonwealth, 836, 7

FORMER RECOVERY.

What defence of a former recovery for the same cause of action is not sustained.

In assumpsit for work and labour done, care and diligence bestowed, and materials provided, the defendant, besides the general issue, pleaded a former action for not performing the same promises, in which the plaintiff recovered damages for the nonperformance of the same: the plaintiff replied that the promises were not the same identical promises in respect whereof the judgment was recovered, and tendered an issue, which was joined. At the trial, the plaintiff having given evidence on the general issue, the defendant, to sustain his plea of former recovery, gave in evidence the record of the former suit, the declaration in which contained two counts, one for work and labour, care and diligence, and materials, as well as for goods sold, money lent, money paid, and money received; and the other upon an account stated. The defendant also gave in evidence the account filed in that case, which contained credits and charges up to the 24th of October 1835, "leaving out the building of a large barn, and work done on a new mill." The verdict and judgment in that case being for \$630.53 cents, the plaintiff examined a witness, who proved that an account was settled with the defendant in October 1835, on which a balance of \$630.53 cents was struck; that the account filed in the former cause was a copy of the account so settled; and that the settlement did not include the plaintiff's demand for work done on the barn or the new mill, charged in the account in the second case, but that this demand remained for future adjustment. It was farther proved, that on the trial in the former cause, the account not being then filed which was afterwards filed in the second suit, all evidence in regard to that account was excluded, and the plaintiff rested his case on the count upon an account stated, and relied upon the settlement before mentioned, shewing the said balance of \$630.53 cents, and recovered upon that ground only. Thereupon

the defendant moved the court to exclude from the jury all the evidence offered by the plaintiff in support of the items charged in the account filed in the second case, on the ground that he was precluded from recovering the same in this action by the recovery in the former suit, and that the demand of the plaintiff for the said sum of \$630.53 cents recovered in the former suit, and for the items charged in the account filed in this case, was one entire demand, and could not be made the subject of two separate suits, and therefore the plaintiff was precluded by the recovery in the former suit from recovering in this suit. But the court 868 *overruled the motion, and a verdict was rendered for the sum found by the jury to be due upon the account filed in the second case. On a supersedeas to the judgment given on this verdict, the same was affirmed.

Weaver v. Vowles, 438

FRANCHISE.

Action for disturbance. See *Ferry No. 3*, 4, and

Patrick v. Ruffners, 209

FRAUD.

1. What purchase by agent from principal will be set aside. See *Principal and agent No. 2, 3*, and

Buckles v. Lafferty's legatees, 292

2. The vendor of a slave continuing in possession until an execution was levied on the slave more than a year after the sale, and the presumption arising from the inconsistency of the possession with the title claimed by the vendee not being repelled by any circumstances appearing in the case, but the circumstances on the contrary confirming the presumption of fraud, the sale declared void as to the execution creditor.

Tavener v. Robinson, 280

FREEHOLD.

A lot of land being sold for a sum of money payable by instalments, the vendee receives immediate possession, and the vendor signs, seals, and acknowledges before magistrates, a conveyance of the land to the vendee in fee simple, which is thereupon, by consent of the parties, placed in the keeping of a third person, to be retained by him until the whole purchase money is paid, and to be then delivered to the vendee. The vendee pays some of the instalments as they become due; others are still unpaid, the time of payment not having arrived: *held*, this vendee is a freeholder duly qualified to serve as a grand juror.

Commonwealth v. Burcher, 826

FREE NEGROES AND MULATTOES.

I. What issue of freedwoman is not free.

1. The decision in *Maria and others v. Surbaugh*, 22 Rand. 228, still adhered to.

Ellis v. Jenny & others, 597

II. Trial for petit larceny.

2. Under the act of March 15, 1832, (Acts of 1831-2, ch. 22, § 9,) a free negro or mulatto,

for simple larceny to the value of 20 dollars or less, must be tried by a justice of the peace of the county or corporation, and a court of oyer and terminer has no jurisdiction of the case.

Cropper *v.* Commonwealth, 842
GAMING.

I. What is no evidence against assignee of bond.

1. Answer of assignor of bond is no evidence against assignee codefendant to prove gaming consideration. See Codefendants No. 1, and

Pettit *v.* Jennings &c., 676

II. Liability of obligor in gaming bond to assignee.

2. Though, upon a bill in equity by an obligor against the obligee and his assignee, it be fully proved that the bond was given for a gaming consideration, still the obligor will not be discharged from liability to the assignee, if the assignee had no knowledge before the bond was assigned of its having been executed for money won at play, and was induced to purchase the same by the assurances of the obligor that there was no objection to it and that it would be paid. Per Baldwin, J. Accord. Buckner &c. *v.* Smith &c., 1 Wash. 296; Hoomes *v.* Smock, 1 Wash. 389; Davis's adm'r *v.* Thomas &c., 5 Leigh 1. Under such circumstances, the only question is as to the amount of the obligor's liability to the assignee. Is it the whole amount of the bond, or is it the sum paid by the assignee to the assignor for the assignment? Per Baldwin, J., it is the former; per Allen, J., the latter.

Pettit *v.* Jennings &c., 676

III. Decree over for obligor in gaming bond against obligee.

3. In an injunction suit by the obligor in a gaming security against the obligee and assignee, if the gaming consideration be admitted by the obligee's answer, but not proved by any competent evidence against the assignee, the injunction will be dissolved and the bill dismissed as to the assignee, but 869 not as to the obligee. *As to him the cause will be retained until payment by the obligor to the assignee of the money due the latter, in order that a decree may then be rendered therefor in favour of the obligor against the obligee.

Pettit *v.* Jennings &c., 676

IV. Prosecution for unlawful gaming.

4. The statute of March 26, 1842, (Acts of 1841-2, ch. 69, § 4, p. 44), enacting "that in all recoveries hereafter had for violations of the gaming laws, the fee recovered shall be ten dollars for the commonwealth's attorney, and the sum of thirty dollars shall be paid to the literary fund in lieu of the sum as at present provided," had no application whatever to offences committed before its passage, but such offences remained liable to prosecution and punishment under the preexisting law, in the same manner as if the said statute has never been passed.

Pitman *v.* Commonwealth, 800

V. Process on indictment for playing.

5. A party being indicted for playing at an unlawful game, the court immediately awards a *capias* against him, returnable the next day; at the return day, he moves to quash the *capias* as improper process, which motion the court overrules, and compels him to plead forthwith: *held*, the irregularity (if any) in this proceeding is no sufficient ground to reverse judgment against the defendant.

Wright *v.* Commonwealth, 800

GENERAL COURT.

Jurisdiction upon habeas corpus. See Habeas corpus, and

Cropper *v.* Commonwealth, 842

GRAND JURORS.

Who is a freeholder qualified to serve as a grand juror. See Freehold, and

Commonwealth *v.* Burcher, 826

GUARDIAN AND WARD.

I. Action against guardian for necessities.

1. In an action brought by keepers of a boarding school against a guardian, for board, tuition, and other necessities furnished to the ward, the administrator of a previous guardian is a competent witness for the plaintiffs. But if it appear that the board, tuition, and other necessities were furnished at the request of the previous guardian, and no express promise has been made by the second guardian to pay therefor, the action against the second guardian for the same cannot be maintained.

Young *v.* Warne &c., 420

II. Liability of ex'or guardian de facto.

2. For several years an infant legatee resides with and is maintained by her grandmother, who is chargeable with the payment of the legacy, the annual interest of which is less than the annual value of the maintenance: *held*, the grandmother shall not be charged with interest on the legacy during the period of such maintenance.

Arrington *v.* Cheatham & wife, 492

III. Decree in suit by ward distributee against guardian adm'r.

3. The administrator of an intestate is also guardian of one of the distributees. Upon the termination of the guardianship, a bill is filed against the guardian and his sureties, to recover what is due upon the guardianship account. An amended bill is afterwards filed against the administrator and his sureties, to recover what is due on the administration account. Reports are made of both accounts. But, for reasons appearing to the court, the guardianship account is recommitted; and then, by consent of parties, the administration account is also recommitted. A further report is made upon the guardianship account, and none upon the administration account. Whereupon the cause is heard as to the guardian and his sureties, upon the further report so made, and a decree is entered against them for the sum deemed by the court to be due upon the guardianship account. From this decree an

appeal is taken by a party interested to get rid of or reduce the amount. In the appellate court it is urged by the appellee, that the balance stated as due on the guardian's account should be augmented, by incorporating in it the appellee's share of the balance due on the administration account: *held*, this claim cannot be sustained: 1st, because

the case was heard and the decree rendered between the parties *to, and on the claim made by, the original bill for the settlement of the guardianship account, as contradistinguished from the administration account, the settlement of which was sought by the amended bill: 2dly, because the case was not prepared for hearing as to the administration account; it standing, as to that account, on a consent order recommitting the same, and the record of course furnishing no account on which a definite charge or decree in respect to the administration account could be made: 3dly, because no claim was made in the court below by the appellee, to bring into the guardianship account any charge against the guardian arising out of the administration account.

Williamson's ex'or v. Howard, 39

4. Affirmance of decree in favour of ward against guardian, deficiency in one charge to ward being regarded as an equivalent for excess in another. See Appellate jurisdiction No. 8, and S. C., 40

HABEAS CORPUS.

A prisoner confined in the penitentiary under the judgment of a court of oyer and terminer, for an offence which such court had no jurisdiction to try, may be discharged by the general court upon a writ of habeas corpus.

Cropper v. Commonwealth, 842

HEARING OF CAUSE.

I. What setting for hearing is premature.

1. In a suit in chancery, when an answer is filed at rules in due time, four months from the time of the replication to the answer are allowed the parties for taking their depositions, by the act of February 17, 1823, in Sess. Acts of 1822-3, p. 39, ch. 37, § 1, Suppl. to Rev. Code, p. 129. And until the expiration of the said four months, neither party has the right (without the consent of the other) to set the cause for hearing.

Poling v. Johnson, 255

II. Consequence if cause be prematurely set and heard.

2. It appearing by the record of a suit in chancery, that the answer and replication were filed at August rules 1840; that at September rules 1840 the plaintiff set the cause for hearing; and that on the 5th of October 1840 the cause was heard upon the bill, answer, replication, depositions, exhibits, and arguments of counsel, and a decree made against the defendants, *held*, the cause was prematurely set for hearing, and prematurely heard. The decree was therefore reversed with costs, and the cause remanded, with directions to the court below to send the case to

rules, there to remain for two months before it shall be set for hearing at the instance of either party, (unless it be set for hearing before the lapse of the two months by the consent of parties,) and for such decree in the case after it shall be set for hearing, as may be proper. *Accord. Dalby v. Price*, 2 Wash. 191.

Poling v. Johnson,

255

HEIR.

1. Concerning inheritance of infant's land derived by descent from his mother, see Writ of right No. 2, and *Walkers v. Boaz &c.*, 485

2. Concerning contribution between realty and personalty conveyed in trust for payment of debts, where conversion takes place after death of grantor, see *Mortgages &c. No. 8*, and *Perrin &c. v. Lomax &c.*, 133

3. When specific execution will be decreed against heirs of vendee. See Specific execution No. 1, and *Wade's heirs v. Greenwood & wife*, 474

4. What decree will be rendered against such heirs. See Specific execution No. 2, and S. C., 475

5. Allowance of time for redemption in such case, and sale upon credit. See Specific execution No. 3, and S. C., 475

HENRICO CHANCERY COURT.

Jurisdiction to revise decision of auditor disallowing claim against commonwealth. See *Banks*, and

Commonwealth v. Farmers bank, 737

HUSBAND AND WIFE.

I. When husband is a mere trustee for the wife.

1. By deed of marriage settlement, personal property of the wife is conveyed to the husband for the exclusive *benefit of the wife and her children during her life, and at her death for her issue, if any then living; and it is provided that in the event of the wife's dying without issue, the property shall be distributed in the same manner as if the deed had not been made. Upon the death of the husband without children (the wife still living), a creditor of the husband, at whose suit the latter took the oath of insolvency, claims that the husband has an interest in the property, which may be charged in the event of the wife's dying without issue: *held*, the conveyance to the husband was merely in the character of trustee, and its effect was to intercept the marital rights of the husband, and preclude him from all beneficial interest during the existence of the trust; that the provision for the event of the wife's dying without issue looked not to the state of things existing at the time of the marriage, but to such as should exist at the death of the wife; that the purpose was in such event to divest the legal title conveyed to the husband as trustee, and let the personal estate stand upon the same footing as any other personal chattels of a wife not reduced into possession by the husband du-

ring the coverture; that if the husband had survived the wife, he would have had a right to administer upon her personal estate, and hold the same free from distribution; but in the event that actually occurred, of the survivorship of the wife, the husband at no time acquired any individual ownership of the subject.

Matthews & co. v. Woodson and others, 601

II. Dower.

2. See title Dower, and
Wilson &c. v. Davisson, 384
Macaulay's ex'or v. Dismal swamp
land co., 507
Shirley v. Mutual Assurance society, 705

III. Validity, as against wife surviving, of husband's assignment of her personalty.

3. The rule laid down by sir Thomas Plumer in *Hornsby v. Lee*, 2 Madd. C. R. 16, american ed. 352, and *Purdev v. Jackson*, 1 Russ. 1, and afterwards confirmed by lord Lyndhurst in *Honner v. Morton*, 3 Russ. 65, 3 Cond. Eng. Ch. Rep. 298, that where a husband assigns personal property in which his wife has a reversionary interest expectant on the death of tenant for life, and the wife and the tenant for life both outlive the husband, the wife is entitled by survivorship in preference to the assignee, recognized as correct by Allen, J. Contra, opinion of Gibson, C. J., in the case of *Siter & another*, 4 Rawle 471-483.

Browning v. Headley, 340

4. The rule laid down in *Lord Carteret v. Paschal*, 3 P. Wms. 197, 2 Brown's Par. Cas. 10 (Tomlin's ed.) and *Bates v. Dandy*, 2 Atk. 207, 1 Russ. 33, note, and 3 Russ. 70, 3 Cond. Eng. Ch. Rep. 301, note, that where the wife has a present interest in personal property, and the husband makes a particular assignment of that interest for valuable consideration, though the thing assigned be no farther reduced into possession during the coverture, the title of the particular assignee will be good against the wife surviving, recognized as correct by judges Allen and Stanard. S. C., 340, 41

5. A testator directed his personal estate to be divided into shares, of which he gave one share to his daughter. The daughter's husband, for valuable consideration, assigned all the interest to which he was entitled, in right of his wife, in her father's estate. After this assignment, an act of assembly was passed by the legislature of Kentucky, in which state the husband and wife had become domiciled, declaring the marriage contract between them forever dissolved so far as respects her, and restoring her to all the rights and privileges of an unmarried woman, and further declaring her entitled, out of the estate of the husband, to receive alimony agreeably to the laws of the commonwealth. On a bill by the assignee against the testator's executor, the husband, and the wife, to recover her share of her father's estate, held by two judges, 1. That by the act of divorce, the right of the wife to her choses in action not reduced into possession during the coverture, is

placed on the same ground as if the husband had then died: but, 2. That the interest of the wife in the subject assigned being a present, not a reversionary interest, and there being a particular assignment of that interest for valuable consideration, the title of the assignee is good against the wife. S. C., 341

IV. Wife's right to provision against husband and his assignee.

6. The doctrine of the english chancery, that where an absolute equitable interest is given to the wife, the court will not permit the husband to recover it without making a provision for the wife, and that the husband's assignee, whether general or particular, takes his interest subject to the same equity, recognized as binding upon the courts of this state. And the doctrine carried farther than it was carried in *Beresford &c. v. Hobson &c.*, 1 Madd. C. R. 361, american ed. 199, by sir Thomas Plumer, who considered that the court in no case had given the whole to the wife; not even "where the husband has left his wife and gone abroad."

Browning v. Headley, 341

7. A testator directs his estate other than slaves to be turned into money, and directs the slaves and money to be divided amongst ten legatees, any advances to whom are to be deducted from their respective shares. The husband of a daughter assigns her interest for valuable consideration. On a bill by the assignee against the executor, the husband, and the wife, it is insisted by the wife that a provision should be made for her. No evidence is taken by the assignee to shew that the whole interest would be more than an adequate provision. But it appears that the penalty of the executor's bond was only 30,000 dollars, and the consideration for the assignment only 1500 dollars; that the husband had received from the testator upwards of 2000 dollars in money and property, and that he had squandered the same, and then abandoned his wife, leaving her with 6 or 7 children in a destitute condition, in consequence of which she obtained a divorce: held, under the circumstances, no enquiry before a commissioner is necessary, to ascertain what would be a reasonable provision for the wife; that it is plain the whole residue coming from her father's estate will not be more than an adequate provision for her; and the bill should be dismissed. S. C., 341, 2

IDENTITY.

Proceedings to identify convict received into penitentiary under second or third sentence. See Penitentiary convict, and

Brooks v. Commonwealth, 845

INDICTMENT.

See Criminal jurisdiction and proceedings.

INFANT.

1. Concerning inheritance of infant's land derived by descent from the mother, see Writ of right No. 2, and

Walkers v. Boaz &c., 485

2. See Guardian and ward.

INJUNCTION.

1. By distributee's donee of a slave, to sale under execution for distributee's debt to the estate. See *Legatees &c. No. 8*, and *Hickerson's adm'r v. Helm*, 628
2. Relief to reversioner of slave removed pending injunction. See *Slaves No. 2*, and *Johns v. Davis's ex'or &c.*, 729
3. When mill owner cannot be enjoined from rebuilding dam. See *Mills No. 2*, and *Talley v. Tyree*, 500
4. An appeal lies to the court of appeals from an order of a circuit court overruling a motion to dissolve an injunction which was improvidently granted. Accord. *Lomax v. Picot*, 2 Rand. 247.

Talley v. Tyree, 500

INQUISITION.

Weight and effect of inquisition on application to establish ferry, and what is no ground for quashing such inquisition. See *Ferry No. 1, 2*, and *Muire &c. v. Smith*, 458

INSOLVENT.

1. What marriage settlement exempts the personality of wife from liability to creditor of insolvent husband. See *Husband and wife No. 1*, and *Matthews & co. v. Woodson & others*, 601
2. When objection that sheriff is no party to suit in equity for satisfaction out of insolvent's estate will not avail in appellate court. See *Codefendants No. 2*, and *Chappell v. Robertson*, 590
- 873 *3. Where a person taken in execution is discharged as an insolvent debtor, the estate in lands belonging to him at the time of such discharge is, by the act in 1 R. C. of 1819, ch. 134, § 34, p. 538, so completely vested in the sheriff of the county wherein such lands lie, that an ejectment for such lands cannot afterwards be maintained on the demise of the insolvent debtor, while the execution remains unsatisfied. *Syrus &c. v. Allison*, 200

INSURANCE.

See *Mutual Assurance society*, and *Shirley v. Mut. Ass. society*, 705

INTEREST.

1. Application of payment to principal instead of interest. See *Payment No. 1*, *Trusts &c. No. 4*, and *Miller v. Trevilian and others*, 1
2. When purchaser of land under trust deed is liable for interest before obtaining possession. See *Elegit No. 1*, and *Findlay v. Toncray*, 374
3. When executor guardian de facto shall not be charged with interest on ward's legacy. See *Guardian and ward No. 2*, and *Arrington v. Cheatham & wife*, 492
4. What interest is to be discounted in ascertaining present value of annuity. See *Dower No. 6*, and *Wilson &c. v. Davisson*, 384, 5

INTERROGATORIES.

Case in which a defendant was brought in by a messenger to answer interrogatories. *Johns v. Davis's ex'or &c.*, 729

JOINT OBLIGORS.

Extinguishment of remedy on joint contract.

1. Where two or more are jointly bound by contract, the legal remedy must be pursued against all. And if, by act of the claimant in such joint contract, one or more of the parties jointly bound be discharged, so that all cannot be subjected to a joint judgment, none are liable on the joint contract. Per *Stanard, J.*

Ward v. Motter, 536

2. See *Partnership*, and *S. C.*, 536

JOINT TENANTS.

Effect of deed by one, conveying part of the land by metes and bounds.

At the trial of the mise joined in a writ of right, after the demandants had introduced a grant to their ancestor, embracing the land demanded, the tenant introduced an earlier grant of the land to two grantees, and offered to give in evidence a deed from one of those grantees, conveying by metes and bounds a particular part of the land to a person under whom he (the tenant) claimed, and also offered other evidence tending to prove that partition had been in fact made, though without deed, between the two grantees. The circuit court, being of opinion that the conveyance by metes and bounds by one joint tenant, of a portion of the land held jointly, was void, refused to permit the same to go in evidence to the jury; and a verdict and judgment were rendered for the demandants: *held*, the circuit court erred; and its judgment therefore reversed, the verdict set aside, and the cause remanded for a new trial, on which the conveyance, if offered, is not to be rejected on the ground that it is void.

Robinett v. Preston's heirs, 273

JUDGMENT.

- I. What is the record of a judgment confessed, and how far evidence aliunde is admissible to shew the power and action of attorney confessing the same.

1. On a motion for award of execution against three obligors in a forthcoming bond, one of whom is principal and the other two are sureties, the entry upon the record states that as well the plaintiffs came by their attorney, "as the defendant M." (the principal) "in his proper person, and the other defendants by their attorney, and the said defendants acknowledge judgment." In the same entry (after the judgment) is the following: "And the plaintiffs by their attorney here in court release to the defendants 183 dollars 60 cents, and agree to stay execution of this judgment until the first day of the next term." On a bill in equity by the sureties, claiming a discharge on the ground that the agreement to stay was without their consent *or knowledge, it is al-

leged that the sureties did not appear by an attorney at law, but by an attorney in fact; that the power under which the attorney acted did not authorize him to confess judgment with stay of execution; and that in fact he never consented to such stay, but the agreement for the stay was with the principal alone. The power of attorney is in these words: "We authorize J. M. to confess judgment for us and in our name, on a delivery bond in favour of S. & S. executed by us on the 18th November 1840;" and is signed and sealed by the three obligors; *held*, 1. That the entry must be taken altogether, and regarded as the record of a judgment between the parties upon the confession of the defendants therein, with the condition of a stay of execution. 2. That it not appearing from that record whether the sureties appeared by an attorney at law or an attorney in fact, evidence aliunde is admissible for the purpose of proving that they appeared by an attorney in fact, and to shew the authority under which he acted. 3. That the power of attorney under which the attorney acted did authorize the confession of a judgment with stay of execution. 4. That parol testimony is not admissible to prove that so much of the entry as relates to the stay of execution was without the consent of the said attorney; *dissentiente Standard, J.*

Calwells v. Sheilda & Somerville, 305

II. Estoppel by judgment.

2. What judgment recovered by corporation will estop from alleging previous extinction of such corporation. See Corporation, and

May &c. v. State bank of N. Carolina, 56

3. What defence of a former recovery for the same cause of action is not sustained. See Former recovery, and

Weaver v. Vowles, 438

III. Finality of judgment.

4. What is a final proceeding or order of a county court, to which a supersedeas lies. See Supersedeas, and

Farneyhough's ex'ors v. Dickerson &c., 582

IV. Denial of relief in equity.

5. Denial of relief in equity against judgment, where the party neglected to make defence at law. See Laches No. 3, and

Hendricks &c. v. Compton's ex'or, 192

JURISDICTION.

See Equitable jurisdiction, Appellate jurisdiction, Criminal jurisdiction and proceedings.

JURORS.

I. Grand jurors.

1. Who is a freeholder qualified to serve as a grand juror. See Freehold, and
Commonwealth v. Burcher, 826

II. Jurors upon inquest.

2. What declarations and conduct of jurors are no ground for quashing inquisition on

application to establish ferry. See Ferry No. 2, and

Muire &c. v. Smith, 458

III. Who shall be deemed impartial jurors for trial of felon.

3. On the separate trial of a prisoner jointly indicted with three others for murder, several persons called as jurors are examined on voir dire touching their indifference. 1. One of them states, that he has heard rumours and conversations in the country touching the case of the prisoner, and a representation of part of the evidence given on the trial of one of the parties indicted with him, and from these sources of information, if the same be true, he had made up an opinion of decided character, which he still entertains, and which will remain the same unless removed by evidence of a state of facts different from what he has heard; but he feels no prejudice or bias for or against the prisoner, and is satisfied that the opinion so formed and entertained would have no influence upon his mind in trying him, and that he could now give him as impartial a trial upon the evidence as if he had heard nothing of his case. 2. Another juror states, that he has heard no evidence in relation to the prisoner's case, nor formed any opinion on the question of his guilt or innocence; that he was present at the trial of another of the parties indicted, and heard a part of the evidence, from which he had formed a decided opinion as to that party, and if he were now called to try him, he should be influenced thereby; but that opinion would have no influence

875 *upon his mind in trying this prisoner, as to whom he feels no prejudice or prepossession, and he thinks he could try him as fairly and impartially as if he had heard nothing about the transaction. 3. A third juror states, that he heard the reports in the country concerning the death of the deceased, and the prisoners implicated therein, and had formed some opinion thereon, dependent upon the truth and fulness of those reports; he believed them to be true at the time he heard them, and the opinion formed on them was decided, and yet rests upon his mind; but he is satisfied the opinion so formed would have no influence upon him in trying the prisoner, and he could now try him according to the evidence, free from any leaning or bias for or against him, and decide the case as impartially as if he had previously heard nothing of it: *held*, all of these persons are good and impartial jurors.

M'Cune v. Commonwealth, 771

IV. Peremptory challenge.

4. When no right of peremptory challenge exists. See Penitentiary convict No. 2, and
Brooks v. Commonwealth, 845

LACHES.

1. What laches will preclude dower from right to account. See Dower No. 7, and
Macaulay's ex'or v. Dismal swamp land co., 507

2. What delay of principal to impeach

purchase made from him by his agent will not deprive him of right to relief in equity. See Principal and agent No. 3, and

Buckles v. Lafferty's legatees, 292, 3

3. An obligation given on the retainer of counsel to defend the obligor on a charge of forgery, is assigned by the counsel, and judgment is obtained thereupon by the assignees, on which judgment execution issues, under which a forthcoming bond is taken, and judgment is rendered thereupon. After these proceedings, without any defence having been made at law, and without any excuse for not making it, an injunction is obtained on the ground that the obligor was induced to employ the obligee, by the menace that if he did not, the obligee would act as counsel against him in aid of the prosecution: *held*, the injunction should be dissolved and the bill dismissed: for if in law such a contract was valid, a court of equity has no right to absolve the party from it; and if in law the contract was invalid, the defence should have been made in that forum.

Hendricks &c. v. Compton's ex'or, 192

LAND LAWS.

Invalidity of patent for land settled thirty years, on which taxes have been paid within that time. See Patent No. 1, 2, and

Tichanal v. Roe, 288

LANDLORD AND TENANT.

I. Waygoing crop.

1. The principle settled in *Harris v. Carson*, 7 Leigh 632, that where a lease has a fixed period for its termination, and there is nothing in it purporting to give to the tenant the crops growing upon the land at the time of its termination, the tenant has no right to reap those crops after his lease terminates, again recognized.

Mason &c. v. Moyers, 606

See also opinions in

S. C., 611, 12, 613, 14, 15

II. Apportionment of rent.

2. When rent may be apportioned in equity. See Rent, and

Mason &c. v. Moyers, 606, 7

LAPSE OF TIME.

1. What endorsement on bond is evidence to repel presumption of payment arising from lapse of time. See Bond No. 2, 3, and

Dabney's ex'ors v. Dabney's adm'r, 622

2. Invalidity of patent for land settled thirty years, on which taxes have been paid within that time. See Patent No. 1, 2, and

Tichanal v. Roe, 288

3. See Laches.

LARCENY.

How free negroes and mulattoes are to be tried for petit larceny. See Free negroes &c. No. 2, and

Cropper v. Commonwealth, 842

876

*LEASE.

Concerning right to the waygoing crop, see Landlord and tenant No. 1, and

Mason &c. v. Moyers, 606

LEGATEES AND DISTRIBUTEES.

I. Contribution between realty and personality.

1. Concerning contribution between realty and personality conveyed in trust for payment of debts, where conversion takes place after death of grantor, see Mortgages and trusts No. 8, and

Perrin &c. v. Lomax &c., 133

II. Invalid purchase by agent of ex'or.

2. What purchase by executor's agent at his own sale of land will be set aside at the suit of legatees, and what decree will be rendered in their favour. See Principal and agent No. 3, and

Buckles v. Lafferty's legatees, 292

III. Ex'or's commissions and other charges.

3. Concerning the commissions of executor, and allowance for clerk hire, see Ex'ors and adm'rs No. 1, 2, 3, and

Farneyhough's ex'ors v. Dickerson &c., 582

IV. What legacy does not charge sureties of ex'or.

4. What legacy is a charge upon the executor as legatee, and does not render his sureties responsible. See Will No. 4, and

Arrington v. Cheatham & wife, 492

V. Liability of ex'or guardian de facto.

5. When executor guardian de facto shall not be charged with interest on ward's legacy. See Guardian and ward No. 2, and

Arrington v. Cheatham & wife, 492

VI. What grants of adm'n are valid: what payments by representative of deceased adm'r to succeeding adm'r are good against legatees: for what assets succeeding adm'r and his sureties are liable to legatees.

6. Pending a suit in chancery by legatees against an executor to recover their legacies, the executor died. Process was awarded to revive the suit against his administrator; and the administrator dying, process was issued and an order entered to revive the suit against his representative. But afterwards that process was quashed and that order set aside, as early as 1811; and then, by consent of parties, the suit was revived against the administrator de bonis non of the executor, and by like consent it was entered that the cause was not to abate by the death of any of the parties. A personal decree was obtained in 1818 by the legatees against the administrator de bonis non, from which he appealed. Pending the appeal, he died. Whereupon, though the two former grants of administration on the executor's estate had been by the court of Orange, the court of Hanover now granted administration on the same estate, not in the form of a grant de bonis non, but of an original grant. At the instance of the legatees, a scire facias issued to revive the appeal against this new administrator, (calling him administrator de bonis non) which was duly executed, and in 1822 the decree affirmed. In the caption to the decree of affirmance, the name of the

administrator de bonis non against whom the decree of the court below was entered did not appear as a party, but the new administrator was mentioned therein as appellant. In 1823, a bill of revivor and supplement was filed in the court below, convening before the court, and seeking to charge, the representatives of the first administrator and of the first administrator de bonis non. It turned out, that after the *scire facias* to revive the appeal had been executed, and before the decree of affirmance, the new administrator had, in the character of administrator de bonis non, brought suits and obtained decrees for the assets of the executor's estate in the hands of the representatives of the first administrator and of the first administrator de bonis non, against those representatives respectively, without opposition on their part; and the decrees so obtained were soon after satisfied. Those decrees were in 1820 and 1821, about six years before the decision in *Wernick's adm'r v. M'Murdo &c.*, 5 Rand. 51: *held*, 1 (in accordance with *Fisher v. Bassett* and others, 9 Leigh 119,) that the grants of administration by the court of Orange to the first administrator and the first administrator de bonis non, never having been reversed or

877 *revoked, must be considered valid grants, which conferred upon those administrators respectively all the powers of rightful administrators. 2. That when the grant to the first administrator de bonis non expired by his death, and there was no conflicting right in existence, it was competent for the court which might in the first instance have rightfully exercised jurisdiction, to act on the subject; and Hanover court having acted when there was no such conflicting right, and its grant not having been reversed or revoked, that grant is valid, and the sureties in the administration bond taken by Hanover court are liable thereupon. 3. That as the legatees, after the death of the first administrator, dismissed his representative from the suit, it was lawful for that representative to pay over to the administrator against whom the legatees were proceeding, the unapplied assets of the executor's estate; and such payment, made in good faith and under the sanction of a decree of a court of competent jurisdiction, is a complete protection to such representative against the legatees, as to the money so paid. 4. That the decree in favour of the legatees against the administrator de bonis non was personal, only in respect to the assets in his hands, and (it being nowhere alleged that he had converted or wasted the same) such unapplied assets coming to the hands of his representative must in equity be regarded as unadministered assets of the executor's estate; and the representative of the administrator de bonis non having in good faith, and in pursuance of the decree of a court of competent jurisdiction, paid over the said assets to the administrator against whom the legatees revived the appeal, such payment protects the estate of the administrator de bonis non from the claim of the legatees. 5. That for the assets so paid over by the

representatives of the first administrator and of the administrator de bonis non, the administrator to whom such payment was made, and the sureties in his official bond, are liable. 6. That the dismissal of the bill as to the representatives of the first administrator and of the administrator de bonis non should be without costs.

Burnley's representatives *v.* Duke & others, 102

VII. Setoff of distributee's share against his purchases.

7. The rule laid down in *Pulliam v. Winston &c.*, 5 Leigh 324, that a distributee purchasing at an administrator's sale cannot injoin the collection of the bond for his purchases until his distributive share is ascertained and set off against the bond, approved as a general one; but an exception to it is recognized.

Hickerson's adm'r *v.* Helm, 628

VIII. Injunction by distributee's donee of a slave to sale under execution for distributee's debt to estate, and setoff of distributable share against the judgment.

8. In November 1815, at a sale by an executor on twelve months credit, a distributee was one of the purchasers. The person requested to be her surety manifesting some reluctance to become such, the executor assured him that there was no danger of his having any thing to pay, as the purchases by the distributee were not so much as her portion of the estate. Whereupon the bond was executed. The executor died in 1821, and there was immediate administration on his estate, and on that of the first testator; but no suit was brought on the bond till 1827. Judgment was then obtained on it: and in the same year some of the legatees brought a suit for a settlement of the executorship account. In 1832, the distributee acquired slaves by the death of her father, and made a voluntary conveyance of them. One of them was sold under execution upon the judgment, and purchased by the administrator de bonis non at the sheriff's sale. Two others being afterwards levied on, the donee filed a bill in 1833 against the judgment creditor, to restrain the sale. During all this time there was no settlement of the executorship account; and none took place until the administrator of the executor was coerced to settle, by attachments for his contempt in disobeying the orders of the court in the suit of the legatees: *held*, 1. On the donee's bill, an injunction may be awarded to restrain the sale of the two slaves levied on, until the amount of the distributee's claim is ascertained; and when ascertained, the same may be set off against the judgment. 2. The distributee is an indispensable party to *the donee's suit.

878 3. As a suit is pending in which all the other distributees are parties, there is no necessity to make them parties in the donee's suit, but the proper course is to retain the injunction until, by the adjustment of the account in the other suit, the amount of the distributee's claim is finally liquidated,

and then to apply that amount as a setoff against the judgment. It being ascertained that after allowing credit for the entire claim of the distributee, she was indebted, at the time of the sale of the slave first levied on, more than the amount for which he sold, the credit in respect to that slave cannot be enlarged to what is estimated as his value at the time of the sale, but must be limited to the amount made on the execution by the sale of him: *dissentiente Baldwin, J.*, on the last point.

Hickerson's adm'r v. Helm, 628

IX. Widow's distributable share of slaves.

9. Measure of widow's right where husband's slaves liable to her dower have been sold by his executor. See *Widow No. 3*, and *Hickerson's adm'r v. Helm*, 629

X. When supersedeas lies for legatee.

10. Supersedeas lies for legatee exceptor to order of county court admitting executor's account to record. See *Supersedeas*, and *Farneyhough's ex'ors v. Dickerson &c.*, 582

XI. When ex'or cannot compel legatee to refund.

11. The rule of the english courts, that where an executor voluntarily pays a legacy, he cannot afterwards maintain a bill to compel the legatee to refund, unless it becomes necessary for the discharge of debts, recognized and acted on.

Davis &c. v. Newman, 664

12. A testator owing no debts and having bequeathed legacies, his executor voluntarily made considerable payments to the legatees, under an impression that a bond for a large amount, executed by a debtor of the testator to the latter in his lifetime, was good and would be collected. The bond turned out to be unavailing, and the other assets were less than what was paid the legatees: *held*, though the executor may not have been culpably negligent in respect to the bond, and therefore not chargeable with its whole amount, yet he cannot recover back from the legatees any part of what he had paid them.

S. C., 664

LETTER OF CREDIT.

What is not a letter of credit in respect whereof forgery can be committed. See *Forgery No. 1*, and

Foulkes v. Commonwealth, 837

LIEN.

1. Lien of *elegit* on land conveyed in trust to secure debts. See *Elegit No. 1*, and *Findlay v. Toncray*, 374

2. Upon what terms sale under vendor's lien will be decreed against heirs of vendee. See *Specific execution No. 3*, and

Wade's heirs v. Greenwood & wife, 475

3. When sale under vendor's lien precludes right to dower. See *Dower No. 1*, and

Wilson &c. v. Davisson, 384

4. Lien of Mutual Assurance society on property insured. See *Mutual Assurance Society*, and

Shirley v. Mut. Ass. society, 705, 6

LIMITATION.

Invalidity of entry or location on land settled thirty years, on which taxes have been paid within that time. See *Patent No. 1, 2*, and

Tichanal v. Roe, 288

LIS PENDENS.

Relief to reversioner of slave removed pending injunction. See *Slaves No. 2*, and *Johns v. Davis's ex'or &c.*, 729

LONGEVITY.

Wigglesworth's table referred to.

Wilson &c. v. Davisson, 384, 403

LOST DEED.

Relief in equity where conveyance of land has been accidentally destroyed. See *Specific execution No. 1*, and

Wade's heirs v. Greenwood & wife, 474

MARRIAGE SETTLEMENT.

When husband is a mere trustee for the wife, acquiring no individual interest in her property. See *Husband and wife No. 1*, and

Matthews & co. v. Woodson &c., 601

879

*MERGER.

Of simple contract of partnership in specialty of one partner. See *Partnership*, and

Ward v. Motter, 536

MESENGER.

Case in which a defendant was brought in by a messenger to answer interrogatories. *Johns v. Davis's ex'or &c.*, 729

MILLS.

I. Ownership of applicant for leave to erect mill, and proprietorship of party receiving notice.

1. A person owning real estate died intestate, leaving a widow and children; and dower not being assigned to the widow, she continued in the mansion house and the plantation thereto belonging. Under the act in 2 R. C. of 1819, ch. 235, § 1, p. 225, notice was given to the widow as the proprietor of the land, by a person desiring to build a machine useful to the public, and to abut his dam against the said land, that application would be made for a writ of *ad quod damnum*: and the writ was accordingly awarded, and an inquisition returned. After which, one of the heirs, who resided on the plantation with his mother, being made a defendant on his motion, moved the court to dismiss the case, upon the ground that notice of the application ought to have been given to him as one of the proprietors; but his motion was overruled. He then offered to introduce evidence to prove that the applicant did not own the land on which he proposed to erect his machine: but it being proved that the applicant was in possession of the land, claiming title to it, and had built a house thereon, the court refused to permit the evidence so offered to be introduced: *held*, there is no error in

these proceedings. For it was sufficient that the person making the application was in the actual possession and occupation of the land on which the machine was to be built; and that the person to whom the notice was given was the tenant in possession, and appeared as the visible owner.

Pitzer v. Williams, 241

II. When mill owner cannot be enjoined from rebuilding dam.

2. Two verdicts were rendered in favour of a party whose land was overflowed, against the owner of a mill, for keeping his dam too high. The dam was then swept away; and the plaintiff at law thereafter exhibited a bill of injunction against the mill owner, which alleged that he had not begun, within the time prescribed by law, to rebuild the dam, and also contained a suggestion in general terms, that irreparable mischief would result to the plaintiff from rebuilding the same. It did not appear that there was any order of court granting leave to build the mill and dam; it did appear, however, that the mill and dam had existed more than 50 years: *held*, that the verdicts for keeping the dam too high shew that the mill owner had at least a prescriptive right to keep the dam at some height; that these verdicts did not warrant an injunction to restrain him from rebuilding the dam, in the absence of any allegation in the bill that he was about to build it, or had threatened to build it, beyond the authorized height; and that if it was competent for a court of equity to interpose at all to enforce a forfeiture of the mill owner's right because of his failure to rebuild the dam, within the time prescribed by law, it ought not to be done by way of injunction, without an allegation in the bill of some distinct and sufficient ground of irreparable mischief.

Talley v. Tyree, 500

MISDEMEANOUR.

1. What trespass is no misdemeanour under the statute of 1823. See *Trespass*, and

Campbell &c. v. Commonwealth, 791

2. Process on indictment for playing at unlawful game. See *Gaming No. 5*, and

Wright v. Commonwealth, 800

MISJOINDER.

Within what time the plea of several tenancy should be pleaded in a writ of right.

Walkers v. Boaz and others, 485

MORTGAGES AND TRUSTS.

I. Registry.

1. What registry of deed of trust of personal estate is invalid. See *Registry*, and

Cocke v. Haxall's ex'x, 470

880 *II. What grantor has no right of redemption.

2. A deed in made, whereby, after reciting that F. the grantor hath sold to H. the grantee, for the sum of 200 dollars, certain real and personal estate, it is witnessed that the grantor, in consideration of that sum, conveys the same to the grantee; and then the deed concludes as follows: "It

is agreed and fairly understood by and between the said F. and H. that in case the said H. or his heirs or assigns shall not be able to make the aforesaid 200 dollars out of the estate herein before conveyed, that then the said F. shall refund the same to the said H. or his heirs or assigns, with lawful interest thereon from this date till paid, or such part of the said 200 dollars as the said H. shall not be able to realize as aforesaid." Under the authority of this deed, the grantee sells and conveys the estate, and his grantee again sells and conveys the same. After which, to wit, about ten years after the date of the first mentioned deed, the grantor in that deed files a bill in equity to redeem the estate conveyed, on paying whatever may be due of the 200 dollars, with interest: *held*, the bill cannot be sustained. *Allen, J.*, dissented, considering the case within the principle of *Chowning v. Cox and others*, 1 Rand. 306, recognized more recently in *Breckenridge v. Auld and others*, 1 Rob. 148. The two other judges who sat in the case (*Stanard and Baldwin*) considered it not within the principle of those cases.

Floyd v. Harrison &c., 161

III. Whether mortgagee may sell under power given by the mortgage.

3. The case of *Chowning v. Cox and others*, 1 Rand. 306, is a departure from the doctrine, now well settled in England and recognized in New York, that a mortgagee may sell the property after forfeiture, under a power given for that purpose in the mortgage deed: per *Baldwin, J.*—The doctrine so settled in England and recognized in New York seems to have been wholly overlooked by counsel and court in the argument and decision of *Chowning v. Cox*. Though this consideration may not warrant the reversal of that decision, it is most cogent to limit its authority to the particular case then in judgment. Per *Stanard, J.*

Floyd v. Harrison &c., 162

IV. Discharge of trust deed.

4. How trust deed conveying personal chattels for payment of debts may be discharged. See *Chattels No. 2*, and

Tavener v. Robinson, 280

V. Enforcement of trust deed in equity.

5. Equitable relief to cestui que trust of bond secured by trust deed. See *Trusts and trustees No. 4*, and

Miller v. Trevilian & others, 1

6. Slaves conveyed by deed of trust to secure what may be due from the grantor as guardian, are afterwards attached by a creditor of the grantor, and under the attachment are sold, subject to the prior lien of the deed of trust. In a suit by the ward, a decree is made for the sum due upon the guardianship account, and the decree directs the trustees to retain the slaves until the amount of the decree is satisfied, and then to surrender them to the purchaser at the sale under the attachment. On an appeal by the purchaser, the objection is taken that the decree ought to have

provided for the sale of the slaves, so that out of the proceeds the amount of the decree might be paid, and the surplus paid to the appellant: *held*, the appellant has no right to have the decree reversed for this cause, but the same should be affirmed, with the addition thereto of a decree for the sale of the slaves; and the appellant should be decreed to pay the costs.

Williamson's ex'or v. Howard, 39

VI. Lien of elegit on land conveyed in trust.

7. Lien of elegit on land conveyed in trust to secure debts; and rights of elegit creditor against purchaser under the trust deed. See *Elegit*, and

Findlay v. Toncray, 374

VII. Contribution, after death of grantor, between realty and personalty conveyed for payment of debts.

8. In 1810 a deed of trust was made, whereby it was witnessed, that for the purpose of securing to the grantor's creditors their debts, and to make provision for the support, education and future settlement of his children, he conveyed his whole estate in trust for the payment of 881 his *debts, and for that purpose the trustees were empowered to sell from time to time such parts of the premises as to them might seem fit, or authorized to dispose of the same, or any part thereof, in such manner as might by them be deemed most beneficial and advantageous to all the parties interested; and out of the rents and profits, they were to support the grantor and his wife, and their family, during the joint lives of the grantor and his wife, and the survivor of them during the life of the survivor; and then the estate was in trust for such children of the grantor as he might leave at his death. After making this deed, the grantor died the same year (1810), leaving a widow, and three children by her. In 1811, the acting trustee sold a portion of the real property, and the proceeds were applied towards the discharge of the debts. In 1814 one of the children died, whereby her interest in remainder in the whole estate passed to her mother and the two other children. In 1815 another child died, whereby his like interest (embracing that acquired through the child that had first died) passed to his mother and the surviving child. And in 1816 the widow died, whereby the interest in the remainder which she had so acquired, passed, as to the realty, to her surviving child, and as to the personalty, to her second husband, who survived her and became her administrator. At the period of the widow's death, part of the real and part of the personal estate conveyed was undisposed of by the trustee; and thereafter he disposed of part of each to satisfy debts: *held*, 1. the conversion in 1811, of part of the realty into personalty, being within the authority and discretion of the trustee, and made at a time when there was no conflict, but an identity of interest, amongst those entitled to the estate, cannot, by reason of

circumstances thereafter arising, furnish any equity for a reimbursement of the realty out of the personalty, or for contribution in favour of the former against the latter. 2. That though, upon the widow's death, the succession to the real fell into a different channel from the personal property, yet as the authority and discretion of the trustee in regard to sales of the property, whether real or personal, continued as before, no equity could arise between the realty and personalty for reimbursement of one to the other, neither being primarily, but the whole estate indiscriminately, subjected to payment of the debts by the provisions of the trust deed; which, and not the principles governing the administration of decedents' estates, must give the rule upon the subject. But 3. that an equity of a different nature did, however, arise out of the provisions of the trust deed, so soon as the successions to the realty and the personalty so fell into different channels; and it was simply this, that the owners of the realty and personalty should contribute to the burthen of paying the debts remaining unsatisfied at the widow's death, in proportion to the value of their respective interests: and the exercise by the trustee of the authority and discretion vested in him, should not have the effect of disturbing the due apportionment of that burthen amongst those several interests.

Perrin &c. v. Lomax &c., 133

VIII. Dower in mortgaged land.

9. When widow of grantor in trust deed may recover rents and profits from husband's death. See *Dower No. 4*, and

Macaulay's ex'or v. Dismal swamp land co., 507

MURDER.

What conviction of murder in the second degree is warranted by the evidence.

Parsons v. Commonwealth, 772, 777

MUTUAL ASSURANCE SOCIETY.

I. Who are members.

1. Every owner of a present freehold estate in property which has been insured in the Mutual Assurance society, becomes a member thereof, according to the true spirit of the law and the scheme of the institution.

Shirley v. Mutal Assurance society, 705

II. Lien upon dower interest.

2. Where a husband insures property in the Mutual Assurance society and dies seized, his widow takes her dower interest subject to the lien of the society; but she in- 882 curs no personal *responsibility until dower is assigned her, whereby she becomes a member, and then only for such quotas and premium as accrue while she remains owner of the dower estate, with interest and damages thereon.

S. C., 705

III. Personal responsibility of successive tenants of premises insured.

3. Two tenements, which had been insured in the Mutual Assurance society, descend, upon the owner's death to his heirs, and are assigned to his widow for her dower.

The widow and her second husband sell and convey her life estate. And the society has a claim for quotas accrued after the death of the first husband; some before the assignment of dower; others afterwards and before the sale of the life estate; and the rest since that sale. It has also a claim for an additional premium accrued during the purchaser's ownership: *held*, 1. The heirs of the first husband are personally responsible for what accrued after his death and before the assignment of dower. 2. The widow and her second husband are personally liable for what accrued after the assignment of dower and before their sale. 3. The purchaser is personally responsible for what has accrued since, and for no more. 4. The party liable for any principal money is liable for interest and damages thereon.

S. C., 705, 6

IV. For what the lien exists, and how it will be enforced.

4. The Mutual Assurance society has a lien upon property insured therein for the principal and interest due the society, but not for damages. This lien is effectual not only against the original member, but against all persons deriving ownership from him, and the property may be sold to satisfy the same. Though one party has the estate for life and another the reversion, the lien will be enforced against the tenement insured by selling the whole fee simple title thereof, and the whole of the tenement, unless from the nature of the property it be practicable and expedient to lay off a portion thereof for sale. Before directing such sale, however, the respective personal liabilities of the several parties chargeable will be ascertained. And if the tenant for life advance the amount chargeable to the reversioner, as well as what is chargeable to himself, there will be no sale of the reversion, but a lien established thereon for reimbursement of the amount so advanced, with interest, to be enforced upon the falling in of the life estate.

S. C., 706

5. If a sale take place, what should be the terms as to cash and credit, and how the deferred instalments should be divided.

S. C., 706

6. Under what circumstances a lien upon two tenements insured may be satisfied by selling only one of them, and applying the proceeds in exoneration of the other.

S. C., 706

NEW TRIAL.

What conviction will not be set aside as contrary to evidence.

1. Where a verdict of conviction in a criminal case is clearly against the evidence, or clearly without evidence to justify it, it is the duty of the court to set the verdict aside on the application of the prisoner, and to award him a new trial. But where, upon evidence merely circumstantial, the jury has found the prisoner guilty, and the court which tried the case has refused to grant a new trial, the verdict will not be disturbed by the general court, even though, in the

opinion of that court, the evidence do not amount to very strong and clear proof.

Parsons v. Commonwealth, 772

2. Case in which, under the circumstances just mentioned, a conviction of murder in the second degree was sustained by the general court.

S. C., 772

NONJOINDER.

Effect of failure to join a demandant in writ of right. See Writ of right No. 2, and Walkers v. Boaz &c., 485

NONSUIT.

When proper to set aside.

A nonsuit in a writ of right having been suffered under a misapprehension on the part of the demandants and their counsel as to the legal effect of an instruction 883 given at the trial, *held*, the court, in the exercise of a sound discretion, should, on the motion of the demandants, have set aside the nonsuit; and this not having been done, the judgment overruling such motion was reversed.

Walkers v. Boaz &c., 485

NOTICE.

What proprietorship of party receiving notice of application for leave to erect mill and dam is sufficient. See Mills No. 1, and Pitzer v. Williams, 241

NUISANCE.

1. Concerning action on the case by ferry owner for disturbance of his franchise, see Ferry No. 3, 4, and

Patrick v. Ruffners, 209

2. When mill owner cannot be enjoined from rebuilding dam. See Mills No. 2, and Talley v. Tyree, 500

NUNCUPATIVE WILL.

I. Last sickness of decedent, and commitment of testimony to writing.

1. What sickness will be considered the last sickness of the deceased, and what will be considered a commitment to writing of the testimony or the substance thereof, within the meaning of the statute concerning nuncupative wills, in 1 R. C. 1819, p. 377, § 7, 8.

Page &c. v. Page, 424

II. How will may be impeached after probat.

2. The statute in 1 R. C. 1819, p. 378, § 13, which allows a person interested to appear within seven years after probat of a will, and by bill in chancery to contest the validity of the will, applies only to written and not to nuncupative wills.

S. C., 424

3. Where a nuncupative will has been proved before a court of competent jurisdiction, after fourteen days from the death of the testator, and after the widow has been summoned to contest the same, as directed by the act in 1 R. C. 1819, p. 379, § 18, the sentence of the court admitting the same to probat is binding upon her, and cannot be impeached except by appeal therefrom, or by a bill in equity founded upon her having been prevented by fraud or accident from making her defence in the court of probat.

S. C., 424

III. Invalidity of will as to realty.

4. A nuncupative will is of no effect in law in relation to the testator's real estate, or the profits to accrue therefrom. But where, in the lifetime of the testator, a division was made between him and his two brothers of their father's real estate, which was acted upon by him in his lifetime by taking possession of the part allotted to him, and was also confirmed and ratified by him at the time of making his nuncupative will, the validity of such division was recognized in a court of equity. S. C., 425

IV. Construction and effect of will.

5. A testator, by a nuncupative will, gave to his wife certain slaves and articles of personalty, "exclusive of the portions of his estate she would be entitled to as his widow under the law." His wife being pregnant, he said he wished his estate to be kept together and managed by his brothers for the benefit of his wife and child during her widowhood, and in the event of her marriage he wished them to manage the child's part of the estate. If the child should live, and then die under age without lawful issue, he wished his brothers to have the whole of his estate in equal portions, except the slaves and articles specifically given to his wife. The child died in ten days after his birth, living the testator's brothers, who were the next of kin of the testator and of the child: *held*, that by the true construction of the will, the testator intended that his wife should have in absolute ownership the slaves and other personal property specifically bequeathed to her, together with her legal rights in his estate as his widow, and nothing more: that the child inherited the real estate, subject to the widow's right of dower therein, and was entitled under the will (after payment of debts) to the slaves not specifically bequeathed, subject to the widow's life estate in one-third thereof, and to distribution with the widow, in conformity to law, of the other personal estate not specifically bequeathed: and that, upon the death of the child, his interest 884 in the *real estate descended to his paternal uncles, and his interest in the slaves and other personal property passed to them under the executory bequest in their favour contained in the will. S. C., 425

OYER AND TERMINER.

Of what offence court of oyer and terminer has no jurisdiction, and how prisoner under sentence of such court may be discharged. See County and corporation courts No. 3, 4, and

Cropper v. Commonwealth, 842
PARTIES.

1. Effect of nonjoinder of a demandant in writ of right. See Writ of right No. 2, and Walkers v. Boaz &c., 485

2. Within what time the plea of several tenancy should be pleaded in a writ of right. S. C., 485

3. When objection that sheriff is no party to suit in chancery for satisfaction out of insolvent's estate will not avail in appellate court. See Codefendants No. 2, and Chappell v. Robertson, 590

4. Concerning parties to suit by distributee's donee of a slave, to injoin sale under execution for distributee's debt to estate, and to set off distributable share against the judgment, see Legatees &c. No. 8, and Hickerson's adm'r v. Helm, 628

PARTNERSHIP.

Merger of partnership contract.

Mercantile business being carried on in a single name, the merchant in whose name the business is conducted buys goods, and executes a specialty for the price thereof. The party who sells the goods and takes the specialty is ignorant at the time that the merchant has a dormant partner. Discovering this fact after the death of the merchant who gave the specialty, he then brings an action of assumpsit for the price of the goods against the dormant partner: *held*, the creditor has no legal remedy on the simple contract, the same being extinguished by the specialty: *dissentiente Baldwin, J.*

Ward v. Motter, 536

PATENT.

I. What patent for land settled is invalid.

1. Construction of the act in 1 R. C. of 1819, ch. 86, § 40, p. 330, which declares that "no entry or location on any lands within this commonwealth, which have been settled thirty years prior to the date of such entry or location, and upon which quit-rents or taxes can be proved to have been paid at any time within the said thirty years, shall be deemed valid;" and relinquishes any title that the commonwealth may be supposed to have thereto.

Tichanal v. Roe, 288

2. In 1796, a person settled upon, cleared and improved a tract or land. In 1806, he conveyed a part of it by metes and bounds. And in 1834, the land embraced in this conveyance was granted by the commonwealth in conformity with a survey made in 1833. It appearing that the tenant claiming under the deed of 1806 had entered upon, settled and improved the land conveyed by this deed, and had, during the period he held it, paid the taxes thereon, and that a portion of this land was actually enclosed in 1796, when the tract of which it then formed a part was settled, *held*, it is competent for the tenant to connect his possession with the possession of those under whom he claims (the same never having been interrupted); and it thus appearing that the location on which the commonwealth's grant was founded was on lands which had been settled thirty years prior to the date of the location, an upon which taxes had been paid within that time, *held*, farther, that the location was invalid, and that no title passed by the commonwealth's grant. S. C., 288

II. Seisin of patentee.

3. Concerning constructive seisin of land under grant from the commonwealth, see Writ of right No. 3, and

Dawson v. Watkins, 259

PAYMENT.

I. Application to principal of debt.

1. The principle laid down by Cabell, J.,

in *Pindall's ex'x &c. v. The Bank of Marietta* 10 Leigh 484, that "a debtor owing a debt consisting of principal and interest, 885 and making a partial *payment, has a right to direct its application to so much of the principal in exclusion of the interest, and the creditor, if he receives it, is bound to apply it accordingly," approved and acted on.

Miller v. Trevilian and others, 1

2. See, on the same subject, *Trusts and trustees No. 4*, and S. C., 1, 2

II. Evidence to repel presumption of payment.

3. What endorsement on bond is evidence to repel presumption of payment. See *Bond No. 2, 3*, and

Dabney's ex'ors v. Dabney's adm'r, 622

III. Payment by ex'or to legatee.

4. When legatee, voluntarily paid by executor, cannot be compelled by him to refund. See *Legatees &c. No. 11, 12*, and

Davis &c. v. Newman, 664

PEDIS POSITIO.

What is not proof of seisin in deed by *pedis positio*. See *Writ of right No. 4*, and

Dawson v. Watkins, 259

PENITENTIARY CONVICT.

Proceedings where received under second or third sentence.

1. A report being made to the circuit court of Henrico by the superintendent of the penitentiary, pursuant to the statute 1 Rev. Code, ch. 171, § 16, that a convict received into the penitentiary is the same person mentioned in the record of a former conviction, and that he has not been sentenced to the punishment prescribed by law for his second offence, the court continues the case at several successive terms, in the absence and without the consent of the convict; after which he is brought into court for the first time, and his identity being duly ascertained, he is sentenced to the proper punishment of his second offense: *held*, such continuance of the case furnishes no ground of objection to the judgment.

Brooks v. Commonwealth, 845

2. Upon an enquiry, in pursuance of the statute 1 Rev. Code, ch. 171, § 16, whether a convict received into the penitentiary be the same person mentioned in the record of a former conviction, the prisoner has no right to challenge peremptorily any person called as a juror. S. C., 845

PERJURY.

I. Indictment.

1. An indictment for perjury in giving false testimony before a grand jury, charges that the defendant, being duly sworn, "did depose and give evidence to the grand jury in substance and to the effect following," (stating the testimony) "which said evidence was wilfully false and corrupt, for in truth" &c. (falsifying the facts deposed to) "and so the defendant did, in manner and form aforesaid, commit wilful and corrupt perjury." On general demurrer to the indictment, *held*,

here is no sufficient averment that the defendant wilfully or corruptly swore falsely, and the indictment is defective as well at common law as under the statute.

Thomas v. Commonwealth, 795

II. Evidence.

2. What witness for prosecution is disinterested. See *Witness No. 2*, and

Commonwealth v. Hart, 819

PERSONALTY.

See *Chattels*.

PETIT LARCENY.

How free negroes and mulattoes are to be tried for petit larceny. See *Free negroes &c. No. 2*, and

Cropper v. Commonwealth, 842

PLEADING.

1. What declaration in case by ferry owner for disturbance of his franchise is sufficient on general demurrer. See *Ferry No. 3*, and

Patrick v. Ruffners, 209

2. What bill does not warrant injunction to restrain mill owner from rebuilding dam. See *Mills No. 2*, and

Talley v. Tyree, 500

3. What indictment for perjury is insufficient. See *Perjury No. 1*, and

Thomas v. Commonwealth, 795

4. When matter of abatement must be pleaded. See *Abatement No. 3*, and

May &c. v. State bank of N. Carolina, 56

5. Nonjoinder of a demandant in writ of right must be pleaded in abatement. See *Writ of right No. 2*, and

Walkers v. Boaz &c., 485

*6. Within what time the plea of several tenancy should be pleaded in a writ of right. S. C., 485

7. When plea to foreign attachment, by party claiming as debtor's assignee, alleging that the debtor was a resident, is demurrable. See *Foreign attachment*, and

Smith v. Hunt &c., 206

POSSESSION.

1. What possession by vendor of chattel is fraudulent as to his creditors. See *Fraud No. 3*, and

Tavener v. Robinson, 280

2. When patent for land settled thirty years is invalid. See *Patent No. 1, 2*, and

Tichanal v. Roe, 288

3. What is competent evidence to disprove constructive seisin of demandant in writ of right. See *Writ of right No. 3*, and

Dawson v. Watkins, 256

4. What facts are insufficient to prove a seisin in deed by *pedis positio*. See *Writ of right No. 4*, and S. C., 259

POWER OF ATTORNEY.

A power of attorney is in these words: "We authorize J. M. to confess judgment for us and in our name, on a delivery bond in favour of S. & S. executed by us on the 18th November 1840;" and is signed and sealed by

the obligors in the delivery bond referred to. Judgment on the delivery bond is confessed for the obligors by J. M. the attorney, with stay of execution till the next term: *held*, such confession with stay of execution was authorized by the power.

Calwells v. Shields & Somerville, 305

PRACTICE IN ACTIONS AT LAW.

1. Nonjoinder of a demandant in writ of right must be pleaded in abatement. See Writ of right No. 2, and

Walkers v. Boaz &c., 485

2. Within what time the plea of several tenancy should be pleaded in a writ of right. S. C., 485

3. When nonsuit in writ of right will be set aside. See Nonsuit, and S. C., 485

PRACTICE IN CRIMINAL CAUSES.

See Criminal jurisdiction and proceedings.

PRACTICE IN SUITS IN EQUITY.

1. Concerning parties to suit by distributee's donee of a slave, to injoin sale under execution for distributee's debt to the estate, and to set off distributable share against the judgment, see *Legatees &c. No. 8*, and

Hickerson's adm'r v. Helm, 628

2. What objection for want of parties will not avail in appellate court. See *Codefendants No. 2*, and

Chappell v. Robertson, 590

3. Case in which a defendant was brought in by a messenger to answer interrogatories. *Johns v. Davis's ex'or &c.*, 729

4. When plea to foreign attachment, by party claiming as debtor's assignee, alleging that the debtor was a resident, is demurrable. See Foreign attachment, and

Smith v. Hunt &c., 206

5. At what time after replication to answer a cause may be set for hearing. See *Hearing of cause No. 1*, and

Poling v. Johnson, 255

6. Consequence if cause be prematurely set for hearing and prematurely heard. See *Hearing of cause No. 2*, and S. C., 255

7. Relief to reversioner of slave removed pending injunction. See *Slaves No. 2*, and

Johns v. Davis's ex'or &c., 729

8. Specific execution decreed in part, without prejudice to further remedy at law. See *Award No. 2*, and

Boyd's heirs v. Magruder's heirs, 761

9. Upon what terms sale under vendor's lien will be decreed against heirs of vendee. See *Specific execution No. 3*, and

Wade's heirs v. Greenwood & wife, 475

10. When vendor obtaining specific execution will be decreed to pay costs. See *Specific execution No. 1*, and S. C., 474

11. When dismission of bill by legatees to recover legacies will be without costs. See *Legatees &c. No. 6*, and

Burnley's representatives v. Duke & others, 102

12. Decree on guardianship account only, in suit by ward distributee against guardian administrator. See *Guardian and ward No. 3*, and

Williamson's ex'or v. Howard, 39

13. When decree may be rendered in favour

of one defendant against another. See *Codefendants No. 2*, and

Chappell v. Robertson, 590

887 *14. Decree over for obligor in assigned gaming bond against obligee assignor. See *Gaming No. 3*, and

Pettit v. Jennings &c., 676

15. An appeal lies to the court of appeals from an order of a circuit court overruling a motion to dissolve an injunction which was improvidently granted. Accord. *Lomax v. Picot*, 2 Rand. 247.

Talley v. Tyree, 500

16. What objection to decree does not lie for the party appealing. See *Codefendants No. 2*, and

Chappell v. Robertson, 590

17. As to what parties erroneous decree will be reversed. See *Appellate jurisdiction No. 6*, and

Arrington v. Cheatham & wife, 492

18. Affirmance of decree, deficiency of one item being regarded as an equivalent for excess in another. See *Appellate jurisdiction No. 8*, and

Williamson's ex'or v. Howard, 40

19. Affirmance of decree enforcing lien of trust deed, with addition thereto of direction for sale of the property. See *Mortgages &c. No. 6*, and S. C., 39

PRESUMPTION.

What endorsement on bond is evidence to repel presumption of payment. See *Bond No. 2, 3*, and

Dabney's ex'ors v. Dabney's adm'r, 622

PRETERMITTED CHILD.

What child pretermitted by father's will is entitled to no provision. See *Will No. 5*, and *Savage &c. v. Mears & wife*, 570

PRINCIPAL AND AGENT.

I. Power of attorney.

1. Construction of power of attorney to confess judgment. See *Power of attorney*, and

Calwell's v. Shields & Somerville, 305

II. What purchase by agent from principal will be set aside.

2. The doctrine of the english chancery, that a person standing in the confidential relation of agent cannot, while that relation continues and before that confidence is withdrawn, make a purchase from the principal (that will bind the latter) of a subject within the scope of the agency, recognized and acted upon.

Buckles v. Lafferty's legatees, 292

3. A testator (amongst other things) directed lands to be sold, and legacies to be paid out of the proceeds. The administratrix with the will annexed, on whom the power of making the sale was conferred, appointed an agent, who did the business of the administration, and received the commissions allowed the administratrix. She was old, and had great confidence in him, and he acted in a great degree without her supervision, and practically conducted the admin-

istration without control. After several previous attempts by the agent to sell one of the parcels of land, it was put up at auction (as the sale bill announced) for the last time, and knocked down to a person requested by the agent to bid (for the purpose of promoting the sale) at 21 dollars 52 cents per acre, a higher bid than had been made on any previous occasion. Some persons present were willing to have given as much as 25 dollars per acre; and one of them, who was surprised when the land was knocked off and not to his bid, on the same day (immediately after the sale) stated to the agent his willingness to have gone higher if necessary. A few weeks afterwards, the agent purchased the land from the administratrix by private contract at 22 dollars per acre, and took a conveyance of it from her. This was in 1829. In 1835, a bill was filed by the legatees to rescind the sale and conveyance. The bill alleged that the proceeds of the sale were insufficient to pay the legacies, and it further alleged that most of the plaintiffs were non-residents who had not been in Virginia since the sale, and that some were infants and *femes covert*: *held*, 1. A purchase by such an agent is in substance no better than a purchase from himself, and though it might bind him, is not binding on the legatees, unless ratified by them deliberately and on full information. 2. No such ratification appearing, the delay in this case to impeach the purchase (due allowance being made for the infancy of some and the nonresidence of others) does not deprive the plaintiffs of their right to the aid of equity. 3. The extent of the interest of the plaintiffs ought by a proper account to be ascertained, to the end that the purchaser may, if he thinks proper so to do, remove that interest by paying to the plaintiffs the parts unsatisfied of their legacies. 4. If the purchaser should not do this, the plaintiffs will be entitled to have the land reexposed to sale at a proper upset price, to be ascertained by debiting the purchaser with the profits of the land or with a fair annual rent therefor since his purchase, and crediting him first with his payments and interest on the same, and secondly with all his substantial and permanent improvements. The balance, with the addition thereto of a reasonable amount for the commission and charges of resale, is the sum at which the land should be set up, on a credit of 6, 12 and 18 months, bearing interest. 5. If the land and improvements should not sell for more than the upset price, the purchase should stand confirmed: if it should sell for more, then the former sale should be vacated, the purchase money on the resale duty collected from the purchaser at the same, and a conveyance made to him, and the proceeds of the resale applied, 1st. to pay the charges of sale; 2dly, to pay the first purchaser the balance due him upon an account stated as before mentioned; and the surplus to the legatees, according to their respective rights.

Buckles *v.* Lafferty's legatees, 292, 3

PRINCIPAL AND SURETY.

1. How far sureties are estopped by entry

of judgment confessed by their attorney. See Judgment No. 1, and

Calwells *v.* Shields & Somerville, 305

2. What receipt of constable is *prima facie* evidence against him and his sureties of the collection of the claim. See Constables, and

Smith &c. *v.* The governor, 229

3. What grant of administration is valid against sureties in administration bond, and for what assets they are liable. See Legatees &c. No. 6, and

Burnley's representatives *v.* Duke & others, 102

4. What legacy is a charge upon the executor as a legatee, and does not render his sureties responsible. See Will No. 4, and

Arrington *v.* Cheatham & wife, 492

PROBATE AND ADMINISTRATION.

1. Concerning the probate of nuncupative will, and how such will may be thereafter impeached, see Nuncupative will No. 2, 3, and

Page &c. *v.* Page, 424

2. What grants of administration, original and *de bonis non*, are valid. See Legatees &c. No. 6, and

Burnley's representatives *v.* Duke & others, 102

PROCESS.

On indictment for playing at unlawful game. See Gaming No. 5, and

Wright *v.* Commonwealth, 800

PURCHASER.

See references under title Sale.

RECEIPT.

1. Effect of constable's receipt for claim as evidence of collection. See Constables and

Smith &c. *v.* The governor, 229

2. Relief in equity against estoppel at law by deed acknowledging payment. See Estoppel No. 4, and

Radcliff &c. *v.* High, 271

RECORD.

1. What is the record of a judgment confessed, and how far evidence aliunde is admissible to shew the power and action of attorney confessing the same. See Judgment No. 1, and

Calwells *v.* Shields & Somerville, 305

2. See Registry, and

Cocke *v.* Haxall's ex'x, 470

RECOVERY.

See Former recovery, and

Weaver *v.* Vowles, 438

REDEMPTION.

1. What grantor has no right of redemption. See Mortgages &c. No. 2, and

Floyd *v.* Harrison &c., 161

2. Allowance of time for redemption upon decree against heirs of vendee for sale under vendor's lien. See Specific execution No. 3, and

Wade's heirs *v.* Greenwood & wife, 475

REGISTRY.

What registry of trust deed of personality is invalid.

It was the intention of the legiala-

889 ture in the act of 1792 regulating conveyances, (1 vol. of Old Revised Code, p. 157, § 2, 4,) to require a deed of trust or mortgage of personal estate to be recorded in the general court, or in the court of the district, county or corporation in which the grantor resided. Therefore where a deed of trust of personalty, dated the 15th of July 1812, stated the grantor to be of Henrico county, and the trustee and cestui que trust to be of the town of Petersburg, and the deed was never recorded in Henrico but only in Petersburg, and there was no evidence to shew that either at the date of the deed, or of its recordation in Petersburg, the grantor resided in that town, *held*, the deed so recorded is void as to the grantor's creditors.

Cocke v. Haxall's ex'x, 470

RELEASE.

Of commonwealth's title to land settled thirty years, on which taxes have been paid within that time. See Patent No. 1, 2, and Tichanal v. Roe, 288

RENT.

Apportionment in equity.

Pending a suit in chancery by creditors for the sale of their debtor's land, the heirs of the debtor lease the land to a tenant for 3 years from the first of April, unless there shall in the mean time be a decree of sale, in which case the tenant is to give possession on the first of April after the decree. A rent is reserved of \$300, to be paid at the end of each year of the tenancy. And according to the true construction of the lease, the tenant has a right to the crops growing on the land at the end of every year for which rent is reserved. In June of the third year, the land is sold under a decree in the creditors' suit, and the tenant applies to the purchasers for permission to proceed with the cultivation of the land; but one of the purchasers, in presence of the other (who had been one of the lessors), refuses, declaring that if the tenant sows the land, he the purchaser will reap the crop; and in consequence of this refusal the tenant proceeds no farther with his preparations for a fall crop, though he remains in possession of the land the third year. A few days before the expiration of that year, the purchasers sue out an attachment against the tenant for \$300 rent to become due the first of April, upon the levy whereof the tenant gives to the sheriff bond and security for the rent. Judgment being obtained on this bond, the same is enjoined as to \$200, upon the bill of the tenant praying an abatement of the rent according to equity: *held* by two judges, 1. that under the circumstances, the purchasers were not warranted in assuming the relation of landlord for the purpose of coercing the payment of the \$300; 2. that there not having been an actual eviction, there was no remedy at law, and it was competent for the tenant to come into equity upon the ground that he was entitled to an abatement; and 3. the evidence justifying the allowance of \$200 as a fair abatement, the injunction should be perpetuated.

Mason &c. v. Moyers, 606

REPEAL.

1. What statute is no implied repeal of former laws on same subject. See Gaming No. 4, and

Pitman v. Commonwealth, 800

2. See also, on the subject of implied repeal, title Banks, and

Commonwealth v. Farmers bank, 737

REPLICATION.

At what time after replication to answer a chancery suit may be set for hearing. See Hearing of cause No. 1, and

Poling v. Johnson, 255

RETURN.

Effect of return on *fi. fa.* as evidence in action against sheriff. See *Fieri facias* No. 1, and

Lathrop v. Lumpkin &c., 49

REVERSAL.

As to what parties erroneous decree will be reversed. See Appellate jurisdiction No. 6, and

Arrington v. Cheatham & wife, 492

REVERSION.

1. Relief to reversioner of slave removed pending injunction. See Slaves No. 2, and Johns v. Davis's ex'or &c., 729

890 *2. How lien of Mutual Assurance society will be enforced where one party has estate for life and another the reversion. See Mutual Assurance society No. 4, and Shirley v. Mut. Ass. society, 706

REVOCATION.

What is not an implied revocation of will. See Will No. 5, and

Savage &c. v. Mears & wife, 570

SALE.

1. What grantor has no right of redemption. See Mortgages &c. No. 2, and Floyd v. Harrison &c., 161

2. Whether a power of sale given to mortgagee by the deed of mortgage is valid. See Mortgages &c. No. 3, and S. C., 162

3. What purchase by agent from principal will be set aside. See Principal and agent No. 2, 3, and

Buckles v. Lafferty's legatees, 292

4. Concerning validity, as against wife, of husband's assignment of her personalty, see Husband and wife No. 3, 4, 5, 6, 7, and

Browning v. Headley, 340, 41

5. What sale of chattel is fraudulent as against creditors of vendor. See Fraud No. 2, and

Tavener v. Robinson, 280

6. Action by vendee of chattel against sheriff purchasing at his own sale under execution against vendor. See *Fieri facias* No. 3, and S. C., 280

7. Effect of sale under second of two *fi. fas.* in officer's hands. See *Fieri facias* No. 2, and

M'Key &c. v. Garth, 33

8. What vendee of land, after conveyance by vendor delivered as escrow, is a freeholder qualified to serve as a grand juror. See Freehold, and

Commonwealth v. Burcher, 826

9. When specific execution will be decreed against heirs of vendee. See Specific execution No. 1, and

Wade's heirs *v.* Greenwood & wife, 474

10. What decree will be rendered against such heirs. See Specific execution No. 2, and S. C., 475

11. Time allowed in such case for redemption, and sale to be made upon credit. See Specific execution No. 3, and S. C., 475

12. Lien of elegit on land conveyed in trust to secure debts; and rights of elegit creditor against purchaser under the trust deed. See Elegit, and

Findlay *v.* Toncray, 374

13. When sale under vendor's lien precludes right to dower. See Dower No. 1, and

Wilson &c. *v.* Davison, 384

14. Affirmance of decree enforcing lien of trust deed, with addition thereto of direction for sale of the property. See Mortgages &c. No. 6, and

Williamson's ex'or *v.* Howard, 39

SEISIN.

1. How constructive seisin of demandant in writ of right may be disproved. See Writ of right No. 3, and

Dawson *v.* Watkins, 259

2. What is not proof of seisin in deed by *pedis positio*. See Writ of right No. 4, and S. C., 259

3. When husband will be considered as dying seized, so as to entitle widow to rents and profits from his death. See Dower No. 4, and

Macaulay's ex'or *v.* Dismal swamp land co., 507

SETOFF.

1. What claims cannot be set off by purchaser under trust deed against elegit creditor of grantor. See Elegit No. 1, and

Findlay *v.* Toncray, 374

2. When rent may be apportioned in equity. See Rent, and

Mason &c. *v.* Moyers, 606, 7

3. Setoff by distributee of his share against debt for purchases at executor's sale. See Legatees &c. No. 7, and

Hickerson's adm'r *v.* Helm, 628

4. Injunction by distributee's donee of a slave to sale under execution for distributee's debt to the estate, and setoff of distributable share against the judgment. See Legatees &c. No. 8, and S. C., 628

5. Setoff of maintenance supplied by executor guardian de facto against interest on ward's legacy. See Guardian and ward No. 2, and

Arrington *v.* Cheatham & wife, 492

SETTING FOR HEARING.

See Hearing of cause, and

Poling *v.* Johnson, 255

SEVERAL TENANCY.

Within what time the plea of several tenancy should be pleaded in a writ of right.

Walkers *v.* Boaz &c., 485

891 *SHERIFFS.

1. Effect of return on *fi. fa.* as evi-

dence in action against the sheriff. See *Fieri facias* No. 1, and

Lathrop *v.* Lumpkin &c., 49

2. Action by vendee of chattel against sheriff purchasing at his own sale under execution against vendor. See *Fieri facias* No. 3, and

Tavener *v.* Robinson, 280

3. Effect of sale under second of two *fi. fas.* in hands of officer. See *Fieri facias* No. 2, and

M'Key &c. *v.* Garth, 33

4. When objection that sheriff is no party to suit in chancery for satisfaction out of insolvent's estate will not avail in appellate court. See Codefendants No. 2, and

Chappell *v.* Robertson, 590

SIMPLE CONTRACT.

Merger of simple contract of partnership in specialty of one partner. See Partnership, and

Ward *v.* Motter, 536

SLAVES.

I. Emancipation.

1. What issue of freedwoman is not entitled to freedom. The decision in *Maria and others v. Surbaugh*, 2 Rand. 228, still adhered to.

Ellis *v.* Jenny &c., 597

II. Relief to reversioner of slave removed pending injunction.

2. Upon a bill in equity by a reversioner of slaves against the husband of tenant for life, alleging a purpose to remove one of the slaves out of the commonwealth, an injunction is awarded, and bond given by the husband with surety, conditioned to abide by and perform the final decree of the court. Upon an amended bill against the surety as well as the husband, it appears that the surety, while bound as such, and of course with full knowledge of the plaintiff's claim, caused the slave to be removed and sold out of the commonwealth, through the instrumentality of an agent: *held*, 1. That for such removal and sale in contempt and subversion of the court's authority, it is competent for the court to give redress and vindicate its jurisdiction by decreeing in favour of the plaintiff against both the obligors in the bond. 2. That the measure of relief is not for the value of the slave, but for the value of the plaintiff's reversionary estate in her, which should be ascertained by reference to a commissioner. 3. That the agent of the surety, by his agency in the removal and sale of the slave, would have subjected himself to the like decree, if he had known at the time of the claim of the plaintiff, and had confederated with the surety to defeat the same.

Johns *v.* Davis's ex'or &c., 729

III. Widow's interest as distributee.

3. Measure of widow's right where slaves of husband liable to her dower have been sold by his executor. See Widow No. 3, and

Hickerson's adm'r *v.* Helm, 629

IV. Injunction to sale under execution.

4. Injunction by distributee's donee of a

slave to sale under execution for distributee's debt to the estate. See *Legatees &c.* No. 8, and

Hickerson's adm'r v. Helm, 628

SPECIALTY.

1. Merger of partnership simple contract in specialty of one partner. See *Partnership*, and

Ward v. Motter, 536

2. What endorsement on bond is evidence to repel presumption of payment. See *Bond* No. 2, 3, and

Dabney's ex'ors v. Dabney's adm'r, 622

SPECIFIC EXECUTION.

I. What contract will be enforced against vendee.

1. In 1814 land was sold, possession thereof delivered, part of the purchase money paid, and a contract, made to pay a further part when a lawful right should be conveyed. In 1820 a bill was filed by the vendor and his wife (who claimed to have inherited the land from her father) against the vendees and their assignee, asking specific execution of the contract. The bill also made defendant a nonresident, who, it was alleged, had formerly owned the land, and conveyed it to the father by a deed which was accidentally destroyed before it was placed on record. The assignee in his answer said, he had heard a report that the father mortgaged the land to secure

892 *a debt which was yet unpaid. He professed his readiness to pay the balance due from him to the vendees, upon receiving a title to the land, and a release of the mortgage if there was one. The non-resident defendant, though proceeded against by publication, put in no answer. It was proved by a witness, that in 1794 the non-resident defendant conveyed the land to the father of the female complainant; that the deed was acknowledged before three witnesses, and delivered to one of them to have it recorded; and that it was accidentally burnt while in his possession. In 1830 a decree was made for specific execution. During all this time the vendees and their assignee, and the heirs of the latter, continued to hold possession of the land; none of them asked a rescission of the contract; and it did not appear that there was any such mortgage as was mentioned in the answer. Upon an appeal by the heirs of the assignee: *held*, 1. That as the conveyance to the father, though never recorded, and afterwards destroyed, was effectual against the grantor to vest the legal title in the father, and the great lapse of time since that conveyance, in connexion with the uninterrupted possession of the father and those claiming under him, furnished a sufficient presumption against any claim on the part of the grantor's creditors, the decree for specific execution was, under the circumstances, proper. 2. That as there was no record of the said conveyance, a commissioner should be directed to execute another deed from the grantor to the appellants. 3. That as the ancestor of the appellants was not bound to take

the title until the existence and validity of the said conveyance had been judicially ascertained, and as the burthen of establishing these facts devolved on the vendors, they should be decreed to pay the costs.

Wade's heirs v. Greenwood & wife, 474

II. What decree will be made against heirs of vendee.

2. Where a suit is brought against a vendee for specific execution, and pending the suit he dies, and the same is revived against his heirs, they are not liable to a personal decree: the decree should merely be, that unless they pay the purchase money and interest within a period to be prescribed, the land shall be sold.

Wade's heirs v. Greenwood & wife, 475

3. In a suit by a vendor against the vendee's heirs, to subject lands to sale by virtue of the vendor's lien for his purchase money, it is, in general, an improper exercise of discretion to decree an immediate sale without allowing any time for redemption, or to decree the sale to be made for cash. If circumstances exist which render it expedient to sell forthwith and for cash, such circumstances should be disclosed by the record. If there be a decree to sell forthwith and for ready money, in a case in which nothing appears to call for or justify a departure from the general rule, the decree will for this cause be reversed. *S. C.*, 475

III. Specific execution of award.

4. What submission is binding and entitles to specific execution of the award. See *Award* No. 1, and

Boyd's heirs v. Magruder's heirs, 761

IV. Specific execution in part.

5. Decree for specific execution in part, without prejudice to further remedy at law. See *Award* No. 2, and

Boyd's heirs v. Magruder's heirs, 761

STATUTES OF VIRGINIA, OF A GENERAL NATURE, CITED AND CONSTRUED.

I. Jurisdiction and practice of courts.

1. Acts of 1838, ch. 64, p. 61, authorizing chancery causes which have been pending in the county courts for one year to be removed to circuit courts, cited.

Hendricks &c. v. Compton's ex'or, 196

2. Acts of 1822-3, ch. 37, § 1, p. 39, Suppl. to R. C. p. 129, allowing four months from replication to answer for taking depositions in chancery, construed.

Poling v. Johnson, 255

3. Acts of 1827-8, ch. 25, § 1, p. 20, Suppl. to R. C. p. 125, declaring that no decree shall be reversed for informality in the proceedings, where the parties have proceeded to take their depositions, have been fully heard on the merits, and substantial justice has been done, cited.

Poling v. Johnson, 257

Hickerson's adm'r v. Helm, 640, 643, 657

893 *4. Ch. 66, § 57, p. 208 of 1 R. C. concerning appeals from interlocutory decrees, cited.

Talley v. Tyree, 503

5. Acts of 1830-31, ch. 11, § 31, Suppl. to R. C. p. 149, on same subject, construed. S. C., 500

6. Acts of 1830-31, ch. 11, § 32, Suppl. to R. C. p. 149, abolishing, in respect to appeals from interlocutory decrees (with certain exceptions), the former privilege as to the time and order of hearing, cited. S. C., 505

7. Ch. 69, § 46, p. 237 of 1 R. C. requiring the orders of each day in the circuit courts to be read in open court at the next sitting, cited. Calwells v. Shields & Somerville, 327

8. Same chapter, § 56, p. 239, by which appeals were allowed from judgments or sentences of the county and corporation courts, cited.

Farneyhough's ex'ors v. Dickerson &c., 584

9. Acts of 1830-31, ch. 11, § 30, p. 50, Suppl. to R. C. p. 145, providing that a supersedeas may be allowed to a final judgment, proceeding or order of a county or corporation court, construed. S. C., 582

II. Juries.

10. Ch. 75, § 1, p. 264 of 1 R. C. requiring that grand jurors shall be freeholders, construed.

Commonwealth v. Burcher, 826
S. C., 830

11. Same chapter, § 12, p. 266, prescribing the qualification of petit jurors in the superior courts and for the trial of pleas of the commonwealth, cited. S. C., 833

III. Constables.

12. Acts of 1825-6, ch. 19, p. 21, Suppl. to R. C. p. 201, concerning the liability of constables and their sureties for claims collected and received for collection, cited. M'Key &c. v. Garth, 37

construed.

Smith &c. v. The governor, 229

IV. Land laws.

13. Ch. 86, § 40, p. 330 of 1 R. C. declaring invalidity of entry or location on land settled thirty years, on which quitrents or taxes have been paid within that time, and relinquishing commonwealth's title to such land, construed.

Tichanal v. Roe, 288

V. Conveyances.

14. Ch. 99, § 1, p. 361 of 1 R. C. declaring that no estate of freehold in lands shall be conveyed from one to another except by writing sealed and delivered, cited.

Commonwealth v. Burcher, 831

15. Acts of 1813-14, ch. 10, § 8, p. 36, concerning registry of deeds of trust and mortgages of personal estate, cited.

Cocke v. Haxall's ex'x, 472

16. Ch. 99, § 11, p. 364 of 1 R. C. on same subject, cited. S. C., 472

17. Act of 1792, 1 Old R. C. ch. 90, § 2, 4, p. 157, on same subject, construed. S. C., 470

18. Acts of 1705, ch. 21, 3 Hen. stat. at large p. 318,—of 1710, ch. 13, 3 Id. p. 517,—of 1734, ch. 6, 4 Id. p. 397,—of 1748, ch. 1, 5

Id. p. 408, and of 1785, ch. 62, 12 Id. p. 154, on same subject, cited. S. C., 472, 3

19. Ch. 99, § 20, p. 368 of 1 R. C. restricting the effect of alienations to so much of the right and estate in the land as the grantor may lawfully convey, cited.

Robinett v. Preston's heirs, 278

Findlay v. Toncray, 379

20. Same chapter, § 29, p. 370, for transferring the possession of land to the bargainee, releasee or person entitled to the use, cited.

Syrus & others v. Allison, 202

VI. Wills.

21. Statute of December 13, 1792, 1 Old R. C. ch. 92, § 3, p. 160, 161, 1 R. C. of 1819, ch. 104, § 3, p. 376, providing for children born after the execution of a will made when the testator was childless, and for posthumous children, cited.

Savage &c. v. Mears & wife, 572, 3, 575

22. Statute of December 5, 1794, 1 Old R. C. ch. 170, § 1, p. 319, 20, 1 R. C. of 1819, ch. 104, § 4, p. 376, making provision for children born after the execution of the father's will and pretermitted thereby, construed.

S. C., 570

23. Ch. 104, § 7, p. 377 of 1 R. C. declaring that no nuncupative will shall be established unless it be made in the time of the last sickness of the deceased, construed.

Page &c. v. Page, 424

24. Same chapter, § 8, p. 377, invalidating nuncupative wills in certain cases unless the testimony or the substance thereof shall have been committed to writing, construed.

S. C., 424

894 *25. Same chapter, § 13, p. 378, allowing wills to be contested by bill in chancery after probate, construed.

S. C., 424

26. Same chapter, § 18, p. 379; 5 Hen. stat. at large p. 457, § 11, prescribing after what time and upon what notice nuncupative wills may be proved, cited. S. C., 425, 435

VII. Ex'ors and adm'rs.

27. Ch. 104, § 36, p. 384 of 1 R. C. declaring that no omission to plead or mispleading shall charge an executor or administrator or his sureties beyond the assets, cited.

Davis &c. v. Newman, 667

28. Same chapter, § 59, p. 389, allowing to executors their disbursements, and compensation for their personal trouble, construed.

Farneyhough's ex'ors v. Dickerson

&c., 582

cited. S. C., 587

29. Same chapter, § 66, p. 390, concerning the liability of the personal representative of an executor in his own wrong, cited.

Burnley's representatives v. Duke & others, 124

30. Acts of 1839, ch. 70, p. 44, authorizing administrator de bonis non to receive assets from representative of prior executor or administrator, cited. S. C., 133

VIII. Dower.

31. Ch. 107, § 4, p. 403 of 1 R. C. giving damages to widows deforced of their dower

in lands whereof their husbands died seized, construed.

Macaulay's ex'or v. Dismal swamp land co., 507

IX. Infants.

32. Ch. 108, § 21, p. 410 of 1 R. C. making proceeds of sale of infant's land descendible as realty, cited.

Perrin & c. v. Lomax & c., 142

X. Slaves.

33. Ch. 111, § 48, 49, p. 431, 2 of 1 R. C. forfeiting to reversioner slaves removed out of commonwealth by tenant for life, or husband of such tenant, cited.

Johns v. Davis's ex'or & c., 732, 3

XI. Rents and replevin.

34. Ch. 113, § 23, 24, p. 451, 2 of 1 R. C. concerning the writ of replevin for goods distrained for rent, cited.

Mason & c. v. Moyers, 618

35. Acts of 1822-3, ch. 29, § 9, Suppl. to R. C. p. 255, abrogating the writ of replevin at common law, cited. S. C., 618

36. Acts of 1826-7, ch. 27, § 2, Suppl. to R. C. p. 256, allowing tenant to contest right of landlord to sue out attachment for rent to become due, cited. S. C., 618

XII. Forcible entry.

37. Ch. 115, § 2, p. 455 of 1 R. C. giving summary remedy to person dispossessed by forcible entry, construed.

Pauley v. Chapman, 235

XIII. Writ of right.

38. Ch. 128, § 34, p. 496 of 1 R. C. concerning plea of several tenancy in abatement of writ of right, cited.

Walkers v. Boaz & c., 490

39. Acts of 1822-3, ch. 24, § 2, p. 27; Suppl. to R. C. ch. 151, p. 210, declaring that a non-suit in a writ of right shall be no bar to a subsequent action, cited. S. C., 489

XIV. Death of parties.

40. Ch. 128, § 38, p. 497, 8 of 1 R. C. for preventing abatement of certain actions by death of plaintiff or defendant before judgment, cited.

May & c. v. State bank of N. Carolina, 69

XV. Indebitatus assumpsit.

41. Ch. 128, § 86, p. 510 of 1 R. C. requiring account of items to be filed with declaration in indebitatus assumpsit, cited.

Weaver v. Vowles, 448

XVI. Witnesses.

42. Ch. 131, § 1, 2, p. 517 of 1 R. C. disqualifying as witnesses persons convicted of perjury or felony, cited.

Commonwealth v. Hart, 821

XVII. Insolvents.

43. Ch. 134, § 34, p. 538 of 1 R. C. vesting lands of insolvent debtor in the sheriff of the county where they lie, construed.

Syrus & c. v. Allison, 200

XVIII. Crimes, prosecutions and punishments.

44. Ch. 148, § 1, p. 571 of 1 R. C. defining and punishing perjury, construed.

Thomas v. Commonwealth, 795

45. Acts of 1822-3, ch. 34, § 1, p. 36, Suppl. to R. C. ch. 226, p. 280, making certain trespasses on property *punishable as misdemeanours, construed.

Campbell & c. v. Commonwealth, 791
cited, Pauley v. Chapman, 240

46. Acts of 1827-8, ch. 36, § 4, Suppl. to R. C. p. 275, 6, declaring that persons who should thereafter be guilty of certain offences against the gaming laws should be subjected to a certain punishment in lieu of the former, cited.

Pitman v. Commonwealth, 807, 8, 815

47. Acts of 1841-2, ch. 69, § 4, p. 44, changing the fee of the commonwealth's attorney and the sum to be paid to the literary fund, in all recoveries thereafter had for violations of the gaming laws, construed. S. C., 800

48. Acts of 1842-3, ch. 84, p. 57, repealing the lastmentioned enactment, cited.

S. C., 817

49. Acts of 1827-8, ch. 37, § 5, p. 30, Suppl. to R. C. ch. 183, p. 242, prescribing how slaves shall be tried and punished for simple larceny to the value of twenty dollars or less, cited.

Cropper v. Commonwealth, 843, 4

50. Acts of 1831-2, ch. 22, § 9, p. 22; Suppl. to R. C. ch. 187, p. 247, prescribing how free negroes and mulattoes shall be tried and punished for the same offence, construed.

S. C., 842

51. Ch. 171, § 16, p. 619, 20 of 1 R. C. prescribing the proceedings to be had in certain cases against convicts received into the penitentiary under a second or third sentence, construed.

Brooks v. Commonwealth, 845

XIX. Claims against commonwealth.

52. Ch. 174, § 2, p. 2 of 2 R. C. and Acts of 1838, ch. 14, § 1, p. 27, allowing claims against the commonwealth to be presented to the auditor, construed.

Commonwealth v. Farmers bank, 737

53. Ch. 174, § 6, p. 2 of 2 R. C. Acts of 1838, ch. 14, § 1, p. 27; Acts of 1840-41, ch. 48, § 1, p. 66, prescribing to what court a petition may be presented for redress against the auditor's decision disallowing a claim against the commonwealth, construed. S. C., 737

XX. Banks.

54. Acts of 1838, ch. 13, § 2, p. 27, allowing credit to the banks in account with the commonwealth for the premium on specie paid to the public creditors, construed.

Commonwealth v. Farmers bank, 737

55. Same chapter, § 1, declaring that the interest on public loans shall thereafter be paid in specie or its equivalent, cited.

S. C., 737, 741, 747

56. Acts of 1839-40, ch. 63, p. 52, requiring the banks to pay the next semiannual instalment of interest to the public creditors in specie or its equivalent, construed.

S. C., 737

57. Acts of 1839-40, ch. 65, § 13, p. 55, requiring the banks to pay the next semiannual instalment of interest to the public creditors in specie or its equivalent without charging any premium therefore, cited.

S. C., 745, 753, 757, 759

XXI. Mills.

58. Ch. 235, p. 255 of 2 R. C. concerning mills, cited.

Muire &c. v. Smith, 458

59. Same chapter, § 1, p. 225, declaring who may apply for leave to erect mill and dam, and to whom notice of the application may be given, construed.

Pitzer v. Williams, 241

60. Same chapter, § 9, p. 228, saving prosecutions and private actions except for injuries actually foreseen and estimated upon the inquest in a mill case, cited. S. C., 249

XXII. Ferries.

61. Ch. 238, § 1, p. 261 of 2 R. C. concerning inquest on application for the establishment of a ferry, construed.

Muire &c. v. Smith, 458

62. Same chapter, § 1, 2, authorizing county court to establish ferry where applicant owns the land on both sides of the watercourse or on one side only, cited.

Patrick v. Ruffner, 218

XXIII. Repealing statutes.

63. Various penal statutes containing express clauses of repeal, cited.

Pitman v. Commonwealth, 814

SUBMISSION.

What submission is binding and entitles to specific execution of the award. See Award No. 1, and

Boyd's heirs v. Magruder's heirs, 761

SUPERSEDEAS.

To what proceeding a supersedeas lies.

An executorial account being settled by commissioners under an order of the 896 court of probate, some of the legatees file exceptions to the account, and the court overrules the same, orders the account to be recorded, and adjudges the exceptors to pay the executor's costs: *held*, this is a final proceeding or order, within the meaning of the act in Sess. Acts of 1830-31 ch. 11, § 30, p. 50, Suppl. to Rev. Code p. 145, to which, on the petition of the exceptors, a supersedeas may be awarded. Accord. Triplett's ex'ors v. Jameson, 2 Munf. 242.

Farneyhough's ex'ors v. Dickerson &c., 582

SURETIES.

See Principal and surety.

TAXES.

Invalidity of patent for land settled thirty years, on which taxes have been paid within that time. See Patent No. 1, 2, and

Tichanal v. Roe, 288

TRESPASS.

What trespass is no misdemeanour.

A party in actual and peaceable possession of land, which he claims as his own, encloses it with a fence. About four years afterwards another person, who claims the same land and has a better title to it, forcibly pulls down and removes the fence: *held*, this is not a trespass for which a prosecution can be sustained under the statute of February 14, 1823, Acts of 1822-3, ch. 24, § 1.

Campbell &c. v. Commonwealth, 791

TRUSTS AND TRUSTEES.

I. Mortgages and deeds of trust.

1. See title Mortgages and trusts.

II. Husband trustee for wife.

2. When the husband is a mere trustee for the wife, acquiring no individual interest in her personalty. See Husband and wife No. 1, and

Matthews & co. v. Woodson &c., 601

III. Principal and agent.

3. What purchase by agent from principal will be set aside. See Principal and agent No. 2, 3, and

Buckles v. Lafferty's legatees, 292

IV. Equitable relief to cestui que trust of bond secured by trust deed.

4. A testator having authorized a tract of land to be sold and the money put at interest for the benefit of his children, his executor sold the land and took a bond (secured by a deed of trust) to be paid the 21st of August 1820, with interest from the 25th of December 1817. On the 30th of October 1820, the executor received of the purchaser a sum of money, to be applied to the credit of the principal. The purchaser having sold part of the land and taken from his vendee four bonds, one payable the 16th of April 1821, and the others on the 25th of December in the years 1821, 1822 and 1823, the executor, on the 21st of January 1822, took an assignment of those bonds and of a deed of trust securing the same, and gave a receipt stating that they were to be credited in part of the principal at the dates at which those bonds were due. In June 1823, the purchaser in-joined the executor from selling under his deed of trust, upon the ground of a defect of title to two parcels of the land, one of 16½, the other of 100 acres, part of which last parcel being included in the sale to the subvendee, the alleged defect of title was made the ground also of injunction by him. In 1835, the injunction of the first purchaser was perpetuated as to the price of the 16½ acres, and dissolved as to the residue, so far as it remained unpaid. The executor having in the mean time removed from the commonwealth, a bill was thereupon filed by some of the legatees, against the purchaser, the trustee in his deed of trust, the executor, and another legatee, to ascertain the balance due. The bill averred, that many years since, the bond payable to the executor was transferred to the legatee defendant, to collect for himself and the others interested, and he had removed from the state; that the complainants do not know where the bond is, or whether it is lost or destroyed; and that the trustee declines to advertise or sell, for want of the bond. As to all the defendants except the purchaser, the bill was taken for confessed: *held*, 1. Equity has jurisdiction; on the ground that the legatees, though entitled to the balance due 897 from the purchaser, are mere beneficiaries, having no legal right which they could assert at law; and also on the ground that, the case being one in which it would have been improper for the trustee to

sell until some proceeding was had to ascertain the amount due, the creditors had a right to come into equity to have the amount ascertained. 2. The purchaser, having in his hands evidence of all the payments alleged by him, has no right to require that the bond shall be produced before an account is stated. 3. The payments which the executor agreed should be credited against the principal must be so applied; the case not being taken out of the influence of the principle laid down in *Pindall's ex'x &c. v. The Bank of Marietta*, 10 Leigh 484, by the circumstance that the party who so agreed was a fiduciary, nor by any of the other circumstances before mentioned.

Miller v. Trevilians & others, 1

USURY.

Weight of answer denying usury, where bill disclaims benefit of discovery. See Answer No. 3, and

Thornton v. Gordon &c., 719

VENDOR AND VENDEE.

See references under title Sale.

WARD.

See Guardian and ward.

WARRANTY.

Concerning the effect of a general warranty in deed conveying land, see *Elegit No. 1*, and

Findlay v. Toncray, 374

WIDOW.

I. Rights against husband's assignee.

1. Concerning rights of wife surviving the coverture against husband's assignee of her personalty, see *Husband and wife No. 3*, 4, 5, 6, 7, and

Browning v. Headley, 340, 341

II. Right as dowress.

2. See title Dower, and
Wilson &c. v. Davison, 384
Macaulay's ex'or v. Dismal swamp land co., 507
Shirley v. Mutual Assurance society, 705

III. Rights as distributee.

3. A testator dies possessed of slaves, to a third of which his widow, who renounces his will, is entitled during her life. In a settlement of the executorship account after the death of the executor, and after the widow's death, it appears by the appraisal that the slaves were seven in number. Two were specifically bequeathed by the testator, and the presumption is that they were delivered over to the legatees. Two were sold under execution of a creditor of the testator, before the executor had other assets in hand to pay the execution, and were purchased by the executor at the sheriff's sale. And two others were sold by the executor, though the payment of debts did not require the sale of them if the widow had paid up a sum of 792 dollars 48 cents, due from her for purchases of the testator's goods. When or for what prices these two were sold, did not appear. The record furnished

no information of the disposition of the seventh slave; but the probability is that he was old and of little or no value: *held*, the charge for the widow's interest in the slaves, instead of being measured by their estimated hires, should be an annual sum from the death of her husband until her death, equal to the annual interest of one third of the gross amount of the sales or the value of the slaves: *dissentiente Baldwin, J.*, who was of opinion that the widow was entitled to credit for one third annually of the estimated hires.

Hickerson's adm'r v. Helm, 629

WIGGLESWORTH'S TABLE.

Professor Wigglesworth's table of longevity referred to.

Wilson &c. v. Davison, 384, 403

WILFUL TRESPASS.

See Trespass, and

Campbell &c. v. Commonwealth. 791

898

*WILL.

I. Nuncupative will.

1. Concerning the validity nuncupative will, and how the same may be impeached after probate, see *Nuncupative will No. 1*, 2, 3, 4, and

Page &c. v. Page, 424, 5

II. Revocation.

2. What is not an implied revocation of will.

Savage &c. v. Mears & wife, 570

III. Construction and effect of will.

3. See *Nuncupative will No. 5*, and

Page &c. v. Page, 425

4. A testator, by his will, after directing that in the first place all his just debts shall be paid, devises and bequeaths to his wife, during her life, his plantation, all his stock and furniture, and six slaves by name; and then, after various specific devises and legacies to his children, directs as follows: "I desire that my wife will, as soon as convenient after my decease, purchase and deliver to my granddaughter C. C. a negro girl of about £50. price, which I give to my said granddaughter and her heirs." The wife is also named executrix. She qualifies as such, giving a bond with sureties; and the whole personal estate, other than specific legacies, is exhausted in payment of the debts. The widow having accepted the property given her by the will, and taken possession of the whole of it, *held*, she is liable personally as legatee, not as executrix, for the payment of the legacy to the granddaughter, and the sureties in her executorial bond are nowise responsible for the same.

Arrington v. Cheatham & wife, 492

5. A testator having six children, four the issue of a deceased wife, and two the issue of his present wife, devises to his two sons each a tract of land described by metes and bounds, directs that all his other lands shall be equally divided among his four daughters and their heirs, and then devises and bequeaths as follows: "My will is that my negroes be apportioned equally amongst my

six children, under the following regulation, to say, that the one third thereof which shall be allotted to my wife as her dower shall be the full part of the two children I had by her, and also that the several negroes I have from time to time furnished any of my children be their right, but that they shall be each appraised and accounted for in their part of the division of my slaves. Lastly, I desire that all the residue of my estate not before specifically given be equally divided amongst my aforesaid six children." The will is made the 31st of December 1792, and the testator dies in 1794, prior to the 28th of October; between which periods, to wit, in November 1793, a third child of the testator by his second wife is born: *held*, 1. According to the authority of *Yerby v. Yerby*, 3 Call 334, the birth of such third child was not a revocation of the will. 2. As the will was published, and the testator died, before the passage of the act of 1794 providing for pretermitted children, the case does not fall within the operation of that statute. 3. Upon the true construction of the will, the afterborn child has no claim to share in the division of the dower slaves after the death of the widow.

Savage &c. v. Mears & wife, 570

6. What issue of freedwoman is not entitled to freedom. The decision in *Maria* and others *v. Surbaugh*, 2 Rand. 228, still adhered to.

Ellis v. Jenny and others, 597

WITNESS.

Competency.

1. In an action brought by keepers of a boarding school against a guardian, for board tuition, and other necessities furnished to the ward, the administrator of a previous guardian is a competent witness for the plaintiffs.

Young v. Warne &c., 420

2. On the trial of an indictment for perjury, the commonwealth offers as a witness a person against whom a civil action is pending, wherein the defendant in the indictment has been summoned as a witness for the opposite party: *held*, the witness so offered for the commonwealth has no such interest in the prosecution as renders him incompetent to testify.

Commonwealth v. Hart, 819

3. On a trial for forgery, the party whose signature is alleged to be forged need not be called as a witness for the prosecution. See *Forgery No. 2*, and

Foulkes v. Commonwealth, 836

899

*WOODLAND.

Right to dower in woodland incapable of cultivation. See *Dower No. 3*, and *Macaulay's ex'or v. Dismal swamp land co.*, 507

WRIT OF RIGHT.

I. Matter of abatement.

1. Within what time the plea of several tenancy should be pleaded in a writ of right. *Walkers v. Boaz &c.*, 485

2. Upon a writ of right by three demandants, it appears at the trial of the mise, that the tenement demanded descended to the demandants and their two infant brothers from their mother, and that those two infants successively died without issue, and were survived by their father as well as by the demandants: *held*, 1. That upon the death of the infant who first died, his share of the tenement descended to his four brothers, without regards to the father; and upon the death of the other infant, the share which he derived by descent from the mother passed in like manner to the three brothers, but the share which he derived by descent from his brother (1-4th of 1-5th) descended to his father. 2. That according to the principles established in *Garrard &c. v. Henry &c.*, 6 Rand. 110, and *Linton and others v. Bartly and others*, 9 Leigh 444, the fact of the father's having so become interested as tenant in common with the demandants (not having been pleaded in abatement) cannot prevent the demandants from recovering so much of the tenement as they shew title to, namely, all except that fourth of a fifth. S. C., 485

II. Seisin of demandant.

3. The decision in *Green v. Watkins*, 7 Wheat. 27, that in a writ of right, where the demandant shews no seisin by a *pedis positio*, but relies wholly on a constructive seisin by virtue of a patent of the land as vacant land, it is competent for the tenants to disprove that constructive seisin by shewing that the state had previously granted the same land to other persons, with whom the tenants claim no privity, approved and acted on.

Dawson v. Watkins, 259

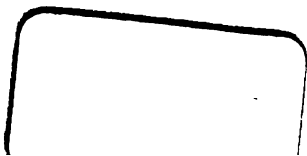
4. The demandant in a writ of right claims the land (of which the tenant is in possession) under a patent bearing date the 17th of June 1786, and the tenant disproves the constructive seisin of the demandant, by shewing a patent for a large tract embracing the same land, which issued as early as the first of December 1773. Whereupon the demandant, to establish a seisin in deed by a *pedis positio*, proves that the patentee under whom he claims came, in 1824 or 1825, to the county in which the land lies, and employed an agent to enter upon and survey the said land and various others tracts in the same county; that the said agent procured a surveyor and chain carriers immediately thereafter, who went upon the land in questions, and surveyed and re-marked the same for the patentee: *held*, these facts are not sufficient to authorize a jury to find a seisin in the demandant. S. C., 259

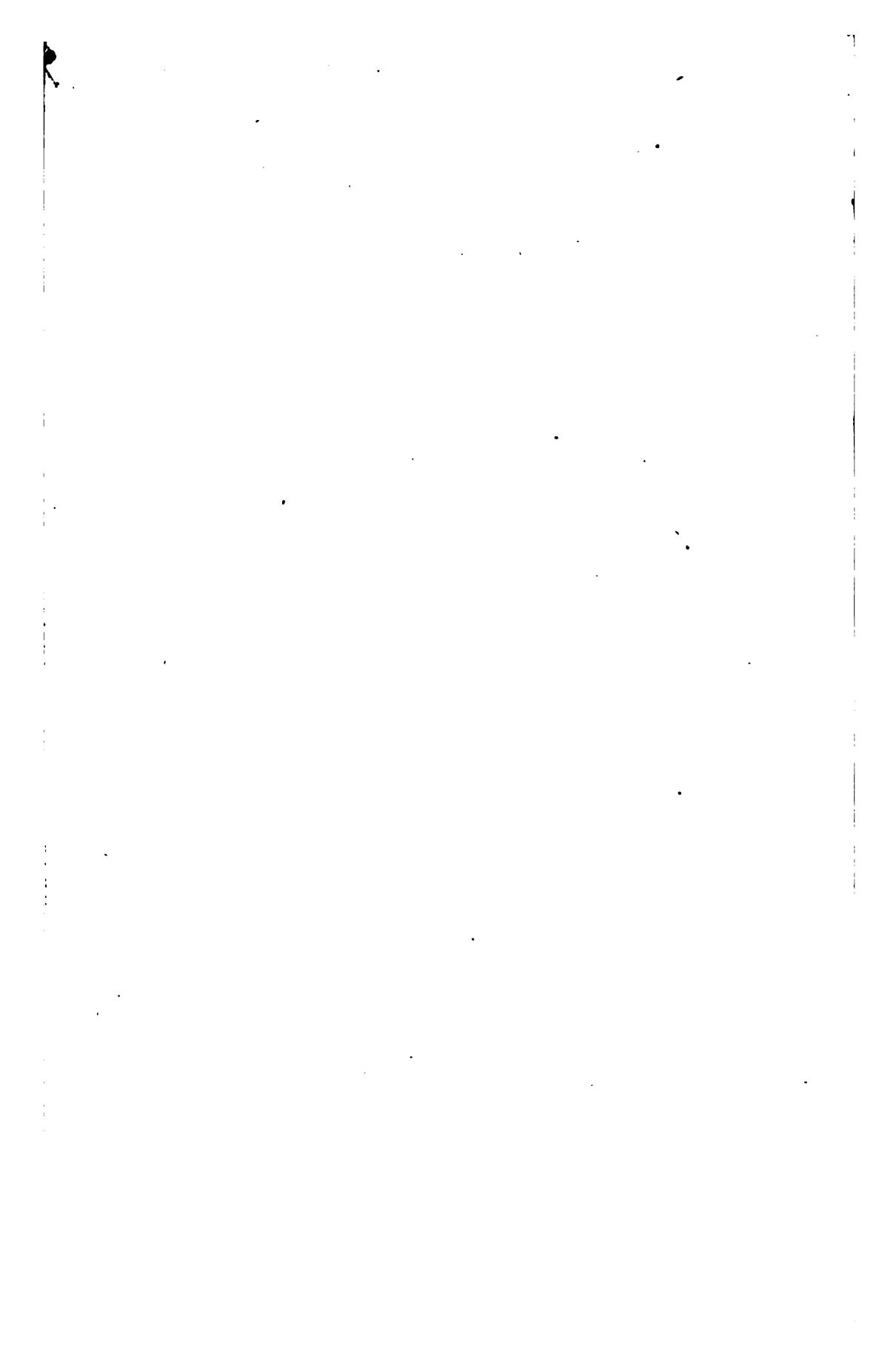
III. Setting aside nonsuit.

5. In what case nonsuit in writ of rights will be set aside. See *Nonsuit*, and *Walkers v. Boaz &c.*, 485

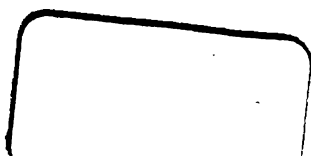


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INDEX.

ABATEMENT.

1. Within what time the plea of several tenancy should be pleaded in a writ of right. *Walkers v. Boaz & others*, 485
2. Nonjoinder of a demandant in a writ of right must be pleaded in abatement. See Writ of right No. 2, and S. C., 485
3. Matter of abatement either shews the action to be abatable, or that it is de facto abated. The former usually exists at the time of the suit; the latter for the most part occurs during its progress. The first must be pleaded in technical form, and at a proper stage of the cause. The last may be, but need not be, pleaded; and when apparent, or made known to the court, will be declared by its order in any stage of the suit. Examples illustrating this distinction, stated in the opinion of Baldwin, J.
May &c. v. State bank of North Carolina, 56
4. Concerning effect of extinction of corporation plaintiff in abating the suit, see Corporation, and S. C., 56

ABSENT DEFENDANTS.

- When assignee's plea that debtor was a resident is demurrable. See Foreign attachment, and
Smith v. Hunt and others, 206

ACCIDENT.

- Relief in equity where conveyance of land has been accidentally destroyed. See Specific execution No. 1, and
Wade's heirs v. Greenwood & wife, 474

ACCOUNT.

1. When production of bond may be dispensed with on account between grantor in trust deed and cestui que trust. See Trusts &c. No. 4, and
Miller v. Trevilian and others, 1, 2
2. Account between principal and agent, on bill by the former impeaching purchase of land by the latter. See Principal and agent No. 3, and
Buckles v. Lafferty's legatees, 293
3. What laches will preclude dower from right to account. See Dower No. 7, and
Macaulay's ex'or v. Dismal swamp land co., 507
4. When enquiry before commissioner, to ascertain what would be a reasonable provision for wife out of her equitable interest assigned by husband, may be dispensed with. See Husband and wife No. 7, and
Browning v. Headley, 341, 2

ACQUIESCENCE.

See Admission and Laches.

ADMINISTRATION.

See Executors and administrators and Legatees and distributees.

ADMISSION.

1. What judgment recovered by corporation will estop from alleging previous extinction of plaintiff. See Corporation, and
May &c. v. State bank of N. Carolina, 56
2. What defence of a former recovery for the same cause of action is not sustained. See Former recovery, and
Weaver v. Vowles, 438, 9
3. Concerning estoppel by deed, see Estoppel No. 4, and
Radcliff &c. v. High, 271
4. The general rule, that the admission of one person cannot be given in evidence against another, adverted to by Baldwin, J.
Pettit v. Jennings and others, 676

AD QUOD DAMNUM.

Who may apply for the writ, and what notice is sufficient. See Mills No. 1, and
Pitzer v. Williams, 241

852 *AFFIRMANCE.

See Appellate jurisdiction No. 8, Mortgages &c. No. 6, and
Williamson's ex'or v. Howard, 39, 40

AGENT.

See Principal and agent.

ANNUITY.

Mode of calculating present value. See Dower No. 6, and
Wilson and others v. Davisson, 384, 5

ANSWER.

I. Bringing in defendant.

1. Case in which a defendant was brought in by a messenger to answer interrogatories.
Johns v. Davis's ex'or and others, 729

II. Weight of answer as evidence.

2. It is a rule in equity that the answer of a defendant denying the allegations of the bill must be taken as true unless disproved by two witnesses, or by one witness and circumstances in his support: it is not in the power of a plaintiff to make his case an exception to this rule by stating in his bill that he expects to prove its allegations, and disclaiming a discovery from the defendant.
Thornton v. Gordon &c., 719

3. A bill is filed to enjoin the sale of property conveyed to secure a debt alleged to be usurious, and the plaintiff avers that he expects to make full proof of his allegations, and disclaims all benefit of any discovery from the defendant. The injunction is awarded. But afterwards the defendant files an answer denying the allegation of the bill. And the plaintiff relies on the testimony of a single witness, unsustained by any corroborating circumstances: *held*, the injunction must be dissolved and the bill dismissed.

S. C., 719

III. Answer of codefendant.

4. Answer of assignor of bond is no evidence against assignee codefendant, to prove gaming consideration. See Codefendants No. 1, and

Pettit v. Jennings and others, 676

IV. Setting for hearing after replication.

5. At what time after replication to answer, a chancery suit may be set for hearing. See Hearing of cause No. 1, and

Poling v. Johnson, 255

APPELLATE JURISDICTION.

I. Appellate court.

1. What court may revise decision of auditor disallowing claim against commonwealth. See Banks, and

Commonwealth v. Farmers bank, 737

II. What may be appealed from.

2. What is a final proceeding or order of county court, to which a supersedeas lies. See Supersedeas, and

Farneyhough's ex'ors v. Dickerson &c., 582

3. An appeal lies to the court of appeals from an order of a circuit court overruling a motion to dissolve an injunction which was improvidently granted.

Talley v. Tyree, 500

III. What objections will be disregarded.

4. What objection to decree does not lie for the party appealing. See Codefendants No. 2, and

Chappell v. Robertson, 590

5. When objection that sheriff is no party to bill for satisfaction out of insolvent's estate will not avail in appellate court. See Codefendants No. 2, and S. C., 590

IV. Reversal.

6. A decree being rendered against the sureties of an executor, and the appellate court being of opinion that they are not liable, decree reversed and bill dismissed as to all of them, although only one had appealed. But though a sum, (less than 100 dollars) was erroneously decreed against a succeeding administrator, as to whom the bill ought to have been dismissed, yet he not having appealed, no correction was made by the appellate court in this part of the decree, the appellant being in no wise interested therein.

Arrington v. Cheatham & wife, 492

V. Affirmance.

7. Affirmance of decree enforcing lien of trust deed, with addition thereto of direction for sale of the property. See Mortgages &c. No. 6, and

Williamson's ex'or v. Howard, 39

8. Case in which it was considered in the appellate court, that a guardian, who had been culpably in default in failing to render any account of his receipts or disbursements, was allowed by the court below more for *the board and clothing of his ward than he was entitled to; but as a particular sum payable by the ward had not been charged in the court below, it was

deemed best to consider that as an equivalent for the excess of the charge for board and clothing, and (saving the parties the delay and expense of restating the guardian's account) to terminate the case by affirming the decree.

VI. Jurisdiction in criminal cases.

9. See Criminal jurisdiction and proceedings.

APPLICATION OF PAYMENT.

Right of debtor to apply payment to principal instead of interest. See Payment No. 1, Trust &c. No. 4, and

Miller v. Trevilian & others, 1

APPORTIONMENT.

When rent may be apportioned in equity. See Rent, and

Mason &c. v. Moyers, 606, 7

ARBITRATION.

See Award, and

Boyd's heirs v. Magruder's heirs, 761

ASSETS.

What will be regarded in equity as unadministered. See Legatees &c. No. 6, and *Burnley's representatives v. Duke and others*, 102

ASSIGNMENT.

I. Evidence of consideration.

1. A share of the proceeds of a testator's estate being bequeathed to a feme covert, and her husband having assigned the same, a bill is filed by the assignee, which alleges that the assignment was in consideration of 1500 dollars. The executor and the feme both answer, but the answers do not deny the consideration, or call for proof of it; and the deed of assignment purports on its face to be in consideration of 1500 dollars. It seems, there being no such denial or call for proof, the deed is prima facie evidence of the allegation in the bill. Accord. *Scott & wife &c. v. Gibbon & co. &c.*, 5 Munf. 86.

Browning v. Headley, 342

2. Answer of assignor of bond is no evidence against assignee codefendant, to prove gaming consideration. See Codefendants No. 1, and

Pettit v. Jennings and others, 676

II. Liability and rights of obligor in assigned gaming bond.

3. When obligor in gaming bond is liable to assignee, and for what amount. See Gaming No. 2, and

Pettit v. Jennings and others, 676

4. Decree over for obligor in assigned gaming bond against obligee assignor. See Gaming No. 3, and S. C., 676

III. Rights of wife against husband's assignee.

5. Concerning rights of wife surviving the coverture against husband's assignee of her personalty, see Husband and wife No. 3, 4, 5, 6, 7, and

Browning v. Headley, 340, 41

IV. Assignee of absent debtor.

6. What plea to foreign attachment, by party claiming as assignee of absent debtor, is demurrable. See Foreign attachment, and *Smith v. Hunt &c.* 206

ATTACHMENT.

What plea to foreign attachment, by party claiming as assignee of absent debtor, is demurrable. See Foreign attachment, and *Smith v. Hunt &c.*, 206

ATTORNEY.

1. Construction and effect of power of attorney. See Power of attorney, and *Calwells v. Shields & Somerville*, 305

2. Concerning validity of contract between attorney at law and client, see *Laches No. 3*, and

Hendricks &c. v. Compton's ex'or, 192

AUDITOR.

What claim against commonwealth may be presented to first auditor, and what court may revise his decision disallowing it. See Banks, and

Commonwealth v. Farmers bank, 737

AWARD.

I. What submission is binding and entitles to specific execution of award.

1. An equitable title to land of which an intestate died seized being set up 854 *against his heirs, some of the heirs and the claimants enter into an agreement under seal, referring the matter to arbitration, and the arbitrators award in favour of the claimants, and direct a conveyance by the heirs of their interest in the land to the claimants: *held*, it was competent for the adult heirs who were sui juris to enter into the submission, notwithstanding there were other heirs interested in the subject who were not parties; that the award made in pursuance of such submission is binding on the parties to such submission, according to the terms thereof; and that, upon a bill in equity for the purpose, specific execution may be decreed against such parties to the submission, and a conveyance compelled of such legal title to the land as has descended to them respectively. Accord. *Smith and others v. Smith &c.*, 4 Rand. 95.

Boyd's heirs v. Magruder's heirs, 761

II. Specific execution in part.

2. Such decree will be without prejudice to the right of the plaintiffs to proceed at law for a failure to comply with the submission and award in any other respect.

S. C., 761

BAIL.

What is no ground for letting to bail.

A prisoner having been examined by the county court and remanded for trial for the offence of feloniously passing two counterfeit half eagles, one of them to J. C. and the other to W. M., two indictments are found against him, in one of which he is charged with passing one of the counterfeit coins to

J. C. on the 13th of October 1842, in the other with passing the other coin to W. M. on the same day. Upon a trial of one of the indictments, the jury find the prisoner not guilty: *held*, his acquittal in that case does not entitle him to be let to bail in the other. *Summerfield v. Commonwealth*, 767

BANKS.

When not entitled to credit with commonwealth for premium on specie.

The banks of this commonwealth in which the public moneys were on deposit, paid the interest falling due in January 1840 upon public loans, in specie or its equivalent. Under the proviso to the second section of the act of March 28, 1838, (Sess. Acts of 1838, p. 27, ch. 13,) they claimed credit in account with the commonwealth for the premium which they had to pay to the public creditors for the then difference between specie and the notes of the banks: *held*, 1. That under the acts in 2 R. C. of 1819, ch. 174, § 6, p. 2, and in Sess. Acts of 1838, p. 27, ch. 14, the claim of any bank for such premium may properly be presented to the first auditor. 2. That upon the disallowance of such claim, the bank may file a petition for redress to the court of chancery for Henrico and Richmond, created by the act of March 13, 1841, in Sess. Acts of 1840-41, p. 65, ch. 48. 3. That according to the true construction and effect of the act of December 11, 1839, in Sess. Acts of 1839-40, p. 52, ch. 63, (especially of the first proviso thereto) the claim of any bank for the premium so paid must be disallowed; dissentiente Brooke, J., on the last point.

Commonwealth v. Farmers bank, 737

BOND.

I. Merger of simple contract.

1. Concerning the extinguishment of simple contract of partnership by bond of one partner, see Partnership, and

Ward v. Motter, 536

II. What endorsement is evidence to repel presumption of payment.

2. An endorsement of credit on a bond, made by the obligee within the period that raises the legal presumption of payment, is evidence for him for the purpose of repelling that presumption.

Dabney's ex'ors v. Dabney's adm'r, 622

3. In an action of debt brought in 1837 by an administrator against an executor, upon a bond of the 10th of January 1833, payable the first of January 1834, the defendant offered as a setoff a bond of the plaintiff's intestate to the defendant's testator, dated the 5th of April 1820 and payable on demand, with two endorsements thereon, admitted by the plaintiff to be in the handwriting of the defendant's testator, one of which credited a sum paid in part on the 855 *first of June 1828, and the other credited another payment in part on the 5th of May 1829. The circuit court, at the instance of the plaintiff, instructed the jury, that after the lapse of 16 years from the date of the said bond, the jury might, from this

aided by other circumstances, presume it paid; and, at the instance of the defendant, instructed the jury, that such presumption of payment might be repelled by other circumstances. The defendant relying upon the endorsements aforesaid upon the bond, and there being no proof of the time at which they were made, except that it appeared the defendant's testator died in 1833, the circuit court, at the instance of the plaintiff, instructed the jury, that the said endorsements were not circumstances to be taken into consideration by the jury to repel the presumption: *held*, as the endorsements must have been made within the period of about 13 years from the time the bond was due, the circuit court clearly erred in its last instruction. S. C., 622

CASE.

Concerning declaration and proof in action on the case by ferry owner for disturbance of his franchise, see *Ferry No. 3, 4*, and

Patrick v. Ruffners, 209

CHALLENGES.

1. When no right of peremptory challenge exists. See *Penitentiary convict No. 2*, and *Brooks v. Commonwealth*, 845

2. Who shall be deemed impartial jurors for the trial of felony. See *Jurors No. 3*, and

M'Cune v. Commonwealth, 771

CHANCERY.

See *Equitable jurisdiction and Practice in suits in equity*.

CHATTELS.

I. Registry of trust deed.

1. What registry of trust deed conveying personal property to secure debts is invalid. See *Registry*, and

Cocke v. Haxall's ex'x, 470

II. Discharge of trust deed.

2. A slave conveyed by a deed of trust is sold, in the absence of the trustee, by the debtor with the concurrence of the trust creditor, to another creditor not secured by the deed, for a consideration compounded of the balance remaining due upon the trust, other debts claimed by the trust creditor, and a debt due to the purchasing creditor: *held*, that by this arrangement the trust deed was discharged, and the title of the trustee, so far as concerns the personal property embraced in the deed, divested; for in a conveyance of chattels personal the law disregards mere formalities of the instrument, and the payment of the debt secured thereupon completely extinguishes the incumbrance.

Tavener v. Robinson, 280

CODEFENDANTS.

I. Answer of one no evidence against another.

1. It is a general rule, that the answer of one defendant in chancery is not evidence against his codefendant. From this rule there is no exception of the answer of an assignor; not even though the bond assigned be alleged to have been given on a

gaming consideration. The fact of its being on such consideration cannot be established against a defendant who is the assignee, by the answer of his codefendant the obligee and assignor. Accord. *Hoomes v. Smock*, 1 Wash. 389; *Dade's adm'r v. Madison*, 5 Leigh 401.

Pettit v. Jennings &c.,

676

II. Decree against one in favour of another.

2. A party having covenanted to pay a sum of money in trust for the benefit of the covenantee and his wife and children, the covenantee afterwards takes the oath of insolvency, and transfers to the sheriff, for the benefit of the creditor, his interest under the covenant. Upon a bill by the creditor against the covenantor, the covenantee, and the wife and children of the latter, (the sheriff not being made a party), the court decrees that the covenantor pay to a trustee, appointed by consent of the other defendants and the plaintiff, the money secured by the covenant, and directs the trustee to 856 invest the *same, and out of the interest pay the plaintiff the amount of his debt. From this decree the covenantor alone appeals: *held*, 1. The objection that the sheriff was no party to the suit, not having been taken in the court below, cannot be made a ground in the appellate court for reversing the decree. 2. The decree was properly rendered in favour of the codefendants of the covenantor, as well as in favour of the plaintiff. 3. The appellant, being bound by his covenant to pay the money has no interest in the question how it shall be applied, and therefore is not entitled to make the objection that the fund secured by the covenant was not liable to the creditor of the covenantee.

Chappell v. Robertson,

590

COMMONWEALTH.

1. When the banks are entitled to credit with the commonwealth for premium on specie paid to public creditors. See *Banks*, and *Commonwealth v. Farmers bank*, 737

2. Relinquishment of commonwealth's title to land settled thirty years. See *Patent No. 1, 2*, and

Tichanal v. Roe,

288

CONFESSION OF JUDGMENT.

What is the record of a judgment confessed, and how far evidence aliunde is admissible to shew the power and action of attorney confessing the same. See *Judgment No. 1*, and

Calwells v. Shields & Somerville,

305

CONSTABLES.

Effect of constable's receipt as evidence.

In an action against a constable and the sureties in his official bond, for failing to pay over debts entrusted to the constable and received by him from the debtors, the receipt of the constable for the debts, signed in his official character, is, according to the true construction of the act passed March 8, 1826, concerning constables and their securities, prima facie evidence, as well against the sureties as against the constable, of the

receipt of the money; provided six months have elapsed between the date of the receipt and the commencement of the action. Per Allen and Baldwin, J. But the fact that the receipt of the constable was signed in his official character, must appear in some way on the face of the paper itself; if it do not, the party claiming under the receipt cannot obtain the benefit of the act by oral testimony of the character in which the receipt was signed. Per totam curiam.

Smith &c. v. The governor, 229

CONTINUANCE.

What continuance of criminal cause is no ground to reverse judgment of conviction. See Penitentiary convict No. 1, and

Brooks v. Commonwealth, 845

CONTRACT.

I. Construction.

1. What grantor has no right of redemption. See Mortgages &c. No. 2, and

Floyd v. Harrison &c., 161

2. What marriage settlement makes the husband a mere trustee for the wife, and precludes all individual interest in her personality. See Husband and wife No. 1, and Matthews & co. v. Woodson & others, 601

II. Validity.

3. What submission is binding and entitles to specific execution of the award. See Award No. 1, and

Boyd's heirs v. Magruder's heirs, 761

4. What sale of chattels is fraudulent as to creditors of vendor. See Fraud No. 2, and

Tavener v. Robinson, 280

5. What vendee of land, after conveyance by vendor delivered as escrow, is a freeholder qualified to serve as a grand juror. See Freehold, and

Commonwealth v. Burcher, 826

6. How far husband's assignment of wife's personality is valid against the wife surviving the coverture. See Husband and wife No. 3, 4, 5, 6, 7, and

Browning v. Headley, 340, 341

7. Effect of deed by one joint tenant, conveying by metes and bounds a portion of the land held jointly. See Joint tenants, and

Robinett v. Preston's heirs, 273

8. Concerning validity of contract between attorney and client, see Laches No. 3, and

Hendricks &c. v. Compton's ex'or, 192

9. Whether a power of sale given to mortgagee by the deed of mortgage is valid. See Mortgages &c. No. 3, and

Floyd v. Harrison &c., 162

857 *10. What purchase by agent from principal will be set aside. See Principal and agent No. 2, 3, and

Buckles v. Lafferty's legatees, 292

11. When decree for specific execution, and what decree, will be rendered against heirs of vendee. See Specific execution No. 1, 2, 3, and

Wade's heirs v. Greenwood and wife, 474, 5

III. Extinguishment.

12. Concerning extinguishment of legal remedy on joint contract, see Joint obligors No. 1, Partnership, and

Ward v. Motter, 536

CONTRIBUTION.

Concerning contribution, after death of grantor, between realty and personalty conveyed in trust for payment of debts, see Mortgages &c. No. 8, and

Perrin &c. v. Lomax &c., 133

CONVERSION.

Contribution between realty and personalty conveyed in trust for payment of debts, where conversion takes place after grantor's death. See Mortgages &c. No. 8, and

Perrin &c. v. Lomax &c., 133

CONVEYANCE.

See Contract—Deed—and Mortgages and trusts.

CONVICT.

Proceedings against convict received into penitentiary under second or third sentence. See Penitentiary convict, and

Brooks v. Commonwealth, 845

CORPORATION.

I. Effect of extinction of corporation plaintiff; and what judgment estops from alleging previous extinction.

1. If a corporation become extinct by the expiration of the term of its corporate existence, pending a suit at law for a corporate demand, and that fact be brought regularly before the court in which the suit is pending, the action must terminate. It is equally clear that if, after judgment in favour of a corporation, the corporation becomes extinct by the expiration of the term of existence granted by the charter, no execution on such judgment can regularly be sued out in the name of the corporation, and if one be sued out, it is liable to be quashed, on shewing the fact of the extinction of the corporation before the emanation of the execution. On the other hand, if an original judgment be rendered in favour of a corporation, as it could not be regularly rendered unless the existence of the corporation continued, the necessary intentment from the rendition of it is, that the continued existence of the corporation was either proved or admitted; and if execution be sued out on the judgment, the defendant, being by this intentment estopped to deny the existence at the time of the judgment, would not, on a motion to quash the execution, be admitted to controvert this intentment, and proof on such motion of the extinction of the corporation before judgment, would be inadmissible or unavailing. Per Stanard, J.

May &c. v. State bank of N. Carolina, 56

II. What judgment does not estop from alleging previous extinction.

2. In an action by a corporation, a special verdict was rendered, which found, that by the act creating the corporation, it was to continue until the 1st of January 1830, and

that by a subsequent act the charter was extended until the first of January 1835. Other facts were found in relation to the merits of the claim, upon which the circuit court, on the 24th of October 1831, gave judgment for the defendants. An assignment of the claim was made by the corporation on the 6th of December 1831. Whereupon, to wit in June 1832, a supersedeas was obtained to the judgment, upon a petition in the name of the corporation. In April 1837, the court of appeals reversed the judgment, and entered judgment for the plaintiffs; and in May 1837, judgment was entered in the circuit court in pursuance thereof. Execution being then issued, one of the defendants gave a forthcoming bond with surety, which was forfeited. Upon this bond a motion was made for award of execution in the name of the corporation, and the defendants produced the acts before mentioned, to shew 858 that the charter expired on the 1st of January 1835; and this *prima facie* evidence of the extinction of the corporation was not met by any countervailing proof on the other side; but it was insisted that the judgment of the appellate court imported that the corporation was in existence at that time, and estopped the defendants from shewing the contrary: *held*, that according to *The Bank of Alexandria v. Patton* and others, 1 Rob. 499, had the attempt been made, when this case was in the appellate court, to arrest further proceedings therein on the ground that the charter had expired, it would have been fruitless; and as the judgment of the appellate court could not have been prevented by shewing that the charter had expired, so there cannot be a legal intendment of the existence of the corporation, from the fact of the judgment being rendered. The forthcoming bond and the execution under which it was taken were therefore quashed, and the assignee left to proceed in equity to obtain the benefit of the judgment: *dissentiente Baldwin, J.*

May &c. v. State bank of N. Carolina, 56

COSTS.

1. When dismissal of bill by legatees to recover legacies will be without costs. See *Legatees &c. No. 6*, and

Burnley's representatives v. Duke and others, 102, 3

2. When vendor obtaining specific execution will be decreed to pay costs. See *Specific execution No. 1*, and

Wade's heirs v. Greenwood & wife, 474

3. Costs to party substantially prevailing in appellate court. See *Mortgages &c. No. 6*, and

Williamson's ex'or v. Howard, 39

COUNTY AND CORPORATION COURTS.

1. What grants of administration, original and de bonis non, are valid. See *Legatees &c. No. 6*, and

Burnley's representatives v. Duke and others, 102

2. What is a final proceeding or order of county court. See *Supersedeas*, and *Farneyhough's ex'ors v. Dickerson &c., 582*

3. Under the act of March 15, 1832, (Acts of 1831-2, ch. 22, § 9,) a free negro or mulatto, for simple larceny to the value of 20 dollars or less, must be tried by a justice of the peace of the county or corporation, and a court of oyer and terminer has no jurisdiction of the case.

Cropper v. Commonwealth, 842

4. A prisoner confined in the penitentiary under the judgment of a court of oyer and terminer, for an offence which such court had no jurisdiction to try, may be discharged by the general court upon a writ of *habeas corpus*. S. C., 842

COVERTURE.

See *Husband and wife*.

CRIMINAL JURISDICTION AND PROCEEDINGS.

I. Grand jury.

1. Who is a freeholder qualified to serve as a grand juror. See *Freehold*, and *Commonwealth v. Burcher, 826*

II. Bail.

2. What is no ground for admitting prisoner to bail. See *Bail*, and *Summerfield v. Commonwealth, 767*

III. Penitentiary convict.

3. Proceedings against convict received into penitentiary under second or third sentence. See *Penitentiary convict*, and *Brooks v. Commonwealth, 845*

IV. Oyer and terminer.

4. Of what offence court of oyer and terminer has no jurisdiction, and how prisoner in penitentiary under illegal sentence of such court may be discharged. See *County and corporation courts No. 3, 4*, and *Cropper v. Commonwealth, 842*

V. Indictment and process.

5. What indictment for perjury is insufficient. See *Perjury*, and *Thomas v. Commonwealth, 795*

6. Process on indictment for playing at unlawful game. See *Gaming No. 5*, and *Wright v. Commonwealth, 800*

VI. Petit jury.

7. Who shall be deemed impartial jurors for the trial of felony. See *Jurors No. 1*, and

M'Cune v. Commonwealth, 771

859 *VII. Competency and sufficiency of evidence.

8. What witness for commonwealth on prosecution for perjury has no disqualifying interest. See *Witness No. 2*, and *Commonwealth v. Hart, 819*

9. On trial for forgery, party whose signature is alleged to be forged need not be called as a witness. See *Forgery No. 2*, and *Foulkes v. Commonwealth, 836*

10. When secondary evidence of contents of forged instrument is admissible. See *Forgery No. 3*, and S. C., 836

11. What is not a writing in respect whereof forgery can be committed. See *Forgery No. 1*, and S. C., 837

12. Construction of act of March 26, 1842, concerning recoveries thereafter had for violations of the gaming laws. See *Gaming No. 4*, and

Pitman v. Commonwealth, 800

13. What trespass on land is no misdemeanor under the statute of February 14, 1823. See *Trespass*, and

Campbell &c. v. Commonwealth, 791

14. What verdict of conviction will not be set aside by appellate court as contrary to the evidence. See *New trial*, and

Parsons v. Commonwealth, 772

DECLARATION.

What declaration in case by ferry owner for disturbance of his franchise is sufficient on general demurrer. See *Ferry No. 3*, and *Patrick v. Ruffners*, 209

DEED.

1. How far statement in deed of assignment is evidence of the consideration. See *Assignment No. 1*, and

Browning v. Headley, 342

2. What vendee of land, after conveyance by vendor delivered as escrow, is a freeholder qualified to serve as a grand juror. See *Freehold*, and

Commonwealth v. Burcher, 826

3. Effect of deed by one joint tenant, conveying by metes and bounds a portion of the land held jointly. See *Joint tenants*, and *Robinet v. Preston's heirs*, 273

4. Relief in equity against estoppel at law by deed acknowledging payment. See *Estoppel No. 4*, and

Radcliff &c. v. High, 271

5. Relief in equity where deed conveying land has been accidentally destroyed. See *Specific execution No. 1*, and

Wade's heirs v. Greenwood & wife, 474

6. See *Mortgages and trusts*.

DEPOSITIONS.

Time allowed parties in chancery for taking depositions. See *Hearing of cause No. 1*, and

Poling v. Johnson, 255

DESCENTS.

Concerning inheritance of infant's land derived by descent from his mother, see *Writ of right No. 2*, and

Walkers v. Boaz &c., 485

DISTRIBUTEES AND DISTRIBUTION.

See *Legatees and distributees*.

DIVORCE.

Effect of dissolution of marriage on right to choses in action of the wife. See *Huband and wife No. 5*, and

Browning v. Headley, 341

DOWER.

I. When precluded by sale under vendor's lien.

1. The vendor of land conveys the same to the vendee in fee simple, and receives part of the purchase money, but no security for the residue. On a bill in equity against the

vendee to enforce the implied equitable lien of the vendor, a decree is made for the sale of the land, and the proceeds are more than sufficient to satisfy what remains due to the vendor. The surplus is claimed by creditors of the vendee who have obtained judgments against him, and taken him in execution, from which he escaped. With the vendee's assent, a decree is made in favour of those creditors for the surplus. Afterwards, the vendee dying, a bill is filed by his widow against those in possession of the land, to wit, one to whom the purchaser at the sale under the decree had aliened the whole, and two others to whom that one had aliened a part, claiming to be endowed: *held* by two judges (Stanard and Baldwin) that the land *in the hands of the purchasers is not chargeable to the widow, and that her bill must be dismissed; *dissentiente Allen, J.*, whose opinion was, that the widow was entitled to dower in the surplus which remained after satisfying the vendor's lien, and that the amount to which she was entitled constituted a charge upon the land in the hands of the purchaser at the sale under the decree, and of those claiming under him.

Wilson &c. v. Davisson, 384

II. Dower in insured property.

2. Lien of the Mutual Assurance society on dower interest in property insured, and personal responsibility of dowers. See *Mutual Assurance society No. 2*, and *Shirley v. Mut. Ass. society*, 705

III. Right to dower in woodland.

3. A husband dies seized of land incapable of cultivation, and no otherwise productive or valuable than by working the timber and making sale thereof when converted into shingles. It appears that previous to as well as after the husband's death, the timber was worked, and large profits derived from the sale of shingles. Parties coming into possession after the husband's death, under a deed of trust made by him in his lifetime, admit his widow's right as doweress to one third of the timber worked, and for several years pay her one third of the proceeds of the same. Payment is afterwards stopped: *held*, those in possession of the land after the husband's death shall account to the widow or her administrator for one third of the profits received by them during her life, subject to credit for the payments made by them to the widow.

Macaulay's ex'or v. Dismal swamp land co., 507

IV. Right to recover profits from husband's death.

4. Where a husband makes a deed of trust conveying land with power to the trustees to sell the same for payment of debts, and they allow the husband to remain in possession during his life, and make no sale under the deed until after his death, the husband is to be considered as having died seized of the land subject to the deed of trust, so that his widow, if she did not join in the deed, and is entitled to dower in the land, may recover

rents and profits from the husband's death in like manner as if the deed had not been made. In case the widow die before recovering such rents and profits, the same may be recovered to the period of her death by her administrator.

Macaulay's ex'or *v.* Dismal swamp land co., 507

V. Mode of enjoying dower in proceeds of land sold.

5. The principle laid down in *Herbert and others v. Wren and others*, 7 Cranch 380, that where land in which there is a right of dower is sold in a suit to which the tenant in dower is a party, the other parties interested "have a right to insist that instead of a sum in gross, one third of the purchase money shall be set apart, and the interest thereof paid annually to the tenant in dower during her life," approved.

Wilson &c. v. Davison, 384

VI. Mode of calculating present value of dower interest.

6. The table of longevity referred to, which was made by professor Wigglesworth of Cambridge university, and published in the *Transactions of the American Academy*, vol. 2, p. 133, and also republished in the *American Jurist*, vol. 11, p. 492, and in 2 Rob. Pract. p. 381. When the present value of a dower interest is to be calculated, the probable duration of the life by which it is limited and the sum derived from it annually, are first to be ascertained, and then the calculation is to be made, not by discounting simple interest, but by discounting compound interest. For the present value of an annuity is that sum which, being improved at compound interest, will be sufficient to pay the annuity.

Wilson &c. v. Davison, 384, 5

VII. What laches will preclude right to account.

7. Under a deed of trust of land made by a husband, the trustees after his death sell the land, and the purchaser conveys it away to others. A bill is afterwards filed by the widow against the trustees, the purchaser's executor, and those in possession, claiming dower in the land, and an account of profits;

pending which suit the widow dies. 861 The bill *upon its face shews a delay, without excuse, of more than 20 years in calling the trustees and the purchaser's executor to an account. The surviving trustee swears positively that he has paid over to the widow every dollar for which he and his cotrustee were accountable, and exhibits vouchers in proof of his allegation. The widow, by her own shewing in the bill, prosecuted to recovery a suit against the executor of the purchaser, for her share of the profits received by him; and the only pretext for a further demand, and that without a shadow of proof, is that she did not recover enough: *held*, the plaintiff is entitled to no account as regards the trustees and the purchaser's executor, and the bill was properly dismissed as to them.

Macaulay's ex'or *v.* Dismal swamp land co., 507

EJECTMENT.

What ejectment on demise of insolvent debtor cannot be sustained. See *Insolvent No. 3*, and

Syrus &c. v. Allison, 200

ELEGIT.

Lien of elegit on land conveyed in trust, and rights of elegit creditor against purchaser under the deed.

1. Under a deed of trust conveying land with general warranty to secure debts, the land is sold for more than enough to pay those debts. The purchaser institutes a proceeding against the grantor for unlawful detainer, and obtains a judgment against him. And then the purchaser insists, 1. that he was not bound to pay his purchase money (and therefore cannot be charged with interest on the same) until he obtained possession; and 2. that he may retain part of the surplus of the purchase money to pay the costs recovered by the judgment on his complaint for unlawful detainer. The claims of the purchaser are objected to by a creditor of the grantor, who obtained a decree against him after the deed of trust, and sued out an elegit within the year: *held* (per totam curiam) the claims so made by the purchaser cannot be allowed.—The purchaser further claims to apply other parts of the surplus to extinguish a dower right in the property existing at the time of the warranty, and to pay taxes assessed on the property before the sale was made: *held* by two judges (dissentiente Stanard, J.) these claims also must be disallowed.

Findlay v. Toncray, 374

2. The case of *Foreman v. Loyd and others*, 2 Leigh 284, recognized as a binding authority. S. C., 374

EMANCIPATION.

The decision in *Maria and others v. Surbaugh*, 2 Rand. 228, still adhered to.

Ellis v. Jenny and others, 597

ENTRY.

1. What is not a forcible entry. See *Forcible entry*, and

Pauley v. Chapman, 235

2. Invalidity of entry or location on land settled thirty years, on which taxes have been paid within that time. See *Patent No. 1, 2*, and

Tichanal v. Roe, 288

EQUITABLE JURISDICTION.

1. To relieve against estoppel at law. See *Estoppel No. 4*, and

Radcliff &c. v. High, 271

2. To relieve reversioner of slave removed pending injunction. See *Slaves No. 2*, and *Johns v. Davis's ex'or &c.*, 729

3. To relieve cestui que trust of bond secured by trust deed. See *Trusts &c. No. 4*, and

Miller v. Trevilian &c., 1. 2

4. To relieve where a deed conveying land has been accidentally destroyed. See *Specific execution No. 1*, and

Wade's heirs v. Greenwood & wife, 474

5. When rent may be apportioned in equity. See Rent, and

Mason &c. v. Moyers, 606, 7

6. What submission is binding and entitles to specific execution of the award. See Award No. 1, and

Boyd's heirs v. Magruder's heirs, 761

7. Concerning suit by distributee's donee of a slave against executor, to injoin sale under execution against distributee for his purchases from executor, and to set off distributable share against the judgment, see Legatees &c. No. 8, and

Hickerson's adm'r v. Helm, 628

*8. When mill owner cannot be in-joined from rebuilding dam. See Mills No. 2, and

Talley v. Tyree, 500

9. Denial of relief in equity against judgment, where the party neglected to make defence at law. See Laches No. 3, and Hendricks &c. v. Compton's ex'or, 192

EQUITY OF REDEMPTION.

1. What grantor has no right of redemption. See Mortgages &c. No. 2, and Floyd v. Harrison &c., 161

2. Whether mortgagee may sell under power given by the mortgage deed. See Mortgages &c. No. 3, and S. C., 162

ESCROW.

What vendee of land, after conveyance by vendor delivered as escrow, is a freeholder qualified to serve as a grand juror. See Freehold, and

Commonwealth v. Burcher, 826

ESTOPPEL.

I. By judgment.

1. What judgment recovered by a corporation will estop from alleging previous extinction of such corporation. See Corporation, and

May &c. v. State bank of N. Carolina, 56

2. How far evidence aliunde is admissible to shew the power and action of attorney in fact by whom judgment was confessed. See Judgment No. 1, and

Calwells v. Shields & Somerville, 305

3. What defence of a former recovery for the same cause of action is not sustained. See Former recovery, and

Weaver v. Vowles, 438

II. Relief in equity against estoppel at law.

4. A deed conveying land contains an acknowledgment on its face that the purchase money has been paid, though in truth no payment thereof has been made. In an action of assumpsit for the purchase money, the defendant, by way of estoppel, relies upon the acknowledgment in the deed; and the plaintiffs, believing that the estoppel will prevent their recovery at law, dismiss their action, and file a bill in equity against the purchaser: *held*, they are entitled to the aid of a court of equity. Accord. Wilson's curator v. Shelton's adm'r, 9 Leigh 342.

Radcliff &c. v. High, 271

EVIDENCE.

I. Competency.

1. In an action brought by keepers of a boarding school against a guardian, for board, tuition, and other necessities furnished to the ward, the administrator of a previous guardian is a competent witness for the plaintiffs.

Young v. Warne &c., 420

2. What witness for commonwealth on prosecution for perjury has no disqualifying interest. See Witness No. 2, and

Commonwealth v. Hart, 819

3. Party whose signature is alleged to be forged need not be called as a witness for the prosecution. See Forgery No. 2, and

Foulkes v. Commonwealth, 836

4. When secondary evidence is admissible to prove contents of forged instrument. See Forgery No. 3, and S. C., 836, 7

5. The general rule, that the admission of one person cannot be given in evidence against another, adverted to by Baldwin, J. Pettit v. Jennings &c., 676

6. Answer of assignor no evidence against assignee codefendant to prove gaming consideration of bond. See Codefendants No. 1, and S. C., 676

7. How far evidence aliunde is admissible to shew the power and action of attorney in fact by whom judgment was confessed. See Judgment No. 1, and

Calwells v. Shields & Somerville, 305

8. What endorsement on bond is evidence to repel presumption of payment. See Bond No. 2, 3, and

Dabney's ex'ors v. Dabney's adm'r, 622

9. What evidence is competent for tenant in writ of right to disprove constructive seisin of demandant. See Writ of right No. 3, and

Dawson v. Watkins, 259

10. What receipt of constable is evidence against him and his sureties of the collection of the debt. See Constables, and

Smith &c. v. The governor, 229

II. Effect and sufficiency.

11. What is prima facie proof of the consideration of assignment. See Assignment No. 1, and

Browning v. Headley, 342

12 Estoppel at law by deed acknowledging payment. See Estoppel No. 4, and Radcliff &c. v. High, 271

13. What judgment recovered by corporation will estop from alleging that such corporation had previously become extinct. See Corporation, and

May &c. v. State bank of N. Carolina, 56

14. What defence of a former recovery for the same cause of action is not sustained. See Former recovery, and

Weaver v. Vowles, 438

15. Weight and effect of inquisition on application to establish ferry. See Ferry No. 1, and

Muire &c. v. Smith, 458

16. What proof will maintain action by ferry owner for disturbance of his franchise. See *Ferry No. 4*, and

Patrick v. Ruffners, 209

17. Effect of return on *fi. fa.* as evidence in action against sheriff. See *Fieri facias No. 1*, and

Lathrop v. Lumpkin &c., 49

18. Effect of constable's receipt as evidence of the collection of the claim. See *Constables*, and

Smith &c. v. The governor, 229

19. What facts are insufficient to prove a seisin in deed by *pedis positio*. See *Writ of right No. 4*, and

Dawson v. Watkins, 259

20. Concerning the weight and effect of an answer in chancery as evidence for respondent, see *Answer No. 2, 3*, and

Thornton v. Gordon &c., 719

21. What conviction of murder in the second degree is warranted by the evidence.

Parsons v. Commonwealth, 772, 777

EXECUTION.

See *Fieri facias*.

EXECUTORS AND ADMINISTRATORS.

I. Commissions and other charges.

1. As a general rule, an executor is not entitled to commission on the amount of debt due from him to the testator, and credited to the estate in the executorial account. Accord. *Carter's ex'ors v. Cutting and wife*, 5 *Munf.* 227.

Farneyhough's ex'ors v. Dickerson &c., 582

2. The commission of an executor should not be on the amount of his disbursements. He ought generally to be allowed a commission on the amount of the credits in his account, except on a credit for a debt due from him to the testator. Though some of the credits are for bonds due the estate, that were passed over by the executor to legatees, and voluntarily received by the latter, commissions will nevertheless be allowed the executor on the amount of such bonds.

S. C., 582

3. An item of \$21, paid by executors for services rendered by a clerk, being allowed by commissioners, the same was excepted to by legatees, upon the ground that what the clerk did ought to have been done by the executors, and therefore that he should be paid out of their commissions. The record contained no evidence on the subject, except that the date of the item was a few days after the date of a large credit for sales at public auction, which furnished some ground for the inference that the clerk was employed during those sales: *held*, the court of probate did not err in overruling the exception.

S. C., 582

II. Suit by ex'or against legatee.

4. When overpaid legatee cannot be compelled by executor to refund. See *Legatees &c. No. 11, 12*, and

Davis &c. v. Newman, 664

III. Suits by legatees and distributees against ex'or.

5. What purchase by executor's agent at his own sale of land will be set aside at the suit of legatees, and what decree will be rendered in their favour. See *Principal and agent No. 3*, and

Buckles v. Lafferty's legatees, 292

6. What grants of administration are valid; what payments by representative of deceased adm'r to succeeding adm'r are good against legatees; for what assets succeeding adm'r and his sureties are liable to legatees. See *Legatees &c. No. 6*, and

Burnley's representatives v. Duke & others, 102

7. Setoff by distributee of his share against judgment for purchases at executor's sale. See *Legatees &c. No. 7*, and

Hickerson's adm'r v. Helm, 628

8. Injunction by distributee's donee of a slave to sale under execution for distributee's debt to the estate, and setoff of distributable share against the judgment. See *Legatees &c. No. 8*, and

S. C., 628

9. Measure of credit to distributee for slave sold under execution on judgment for his purchases at executor's sale. See *Legatees &c. No. 8*, and

S. C., 628, 9

*10. Measure of widow's rights where slaves of husband liable to her dower have been sold by executor. See *Widow No. 3*, and

S. C., 629

11. What legacy is a charge upon the executor as legatee, and does not render his sureties responsible. See *Will No. 4*, and

Arrington v. Cheatham & wife, 492

12. When executor guardian de facto shall not be charged with interest on ward's legacy. See *Guardian and ward No. 2*, and

S. C., 492

13. Decree on guardianship account only, in suit by ward distributee against guardian administrator. See *Guardian and ward No. 3*, and

Williamson's ex'or v. Howard, 39

14. Supersedeas lies for legatee exceptor to order of county court admitting executor's account to record. See *Supersedeas*, and

Farneyhough's ex'ors v. Dickerson &c., 582

EXTINGUISHMENT.

How legal remedy on joint contract may be extinguished. See *Joint obligors No. 1*, *Partnership*, and

Ward v. Motter, 536

FEME COVERT.

See *Husband and wife*.

FERRY.

I. Effect of inquisition on application to establish ferry.

1. Construction of the act in 2 R. C. 1819, p. 261, ch. 238, which provides for the impaneling of a jury to say whether, in their opinion, public convenience will result from the establishment of a proposed ferry, and for the return of this opinion to the county court, "who thereupon, as well as upon any other evidence that may be offered, shall have full

power to establish such ferry." The finding of the jury in which a case is merely evidence, and the weight of it, under all the circumstances, a matter for the discretion of the court.

Muire &c. v. Smith, 458

II. What is no ground for quashing such inquisition.

2. Upon the return of the certificate of a jury, that, in their opinion, public convenience would result from the establishment of a proposed ferry, evidence is introduced, 1. Of one of the jurors, who proved, that before he was sworn, he had made up an opinion that the ferry would be a public convenience; that he thought it probable he might have expressed this opinion, though he did not recollect to have done so; that he had, before he was sworn, signed a petition for the said ferry; and that, at the time he was sworn, he was uninfluenced by the said opinion, and prepared to render an impartial verdict. 2. Of another juror, who proved the like facts with regard to himself, and also that he had expressed his opinion. 3. Of another juror, who proved the same facts with regard to himself that the second had proved with regard to himself, and also that he had circulated a petition for the ferry. Upon this evidence the county court quashed the finding of the jury, and the circuit court reversed the judgment of the county court: *held*, the judgment of the circuit court is right.

Muire &c. v. Smith, 458

III. Declaration in case for disturbance of franchise.

3. A declaration in case by the owner of a ferry for the disturbance of his franchise, contains two counts, each of which is demurred to. The first count sets forth, in substance, that the plaintiff was possessed of a legally established ferry; that there were good and convenient roads, ways and landings for the use of the same; and that there was, and of right ought to have been, a free and uninterrupted passage for the water flowing in and down the river, so as not to affect or injure the landings, ways or roads at the ferry: and it charges that the defendants wrongfully placed obstructions in the river near the ferry and landings, by which the current of the stream was checked and diverted, and thrown from and upon the landings (in modes particularly described); thereby occasioning the plaintiff great labour and expense, destroying or injuring the roads and landings, rendering the embarkation and debarkation difficult, and preventing the transportation of persons and property. The second count is the same, except that, instead of alleging a possession of the ferry by 865 the plaintiff, it avers his right to the reversion thereof, expectant upon the term of his tenant, in whom the possession, use and enjoyment are charged to be, and that the grievance complained of is to the prejudice of the plaintiff's reversionary estate: *held*, both counts are good on general demurrer: dissentiente Allen, J., who was of opinion as to the second count, that it not being for the accruing damages consequent

upon the obstruction, but by the reversioner for an injury to the inheritance, it could not be sustained without an averment in it of possession of the landings, or of some right to their use.

Patrick v. Ruffners, 209

IV. What proof will maintain such action.

4. In an action by the grantee of a ferry against a wrongdoer who disturbs the enjoyment of his franchise, the grant of the franchise from the public, the use of the ferry with its appurtenant landings and outlets, and the fact of such disturbance, are all that need be established. Nor is it material whether the disturbance is by invading the plaintiff's right to the exclusive transportation and tolls, or by obstructing or impairing his navigation, or by destroying or injuring the landings and outlets. Per Baldwin, J.

Patrick v. Ruffners, 209

FIERI FACIAS.

I. Effect of return as evidence in action against sheriff.

1. In debt on a sheriff's official bond, two breaches are assigned: 1. that the sheriff had levied an execution of the relator against an administrator, on slaves of the decedent, but negligently suffered them to be eligned and carried off: 2. that the sheriff might have levied the execution on such slaves, but neglected so to do. At the trial, the plaintiff, to shew the issuing of the execution, and the reception and disposition thereof by the sheriff, was under the necessity of giving in evidence not only the execution with the return originally made thereon, but also an amendment of that return, made by leave of court. This amendment had been made not by obliterating the first return and substituting another in its place, but in a more proper manner by making an addition to the first return; and the return thus constituted of that originally made, and of what was afterwards added, was upon its face contradictory in itself: *held*, that the defendant had a right to rely upon said return as prima facie evidence in his favour; that the plaintiff, on the other hand, was at liberty to disprove any part of it, as well by intrinsic evidence furnished by the return itself, as by evidence aliunde; that it was competent for the defendant in like manner to sustain any part of the return; and it was the province of the jury to decide, upon the whole evidence furnished by the return or otherwise, whether or not the execution was levied by the sheriff upon the property of the intestate in the hands of the administrator, and the same thereafter eligned and lost by the negligence of the sheriff; or whether or not the sheriff might have levied upon such property in the hands of the administrator, but neglected so to do.

Lathrop v. Lumpkin &c., 49

II. Effect of sale under second of two f. faas.

2. Whilst on the one hand, where an officer holding two executions sells under the second, the title of the purchaser is good against

the plaintiff in the first, and the remedy of the latter is against the officer, so on the other hand the purchaser at such sale cannot invoke the lien of the first execution, in aid of a title acquired at a sale made under the second. Therefore, where a slave was levied upon under a *fi. fa.* delivered to a constable before any conveyance of the slave by the debtor, and other executions issued after such conveyance, under which (and not under the first *fi. fa.*) the evidence tended to prove that the slave was sold, it was *held*, in an action brought by the grantee in the conveyance against the purchaser at the sale, that the title of the purchaser must be referred to the process under which the sale was made. *Accord. Eckhols v. Graham & others*, 1 Call 492.

M'Key &c. v. Garth, 33

III. Action against sheriff purchasing at his own sale under *fi. fa.*

3. The owner of a slave sells her, but remains in possession. The slave is afterwards levied upon under execution, 866 *and the vendee forbidding the sheriff to sell, the creditor gives an indemnifying bond with security, and then the slave is sold by the sheriff, and the sheriff becomes himself the purchaser, though at the time in the name of another. In an action of detinue by the first vendee against the sheriff so purchasing, *held*, the question whether a sheriff can acquire title by a purchase at his own sale does not arise, but the proper enquiry is whether the title of the plaintiff is valid against the execution creditor.

Tavener v. Robinson, 280

IV. Injunction to sale of slave under execution.

4. Injunction by distributee's donee of a sale to sale under execution for distributee's debt to the estate. See *Legatees &c. No. 8*, and

Hickerson's adm'r v. Helm, 628

FINALITY.

Of proceeding or order of county court. See *Supersedeas*, and

Farneyhough's ex'ors v. Dickerson &c., 582

FORCIBLE ENTRY.

Case in which, on a complaint by a party under the statute in 1 R. C. of 1819, ch. 115, p. 455, that another had forcibly turned him out of possession of a tenement, the jury returned a special verdict finding the facts, and upon those facts the court considered that the entry was not "with strong hand or with multitude of people," and rendered judgment that the complaint be dismissed.

Pauley v. Chapman, 235

FOREIGN ATTACHMENT.

When assignee's plea that the debtor was resident is demurrable.

In a suit in equity in the circuit court of Russell, against an absent debtor having lands within the commonwealth, after a valuation of the lands had been made and returned, two persons filed petitions, setting forth that they had purchased the lands

from the debtor and received conveyances of the same, and praying to be made defendants. The court ordered the plaintiff to amend his bill and make them parties, which was accordingly done. Whereupon they filed a plea alleging, that at the time the subpoena was sued out, the debtor was a resident of the county of Russell and state of Virginia, subject to the process of the common law courts of said county, and possessed of personalty sufficient to discharge the debts due by him to the plaintiff. To this plea the plaintiff demurred: *held*, the demurrers should be sustained: for the petition is only a part of the case for the purpose of having the petitioners made defendants; and so far as the record discloses, they may have been mere strangers, having no right to intermeddle. Whether the debtor was nonresident or not, was a question foreign to them, until by their answers they had shewn they had an interest in the controversy.

Smith v. Hunt &c., 206

FORGERY.

I. Of what writing forgery cannot be committed.

1. Indictment for forging, with intent to defraud W. & W., a letter in the following terms: "Nottaway, April 24, 1841. Gent. Agreeable to mr. Wm. I. Watkins' request, I take pleasure in making you acquainted with his name, and would say to you that he is very extensively engaged in the manufacturing of tobacco, and has made some large purchases, and says that he wishes to patronize you (on my recommendation). You may be assured that whatever he engages to do he will certainly perform. He says it is probable he will want 1000 dollars by the 1st of May, to meet his engagements, and if he apply for the amount, I have no doubt but you will accommodate him. The roads are in such a condition that it is impossible to get any produce to market. Write me a few lines by mr. Watkins, and say what the chance is for a rise in tobacco. Your compliance with the above will very much oblige your ob't servant, Joseph M. Foulkes. — P. S. Mr. Watkins prefers giving a negotiable note payable in Petersburg Exchange bank, where he can always have an opportunity to send at the shortest notice and draw. He is not a gentleman of a low mean degree, but one that is a perfect gentleman in every sense of the term. I am confident, as I have observed to him, that you will either *let him have the money, or endorse for him. J. M. F." : *held*, this is not a writing in respect whereof forgery can be committed, either at common law or under the statute.

Foulkes v. Commonwealth, 837

II. Party whose signature is forged need not be called.

2. Upon a trial for forgery of a written instrument, the commonwealth may, without producing as a witness the party by whom the instrument purports to be signed, and without accounting for his absence, prove by the evidence of other witnesses that the instrument is not genuine; such evidence

not being in its nature secondary to that of the party whose signature is in question.

Foulkes v. Commonwealth, 836

III. Secondary proof of forged instrument

3. On trial of indictment for forgery of a letter of credit with intent to defraud W. & W., the commonwealth proves that a draft, presented by the prisoner to W. & W. at the same time with the letter of credit, had been filed, together with an indictment against the prisoner for forging the same, with the clerk of the court, who, on making search for the draft among the papers in his office, has been unable to find it; and thereupon the commonwealth offers secondary evidence of the contents of the draft; no notice having been given to the prisoner, before the jury was impaneled, of any intention to offer such evidence: *held*, the foundation so laid for the admission of the secondary evidence is sufficient.

Foulkes v. Commonwealth, 836, 7

FORMER RECOVERY.

What defence of a former recovery for the same cause of action is not sustained.

In assumpsit for work and labour done, care and diligence bestowed, and materials provided, the defendant, besides the general issue, pleaded a former action for not performing the same promises, in which the plaintiff recovered damages for the nonperformance of the same: the plaintiff replied that the promises were not the same identical promises in respect whereof the judgment was recovered, and tendered an issue, which was joined. At the trial, the plaintiff having given evidence on the general issue, the defendant, to sustain his plea of former recovery, gave in evidence the record of the former suit, the declaration in which contained two counts, one for work and labour, care and diligence, and materials, as well as for goods sold, money lent, money paid, and money received; and the other upon an account stated. The defendant also gave in evidence the account filed in that case, which contained credits and charges up to the 24th of October 1835, "leaving out the building of a large barn, and work done on a new mill." The verdict and judgment in that case being for \$630.53 cents, the plaintiff examined a witness, who proved that an account was settled with the defendant in October 1835, on which a balance of \$630.53 cents was struck; that the account filed in the former cause was a copy of the account so settled; and that the settlement did not include the plaintiff's demand for work done on the barn or the new mill, charged in the account in the second case, but that this demand remained for future adjustment. It was farther proved, that on the trial in the former cause, the account not being then filed which was afterwards filed in the second suit, all evidence in regard to that account was excluded, and the plaintiff rested his case on the count upon an account stated, and relied upon the settlement before mentioned, shewing the said balance of \$630.53 cents, and recovered upon that ground only. Thereupon

the defendant moved the court to exclude from the jury all the evidence offered by the plaintiff in support of the items charged in the account filed in the second case, on the ground that he was precluded from recovering the same in this action by the recovery in the former suit, and that the demand of the plaintiff for the said sum of \$630.53 cents recovered in the former suit, and for the items charged in the account filed in this case, was one entire demand, and could not be made the subject of two separate suits, and therefore the plaintiff was precluded by the recovery in the former suit from recovering in this suit. But the court

868 *overruled the motion, and a verdict was rendered for the sum found by the jury to be due upon the account filed in the second case. On a supersedeas to the judgment given on this verdict, the same was affirmed.

Weaver v. Vowles, 438

FRANCHISE.

Action for disturbance. See *Ferry No. 3*, 4, and

Patrick v. Ruffners, 209

FRAUD.

1. What purchase by agent from principal will be set aside. See *Principal and agent No. 2, 3*, and

Buckles v. Lafferty's legatees, 292

2. The vendor of a slave continuing in possession until an execution was levied on the slave more than a year after the sale, and the presumption arising from the inconsistency of the possession with the title claimed by the vendee not being repelled by any circumstances appearing in the case, but the circumstances on the contrary confirming the presumption of fraud, the sale declared void as to the execution creditor.

Tavener v. Robinson, 280

FREEHOLD.

A lot of land being sold for a sum of money payable by instalments, the vendee receives immediate possession, and the vendor signs, seals, and acknowledges before magistrates, a conveyance of the land to the vendee in fee simple, which is thereupon, by consent of the parties, placed in the keeping of a third person, to be retained by him until the whole purchase money is paid, and to be then delivered to the vendee. The vendee pays some of the instalments as they become due; others are still unpaid, the time of payment not having arrived: *held*, this vendee is a freeholder duly qualified to serve as a grand juror.

Commonwealth v. Burcher, 826

FREE NEGROES AND MULATTOES.

I. What issue of freedwoman is not free.

1. The decision in *Maria and others v. Surbaugh*, 2 Rand. 228, still adhered to.

Ellis v. Jenny & others, 597

II. Trial for petit larceny.

2. Under the act of March 15, 1832, (Acts of 1831-2, ch. 22, § 9,) a free negro or mulatto,

for simple larceny to the value of 20 dollars or less, must be tried by a justice of the peace of the county or corporation, and a court of oyer and terminer has no jurisdiction of the case.

Cropper v. Commonwealth, 842
GAMING.

I. What is no evidence against assignee of bond.

1. Answer of assignor of bond is no evidence against assignee codefendant to prove gaming consideration. See Codefendants No. 1, and

Pettit v. Jennings &c., 676

II. Liability of obligor in gaming bond to assignee.

2. Though, upon a bill in equity by an obligor against the obligee and his assignee, it be fully proved that the bond was given for a gaming consideration, still the obligor will not be discharged from liability to the assignee, if the assignee had no knowledge before the bond was assigned of its having been executed for money won at play, and was induced to purchase the same by the assurances of the obligor that there was no objection to it and that it would be paid. Per Baldwin, J. Accord. Buckner &c. v. Smith &c., 1 Wash. 296; Hoomes v. Smock, 1 Wash. 389; Davis's adm'r v. Thomas &c., 5 Leigh 1. Under such circumstances, the only question is as to the amount of the obligor's liability to the assignee. Is it the whole amount of the bond, or is it the sum paid by the assignee to the assignor for the assignment? Per Baldwin, J., it is the former; per Allen, J., the latter.

Pettit v. Jennings &c., 676

III. Decree over for obligor in gaming bond against obligee.

3. In an injunction suit by the obligor in a gaming security against the obligee and assignee, if the gaming consideration be admitted by the obligee's answer, but not proved by any competent evidence against the assignee, the injunction will be dissolved and the bill dismissed as to the assignee, but 869 not as to the obligee. *As to him the cause will be retained until payment by the obligor to the assignee of the money due the latter, in order that a decree may then be rendered therefor in favour of the obligor against the obligee.

Pettit v. Jennings &c., 676

IV. Prosecution for unlawful gaming.

4. The statute of March 26, 1842, (Acts of 1841-2, ch. 69, § 4, p. 44,) enacting "that in all recoveries hereafter had for violations of the gaming laws, the fee recovered shall be ten dollars for the commonwealth's attorney, and the sum of thirty dollars shall be paid to the literary fund in lieu of the sum as at present provided," had no application whatever to offences committed before its passage, but such offences remained liable to prosecution and punishment under the preexisting law, in the same manner as if the said statute has never been passed.

Pitman v. Commonwealth, 800

V. Process on indictment for playing.

5. A party being indicted for playing at an unlawful game, the court immediately awards a capias against him, returnable the next day; at the return day, he moves to quash the capias as improper process, which motion the court overrules, and compels him to plead forthwith: *held*, the irregularity (if any) in this proceeding is no sufficient ground to reverse judgment against the defendant.

Wright v. Commonwealth, 800

GENERAL COURT.

Jurisdiction upon habeas corpus. See Habeas corpus, and

Cropper v. Commonwealth, 842

GRAND JURORS.

Who is a freeholder qualified to serve as a grand juror. See Freehold, and

Commonwealth v. Burcher, 826

GUARDIAN AND WARD.

I. Action against guardian for necessities.

1. In an action brought by keepers of a boarding school against a guardian, for board, tuition, and other necessities furnished to the ward, the administrator of a previous guardian is a competent witness for the plaintiffs. But if it appear that the board, tuition, and other necessities were furnished at the request of the previous guardian, and no express promise has been made by the second guardian to pay therefor, the action against the second guardian for the same cannot be maintained.

Young v. Warne &c., 420

II. Liability of ex'or guardian de facto.

2. For several years an infant legatee resides with and is maintained by her grandmother, who is chargeable with the payment of the legacy, the annual interest of which is less than the annual value of the maintenance: *held*, the grandmother shall not be charged with interest on the legacy during the period of such maintenance.

Arrington v. Cheatham & wife, 492

III. Decree in suit by ward distributee against guardian adm'r.

3. The administrator of an intestate is also guardian of one of the distributees. Upon the termination of the guardianship, a bill is filed against the guardian and his sureties, to recover what is due upon the guardianship account. An amended bill is afterwards filed against the administrator and his sureties, to recover what is due on the administration account. Reports are made of both accounts. But, for reasons appearing to the court, the guardianship account is recommitted; and then, by consent of parties, the administration account is also recommitted. A further report is made upon the guardianship account, and none upon the administration account. Whereupon the cause is heard as to the guardian and his sureties, upon the further report so made, and a decree is entered against them for the sum deemed by the court to be due upon the guardianship account. From this decree an

appeal is taken by a party interested to get rid of or reduce the amount. In the appellate court it is urged by the appellee, that the balance stated as due on the guardian's account should be augmented, by incorporating in it the appellee's share of the balance due on the administration account: *held*, this claim cannot be sustained: 1st, because

the case was heard and the decree rendered between the parties *to, and on the claim made by, the original bill for the settlement of the guardianship account, as contradistinguished from the administration account, the settlement of which was sought by the amended bill: 2dly, because the case was not prepared for hearing as to the administration account; it standing, as to that account, on a consent order recommitting the same, and the record of course furnishing no account on which a definite charge or decree in respect to the administration account could be made: 3dly, because no claim was made in the court below by the appellee, to bring into the guardianship account any charge against the guardian arising out of the administration account.

Williamson's ex'or v. Howard, 39

4. Affirmance of decree in favour of ward against guardian, deficiency in one charge to ward being regarded as an equivalent for excess in another. See Appellate jurisdiction No. 8, and S. C., 40

HABEAS CORPUS.

A prisoner confined in the penitentiary under the judgment of a court of oyer and terminer, for an offence which such court had no jurisdiction to try, may be discharged by the general court upon a writ of habeas corpus.

Cropper v. Commonwealth, 842

HEARING OF CAUSE.

I. What setting for hearing is premature.

1. In a suit in chancery, when an answer is filed at rules in due time, four months from the time of the replication to the answer are allowed the parties for taking their depositions, by the act of February 17, 1823, in Sess. Acts of 1822-3, p. 39, ch. 37, § 1, Suppl. to Rev. Code, p. 129. And until the expiration of the said four months, neither party has the right (without the consent of the other) to set the cause for hearing.

Poling v. Johnson, 255

II. Consequence if cause be prematurely set and heard.

2. It appearing by the record of a suit in chancery, that the answer and replication were filed at August rules 1840; that at September rules 1840 the plaintiff set the cause for hearing; and that on the 5th of October 1840 the cause was heard upon the bill, answer, replication, depositions, exhibits, and arguments of counsel, and a decree made against the defendants, *held*, the cause was prematurely set for hearing, and prematurely heard. The decree was therefore reversed with costs, and the cause remanded, with directions to the court below to send the case to

rules, there to remain for two months before it shall be set for hearing at the instance of either party, (unless it be set for hearing before the lapse of the two months by the consent of parties,) and for such decree in the case after it shall be set for hearing, as may be proper. Accord. Dalby v. Price, 2 Wash. 191.

Poling v. Johnson, 255

HEIR.

1. Concerning inheritance of infant's land derived by descent from his mother, see Writ of right No. 2, and

Walkers v. Boaz &c., 485

2. Concerning contribution between realty and personalty conveyed in trust for payment of debts, where conversion takes place after death of grantor, see Mortgages &c. No. 8, and

Perrin &c. v. Lomax &c., 133

3. When specific execution will be decreed against heirs of vendee. See Specific execution No. 1, and

Wade's heirs v. Greenwood & wife, 474

4. What decree will be rendered against such heirs. See Specific execution No. 2, and S. C., 475

5. Allowance of time for redemption in such case, and sale upon credit. See Specific execution No. 3, and S. C., 475

HENRICO CHANCERY COURT.

Jurisdiction to revise decision of auditor disallowing claim against commonwealth. See Banks, and

Commonwealth v. Farmers bank, 737

HUSBAND AND WIFE.

I. When husband is a mere trustee for the wife.

1. By deed of marriage settlement, personal property of the wife is conveyed to the husband for the exclusive *benefit of the wife and her children during her life, and at her death for her issue, if any then living; and it is provided that in the event of the wife's dying without issue, the property shall be distributed in the same manner as if the deed had not been made. Upon the death of the husband without children (the wife still living), a creditor of the husband, at whose suit the latter took the oath of insolvency, claims that the husband has an interest in the property, which may be charged in the event of the wife's dying without issue: *held*, the conveyance to the husband was merely in the character of trustee, and its effect was to intercept the marital rights of the husband, and preclude him from all beneficial interest during the existence of the trust; that the provision for the event of the wife's dying without issue looked not to the state of things existing at the time of the marriage, but to such as should exist at the death of the wife; that the purpose was in such event to divest the legal title conveyed to the husband as trustee, and let the personal estate stand upon the same footing as any other personal chattels of a wife not reduced into possession by the husband du-

ring the coverture; that if the husband had survived the wife, he would have had a right to administer upon her personal estate, and hold the same free from distribution; but in the event that actually occurred, of the survivorship of the wife, the husband at no time acquired any individual ownership of the subject.

Matthews & co. v. Woodson and others, 601

II. Dower.

2. See title Dower, and
Wilson &c. v. Davisson, 384
Macaulay's ex'or v. Dismal swamp
land co., 507
Shirley v. Mutual Assurance society, 705

III. Validity, as against wife surviving, of husband's assignment of her personality.

3. The rule laid down by sir Thomas Plumer in *Hornaby v. Lee*, 2 Madd. C. R. 16, american edi. 352, and *Purdew v. Jackson*, 1 Russ. 1, and afterwards confirmed by lord Lyndhurst in *Honner v. Morton*, 3 Russ. 65, 3 Cond. Eng. Ch. Rep. 298, that where a husband assigns personal property in which his wife has a reversionary interest expectant on the death of tenant for life, and the wife and the tenant for life both outlive the husband, the wife is entitled by survivorship in preference to the assignee, recognized as correct by Allen, J. Contra, opinion of Gibson, C. J., in the case of *Siter & another*, 4 Rawle 471-483.

Browning v. Headley, 340

4. The rule laid down in *Lord Carteret v. Paschal*, 3 P. Wms. 197, 2 Brown's Par. Cas. 10 (Tomlin's edi.) and *Bates v. Dandy*, 2 Atk. 207, 1 Russ. 33, note, and 3 Russ. 70, 3 Cond. Eng. Ch. Rep. 301, note, that where the wife has a present interest in personal property, and the husband makes a particular assignment of that interest for valuable consideration, though the thing assigned be no farther reduced into possession during the coverture, the title of the particular assignee will be good against the wife surviving, recognized as correct by judges Allen and Stanard. S. C., 340, 41

5. A testator directed his personal estate to be divided into shares, of which he gave one share to his daughter. The daughter's husband, for valuable consideration, assigned all the interest to which he was entitled, in right of his wife, in her father's estate. After this assignment, an act of assembly was passed by the legislature of Kentucky, in which state the husband and wife had become domiciled, declaring the marriage contract between them forever dissolved so far as respects her, and restoring her to all the rights and privileges of an unmarried woman, and further declaring her entitled, out of the estate of the husband, to receive alimony agreeably to the laws of the commonwealth. On a bill by the assignee against the testator's executor, the husband, and the wife, to recover her share of her father's estate, *held* by two judges, 1. That by the act of divorce, the right of the wife to her shares in action not reduced into possession during the coverture, is

placed on the same ground as if the husband had then died: but, 2. That the interest of the wife in the subject assigned being 872 a present, not a reversionary *interest, and there being a particular assignment of that interest for valuable consideration, the title of the assignee is good against the wife. S. C., 341

IV. Wife's right to provision against husband and his assignee.

6. The doctrine of the english chancery, that where an absolute equitable interest is given to the wife, the court will not permit the husband to recover it without making a provision for the wife, and that the husband's assignee, whether general or particular, takes his interest subject to the same equity, recognized as binding upon the courts of this state. And the doctrine carried farther than it was carried in *Beresford &c. v. Hobson &c.*, 1 Madd. C. R. 361, american edi. 199, by sir Thomas Plumer, who considered that the court in no case had given the whole to the wife; not even "where the husband has left his wife and gone abroad."

Browning v. Headley, 341

7. A testator directs his estate other than slaves to be turned into money, and directs the slaves and money to be divided amongst ten legatees, any advances to whom are to be deducted from their respective shares. The husband of a daughter assigns her interest for valuable consideration. On a bill by the assignee against the executor, the husband, and the wife, it is insisted by the wife that a provision should be made for her. No evidence is taken by the assignee to shew that the whole interest would be more than an adequate provision. But it appears that the penalty of the executor's bond was only 30,000 dollars, and the consideration for the assignment only 1500 dollars; that the husband had received from the testator upwards of 2000 dollars in money and property, and that he had squandered the same, and then abandoned his wife, leaving her with 6 or 7 children in a destitute condition, in consequence of which she obtained a divorce: *held*, under the circumstances, no enquiry before a commissioner is necessary, to ascertain what would be a reasonable provision for the wife; that it is plain the whole residue coming from her father's estate will not be more than an adequate provision for her; and the bill should be dismissed. S. C., 341, 2

IDENTITY.

Proceedings to identify convict received into penitentiary under second or third sentence. See Penitentiary convict, and

Brooks v. Commonwealth, 845

INDICTMENT.

See Criminal jurisdiction and proceedings.

INFANT.

1. Concerning inheritance of infant's land derived by descent from the mother, see Writ of right No. 2, and

Walkers v. Boaz &c., 485

2. See Guardian and ward.

INJUNCTION.

1. By distributee's donee of a slave, to sale under execution for distributee's debt to the estate. See *Legatees &c. No. 8*, and *Hickerson's adm'r v. Helm*, 628
2. Relief to reversioner of slave removed pending injunction. See *Slaves No. 2*, and *Johns v. Davis's ex'or &c.*, 729
3. When mill owner cannot be enjoined from rebuilding dam. See *Mills No. 2*, and *Talley v. Tyree*, 500
4. An appeal lies to the court of appeals from an order of a circuit court overruling a motion to dissolve an injunction which was improvidently granted. Accord. *Lomax v. Picot*, 2 Rand. 247.

Talley v. Tyree, 500

INQUISITION.

Weight and effect of inquisition on application to establish ferry, and what is no ground for quashing such inquisition. See *Ferry No. 1, 2*, and *Muire &c. v. Smith*, 458

INSOLVENT.

1. What marriage settlement exempts the personalty of wife from liability to creditor of insolvent husband. See *Husband and wife No. 1*, and *Matthews & co. v. Woodson & others*, 601
2. When objection that sheriff is no party to suit in equity for satisfaction out of insolvent's estate will not avail in appellate court. See *Codefendants No. 2*, and *Chappell v. Robertson*, 590
- *3. Where a person taken in execution is discharged as an insolvent debtor, the estate in lands belonging to him at the time of such discharge is, by the act in 1 R. C. of 1819, ch. 134, § 34, p. 538, so completely vested in the sheriff of the county wherein such lands lie, that an ejectment for such lands cannot afterwards be maintained on the demise of the insolvent debtor, while the execution remains unsatisfied. *Syrus &c. v. Allison*, 200

INSURANCE.

See *Mutual Assurance society*, and *Shirley v. Mut. Ass. society*, 705

INTEREST.

1. Application of payment to principal instead of interest. See *Payment No. 1*, *Trusts &c. No. 4*, and *Miller v. Trevilian and others*, 1
2. When purchaser of land under trust deed is liable for interest before obtaining possession. See *Elegit No. 1*, and *Findlay v. Toncray*, 374
3. When executor guardian de facto shall not be charged with interest on ward's legacy. See *Guardian and ward No. 2*, and *Arrington v. Cheatham & wife*, 492
4. What interest is to be discounted in ascertaining present value of annuity. See *Dower No. 6*, and *Wilson &c. v. Davisson*, 384, 5

INTERROGATORIES.

Case in which a defendant was brought in by a messenger to answer interrogatories. *Johns v. Davis's ex'or &c.*, 729

JOINT OBLIGORS.

Extinguishment of remedy on joint contract.

1. Where two or more are jointly bound by contract, the legal remedy must be pursued against all. And if, by act of the claimant in such joint contract, one or more of the parties jointly bound be discharged, so that all cannot be subjected to a joint judgment, none are liable on the joint contract. Per *Stanard, J.*

Ward v. Motter, 536

2. See *Partnership*, and *S. C.*, 536

JOINT TENANTS.

Effect of deed by one, conveying part of the land by metes and bounds.

At the trial of the mise joined in a writ of right, after the demandants had introduced a grant to their ancestor, embracing the land demanded, the tenant introduced an earlier grant of the land to two grantees, and offered to give in evidence a deed from one of those grantees, conveying by metes and bounds a particular part of the land to a person under whom he (the tenant) claimed, and also offered other evidence tending to prove that partition had been in fact made, though without deed, between the two grantees. The circuit court, being of opinion that the conveyance by metes and bounds by one joint tenant, of a portion of the land held jointly, was void, refused to permit the same to go in evidence to the jury; and a verdict and judgment were rendered for the demandants: *held*, the circuit court erred; and its judgment therefore reversed, the verdict set aside, and the cause remanded for a new trial, on which the conveyance, if offered, is not to be rejected on the ground that it is void.

Robinett v. Preston's heirs, 273

JUDGMENT.

- I. What is the record of a judgment confessed, and how far evidence aliunde is admissible to shew the power and action of attorney confessing the same.

1. On a motion for award of execution against three obligors in a forthcoming bond, one of whom is principal and the other two are sureties, the entry upon the record states that as well the plaintiffs came by their attorney, "as the defendant M." (the principal) "in his proper person, and the other defendants by their attorney, and the said defendants acknowledge judgment." In the same entry (after the judgment) is the following: "And the plaintiffs by their attorney here in court release to the defendants 183 dollars 60 cents, and agree to stay execution of this judgment until the first day of the next term." On a bill in equity by the sureties, claiming a discharge on the ground that the agreement to stay was without their consent *or knowledge, it is al-

leged that the sureties did not appear by an attorney at law, but by an attorney in fact; that the power under which the attorney acted did not authorize him to confess judgment with stay of execution; and that in fact he never consented to such stay, but the agreement for the stay was with the principal alone. The power of attorney is in these words: "We authorize J. M. to confess judgment for us and in our name, on a delivery bond in favour of S. & S. executed by us on the 18th November 1840;" and is signed and sealed by the three obligors; *held*, 1. That the entry must be taken altogether, and regarded as the record of a judgment between the parties upon the confession of the defendants therein, with the condition of a stay of execution. 2. That it not appearing from that record whether the sureties appeared by an attorney at law or an attorney in fact, evidence aliunde is admissible for the purpose of proving that they appeared by an attorney in fact, and to shew the authority under which he acted. 3. That the power of attorney under which the attorney acted did authorize the confession of a judgment with stay of execution. 4. That parol testimony is not admissible to prove that so much of the entry as relates to the stay of execution was without the consent of the said attorney; *dissentiente Standard, J.*

Calwells v. Sheilda & Somerville, 305

II. Estoppel by judgment.

2. What judgment recovered by corporation will estop from alleging previous extinction of such corporation. See *Corporation*, and

May &c. v. State bank of N. Carolina, 56

3. What defence of a former recovery for the same cause of action is not sustained. See *Former recovery*, and

Weaver v. Vowles, 438

III. Finality of judgment.

4. What is a final proceeding or order of a county court, to which a supersedeas lies. See *Supersedeas*, and

Farneyhough's ex'ors v. Dickerson &c., 582

IV. Denial of relief in equity.

5. Denial of relief in equity against judgment, where the party neglected to make defence at law. See *Laches No. 3*, and

Hendricks &c. v. Compton's ex'or, 192

JURISDICTION.

See *Equitable jurisdiction*, *Appellate jurisdiction*, *Criminal jurisdiction* and *proceedings*.

JURORS.

I. Grand jurors.

1. Who is a freeholder qualified to serve as a grand juror. See *Freehold*, and *Commonwealth v. Burcher,* 826

II. Jurors upon inquest.

2. What declarations and conduct of jurors are no ground for quashing inquisition on

application to establish ferry. See *Ferry No. 2*, and

Muire &c. v. Smith, 458

III. Who shall be deemed impartial jurors for trial of felon.

3. On the separate trial of a prisoner jointly indicted with three others for murder, several persons called as jurors are examined on voir dire touching their indifference. 1. One of them states, that he has heard rumours and conversations in the country touching the case of the prisoner, and a representation of part of the evidence given on the trial of one of the parties indicted with him, and from these sources of information, if the same be true, he had made up an opinion of decided character, which he still entertains, and which will remain the same unless removed by evidence of a state of facts different from what he has heard; but he feels no prejudice or bias for or against the prisoner, and is satisfied that the opinion so formed and entertained would have no influence upon his mind in trying him, and that he could now give him as impartial a trial upon the evidence as if he had heard nothing of his case. 2. Another juror states, that he has heard no evidence in relation to the prisoner's case, nor formed any opinion on the question of his guilt or innocence; that he was present at the trial of another of the parties indicted, and heard a part of the evidence, from which he had formed a decided opinion as to that party, and if he were now called to try him, he should be influenced thereby; but that opinion would have no influence 875 *upon his mind in trying this prisoner, as to whom he feels no prejudice or prepossession, and he thinks he could try him as fairly and impartially as if he had heard nothing about the transaction. 3. A third juror states, that he heard the reports in the country concerning the death of the deceased, and the prisoners implicated therein, and had formed some opinion thereon, dependent upon the truth and fulness of those reports; he believed them to be true at the time he heard them, and the opinion formed on them was decided, and yet rests upon his mind; but he is satisfied the opinion so formed would have no influence upon him in trying the prisoner, and he could now try him according to the evidence, free from any leaning or bias for or against him, and decide the case as impartially as if he had previously heard nothing of it: *held*, all of these persons are good and impartial jurors.

M'Cune v. Commonwealth, 771

IV. Peremptory challenge.

4. When no right of peremptory challenge exists. See *Penitentiary convict No. 2*, and *Brooks v. Commonwealth,* 845

LACHES.

1. What laches will preclude dower from right to account. See *Dower No. 7*, and *Macaulay's ex'or v. Dismal swamp land co.,* 507

2. What delay of principal to impeach

purchase made from him by his agent will not deprive him of right to relief in equity. See Principal and agent No. 3, and
Buckles v. Lafferty's legatees, 292, 3

3. An obligation given on the retainer of counsel to defend the obligor on a charge of forgery, is assigned by the counsel, and judgment is obtained thereupon by the assignees, on which judgment execution issues, under which a forthcoming bond is taken, and judgment is rendered thereupon. After these proceedings, without any defence having been made at law, and without any excuse for not making it, an injunction is obtained on the ground that the obligor was induced to employ the obligee, by the menace that if he did not, the obligee would act as counsel against him in aid of the prosecution: *held*, the injunction should be dissolved and the bill dismissed: for if in law such a contract was valid, a court of equity has no right to absolve the party from it; and if in law the contract was invalid, the defence should have been made in that forum.

Hendricks &c. v. Compton's ex'or. 192

LAND LAWS.

Invalidity of patent for land settled thirty years, on which taxes have been paid within that time. See Patent No. 1, 2, and

Tichanal v. Roe, 288

LANDLORD AND TENANT.

I. Waygoing crop.

1. The principle settled in *Harris v. Carson*, 7 Leigh 632, that where a lease has a fixed period for its termination, and there is nothing in it purporting to give to the tenant the crops growing upon the land at the time of its termination, the tenant has no right to reap those crops after his lease terminates, again recognized.

Mason &c. v. Moyers, 606

See also opinions in

S. C., 611, 12, 613, 14, 15

II. Apportionment of rent.

2. When rent may be apportioned in equity. See Rent, and

Mason &c. v. Moyers, 606, 7

LAPSE OF TIME.

1. What endorsement on bond is evidence to repel presumption of payment arising from lapse of time. See Bond No. 2, 3, and
Dabney's ex'ors v. Dabney's adm'r, 622

2. Invalidity of patent for land settled thirty years, on which taxes have been paid within that time. See Patent No. 1, 2, and

Tichanal v. Roe, 288

3. See Laches.

LARCENY.

How free negroes and mulattoes are to be tried for petit larceny. See Free negroes &c. No. 2, and

Cropper v. Commonwealth, 842

876

*LEASE.

Concerning right to the waygoing crop, see Landlord and tenant No. 1, and

Mason &c. v. Moyers, 606

LEGATEES AND DISTRIBUTEES.

I. Contribution between realty and personality.

1. Concerning contribution between realty and personality conveyed in trust for payment of debts, where conversion takes place after death of grantor, see Mortgages and trusts No. 8, and

Perrin &c. v. Lomax &c., 133

II. Invalid purchase by agent of ex'or.

2. What purchase by executor's agent at his own sale of land will be set aside at the suit of legatees, and what decree will be rendered in their favour. See Principal and agent No. 3, and

Buckles v. Lafferty's legatees, 292

III. Ex'or's commissions and other charges.

3. Concerning the commissions of executor, and allowance for clerk hire, see Ex'ors and adm'rs No. 1, 2, 3, and

Farneyhough's ex'ors v. Dickerson &c., 582

IV. What legacy does not charge sureties of ex'or.

4. What legacy is a charge upon the executor as legatee, and does not render his sureties responsible. See Will No. 4, and
Arrington v. Cheatham & wife, 492

V. Liability of ex'or guardian de facto.

5. When executor guardian de facto shall not be charged with interest on ward's legacy. See Guardian and ward No. 2, and
Arrington v. Cheatham & wife, 492

VI. What grants of adm'n are valid: what payments by representative of deceased adm'r to succeeding adm'r are good against legatees: for what assets succeeding adm'r and his sureties are liable to legatees.

6. Pending a suit in chancery by legatees against an executor to recover their legacies, the executor died. Process was awarded to revive the suit against his administrator; and the administrator dying, process was issued and an order entered to revive the suit against his representative. But afterwards that process was quashed and that order set aside, as early as 1811; and then, by consent of parties, the suit was revived against the administrator de bonis non of the executor, and by like consent it was entered that the cause was not to abate by the death of any of the parties. A personal decree was obtained in 1818 by the legatees against the administrator de bonis non, from which he appealed. Pending the appeal, he died. Whereupon, though the two former grants of administration on the executor's estate had been by the court of Orange, the court of Hanover now granted administration on the same estate, not in the form of a grant de bonis non, but of an original grant. At the instance of the legatees, a scire facias issued to revive the appeal against this new administrator, (calling him administrator de bonis non) which was duly executed, and in 1822 the decree affirmed. In the caption to the decree of affirmance, the name of the

administrator de bonis non against whom the decree of the court below was entered did not appear as a party, but the new administrator was mentioned therein as appellant. In 1823, a bill of revivor and supplement was filed in the court below, convening before the court, and seeking to charge, the representatives of the first administrator and of the first administrator de bonis non. It turned out, that after the *scire facias* to revive the appeal had been executed, and before the decree of affirmance, the new administrator had, in the character of administrator de bonis non, brought suits and obtained decrees for the assets of the executor's estate in the hands of the representatives of the first administrator and of the first administrator de bonis non, against those representatives respectively, without opposition on their part; and the decrees so obtained were soon after satisfied. Those decrees were in 1820 and 1821, about six years before the decision in *Wernick's adm'r v. M'Murdo &c.*, 5 Rand. 51: *held*, 1 (in accordance with *Fisher v. Bassett* and others, 9 Leigh 119,) that the grants of administration by the court of Orange to the first administrator and the first administrator de bonis non, never having been reversed or

877 *revoked, must be considered valid grants, which conferred upon those administrators respectively all the powers of rightful administrators. 2. That when the grant to the first administrator de bonis non expired by his death, and there was no conflicting right in existence, it was competent for the court which might in the first instance have rightfully exercised jurisdiction, to act on the subject; and Hanover court having acted when there was no such conflicting right, and its grant not having been reversed or revoked, that grant is valid, and the sureties in the administration bond taken by Hanover court are liable thereupon. 3. That as the legatees, after the death of the first administrator, dismissed his representative from the suit, it was lawful for that representative to pay over to the administrator against whom the legatees were proceeding, the unapplied assets of the executor's estate; and such payment, made in good faith and under the sanction of a decree of a court of competent jurisdiction, is a complete protection to such representative against the legatees, as to the money so paid. 4. That the decree in favour of the legatees against the administrator de bonis non was personal, only in respect to the assets in his hands, and (it being nowhere alleged that he had converted or wasted the same) such unapplied assets coming to the hands of his representative must in equity be regarded as unadministered assets of the executor's estate; and the representative of the administrator de bonis non having in good faith, and in pursuance of the decree of a court of competent jurisdiction, paid over the said assets to the administrator against whom the legatees revived the appeal, such payment protects the estate of the administrator de bonis non from the claim of the legatees. 5. That for the assets so paid over by the

representatives of the first administrator and of the administrator de bonis non, the administrator to whom such payment was made, and the sureties in his official bond, are liable. 6. That the dismissal of the bill as to the representatives of the first administrator and of the administrator de bonis non should be without costs.

Burnley's representatives v. Duke & others, 102

VII. Setoff of distributee's share against his purchases.

7. The rule laid down in *Pulliam v. Winston &c.*, 5 Leigh 324, that a distributee purchasing at an administrator's sale cannot injoin the collection of the bond for his purchases until his distributive share is ascertained and set off against the bond, approved as a general one; but an exception to it is recognized.

Hickerson's adm'r v. Helm, 628

VIII. Injunction by distributive's donee of a slave to sale under execution for distributee's debt to estate, and setoff of distributable share against the judgment.

8. In November 1815, at a sale by an executor on twelve months credit, a distributee was one of the purchasers. The person requested to be her surety manifesting some reluctance to become such, the executor assured him that there was no danger of his having any thing to pay, as the purchases by the distributee were not so much as her portion of the estate. Whereupon the bond was executed. The executor died in 1821, and there was immediate administration on his estate, and on that of the first testator; but no suit was brought on the bond till 1827. Judgment was then obtained on it: and in the same year some of the legatees brought a suit for a settlement of the executorship account. In 1832, the distributee acquired slaves by the death of her father, and made a voluntary conveyance of them. One of them was sold under execution upon the judgment, and purchased by the administrator de bonis non at the sheriff's sale. Two others being afterwards levied on, the donee filed a bill in 1833 against the judgment creditor, to restrain the sale. During all this time there was no settlement of the executorship account; and none took place until the administrator of the executor was coerced to settle, by attachments for his contempt in disobeying the orders of the court in the suit of the legatees: *held*, 1. On the donee's bill, an injunction may be awarded to restrain the sale of the two slaves levied on, until the amount of the distributee's claim is ascertained; and when ascertained, the same may be set off against the judgment. 2. The distributee is an indis-

878 pensable party to *the donee's suit.

3. As a suit is pending in which all the other distributees are parties, there is no necessity to make them parties in the donee's suit, but the proper course is to retain the injunction until, by the adjustment of the account in the other suit, the amount of the distributee's claim is finally liquidated,

and then to apply that amount as a setoff against the judgment. It being ascertained that after allowing credit for the entire claim of the distributee, she was indebted, at the time of the sale of the slave first levied on, more than the amount for which he sold, the credit in respect to that slave cannot be enlarged to what is estimated as his value at the time of the sale, but must be limited to the amount made on the execution by the sale of him: *dissentiente Baldwin, J.*, on the last point.

Hickerson's adm'r v. Helm, 628

IX. Widow's distributable share of slaves.

9. Measure of widow's right where husband's slaves liable to her dower have been sold by his executor. See *Widow No. 3*, and

Hickerson's adm'r v. Helm, 629

X. When supersedeas lies for legatee.

10. Supersedeas lies for legatee exceptor to order of county court admitting executor's account to record. See *Supersedeas*, and

Farneyhough's ex'ors v. Dickerson &c., 582

XI. When ex'or cannot compel legatee to refund.

11. The rule of the english courts, that where an executor voluntarily pays a legacy, he cannot afterwards maintain a bill to compel the legatee to refund, unless it becomes necessary for the discharge of debts, recognized and acted on.

Davis &c. v. Newman, 664

12. A testator owing no debts and having bequeathed legacies, his executor voluntarily made considerable payments to the legatees, under an impression that a bond for a large amount, executed by a debtor of the testator to the latter in his lifetime, was good and would be collected. The bond turned out to be unavailing, and the other assets were less than what was paid the legatees: *held*, though the executor may not have been culpably negligent in respect to the bond, and therefore not chargeable with its whole amount, yet he cannot recover back from the legatees any part of what he had paid them.

S. C., 664

LETTER OF CREDIT.

What is not a letter of credit in respect whereof forgery can be committed. See *Forgery No. 1*, and

Foulkes v. Commonwealth, 837

LIEN.

1. Lien of elegit on land conveyed in trust to secure debts. See *Elegit No. 1*, and

Findlay v. Toncray, 374

2. Upon what terms sale under vendor's lien will be decreed against heirs of vendee. See *Specific execution No. 3*, and

Wade's heirs v. Greenwood & wife, 475

3. When sale under vendor's lien precludes right to dower. See *Dower No. 1*, and

Wilson &c. v. Davisson, 384

4. Lien of Mutual Assurance society on property insured. See *Mutual Assurance Society*, and

Shirley v. Mut. Ass. society, 705, 6

LIMITATION.

Invalidity of entry or location on land settled thirty years, on which taxes have been paid within that time. See *Patent No. 1, 2*, and

Tichanal v. Roe, 288

LIS PENDENS.

Relief to reversioner of slave removed pending injunction. See *Slaves No. 2*, and

Johns v. Davis's ex'or &c., 729

LONGEVITY.

Wigglesworth's table referred to.

Wilson &c. v. Davisson, 384, 403

LOST DEED.

Relief in equity where conveyance of land has been accidentally destroyed. See *Specific execution No. 1*, and

Wade's heirs v. Greenwood & wife, 474

MARRIAGE SETTLEMENT.

When husband is a mere trustee for the wife, acquiring no individual interest in her property. See *Husband and wife No. 1*, and

Matthews & co. v. Woodson &c., 601
879

*MERGER.

Of simple contract of partnership in specialty of one partner. See *Partnership*, and

Ward v. Motter, 536

MESSENGER.

Case in which a defendant was brought in by a messenger to answer interrogatories.

Johns v. Davis's ex'or &c., 729

MILLS.

I. Ownership of applicant for leave to erect mill, and proprietorship of party receiving notice.

1. A person owning real estate died intestate, leaving a widow and children; and dower not being assigned to the widow, she continued in the mansion house and the plantation thereto belonging. Under the act in 2 R. C. of 1819, ch. 235, § 1, p. 225, notice was given to the widow as the proprietor of the land, by a person desiring to build a machine useful to the public, and to abut his dam against the said land, that application would be made for a writ of ad quod damnum: and the writ was accordingly awarded, and an inquisition returned. After which, one of the heirs, who resided on the plantation with his mother, being made a defendant on his motion, moved the court to dismiss the case, upon the ground that notice of the application ought to have been given to him as one of the proprietors; but his motion was overruled. He then offered to introduce evidence to prove that the applicant did not own the land on which he proposed to erect his machine: but it being proved that the applicant was in possession of the land, claiming title to it, and had built a house thereon, the court refused to permit the evidence so offered to be introduced: *held*, there is no error in

these proceedings. For it was sufficient that the person making the application was in the actual possession and occupation of the land on which the machine was to be built; and that the person to whom the notice was given was the tenant in possession, and appeared as the visible owner.

Pitzer v. Williams, 241

II. When mill owner cannot be enjoined from rebuilding dam.

2. Two verdicts were rendered in favour of a party whose land was overflowed, against the owner of a mill, for keeping his dam too high. The dam was then swept away: and the plaintiff at law thereafter exhibited a bill of injunction against the mill owner, which alleged that he had not begun, within the time prescribed by law, to rebuild the dam, and also contained a suggestion in general terms, that irreparable mischief would result to the plaintiff from rebuilding the same. It did not appear that there was any order of court granting leave to build the mill and dam; it did appear, however, that the mill and dam had existed more than 50 years: *held*, that the verdicts for keeping the dam too high shew that the mill owner had at least a prescriptive right to keep the dam at some height; that these verdicts did not warrant an injunction to restrain him from rebuilding the dam, in the absence of any allegation in the bill that he was about to build it, or had threatened to build it, beyond the authorized height; and that if it was competent for a court of equity to interpose at all to enforce a forfeiture of the mill owner's right because of his failure to rebuild the dam, within the time prescribed by law, it ought not to be done by way of injunction, without an allegation in the bill of some distinct and sufficient ground of irreparable mischief.

Talley v. Tyree, 500

MISDEMEANOUR.

1. What trespass is no misdemeanour under the statute of 1823. See *Trespass*, and

Campbell &c. v. Commonwealth, 791

2. Process on indictment for playing at unlawful game. See *Gaming No. 5*, and

Wright v. Commonwealth, 800

MISJOINDER.

Within what time the plea of several tenancy should be pleaded in a writ of right.

Walkers v. Boaz and others, 485

MORTGAGES AND TRUSTS.

I. Registry.

1. What registry of deed of trust of personal estate is invalid. See *Registry*, and

Cocke v. Haxall's ex'x, 470

880 *II. What grantor has no right of

redemption.

2. A deed in made, whereby, after reciting that F. the grantor hath sold to H. the grantee, for the sum of 200 dollars, certain real and personal estate, it is witnessed that the grantor, in consideration of that sum, conveys the same to the grantee; and then the deed concludes as follows: "It

is agreed and fairly understood by and between the said F. and H. that in case the said H. or his heirs or assigns shall not be able to make the aforesaid 200 dollars out of the estate herein before conveyed, that then the said F. shall refund the same to the said H. or his heirs or assigns, with lawful interest thereon from this date till paid, or such part of the said 200 dollars as the said H. shall not be able to realize as aforesaid." Under the authority of this deed, the grantee sells and conveys the estate, and his grantee again sells and conveys the same. After which, to wit, about ten years after the date of the first mentioned deed, the grantor in that deed files a bill in equity to redeem the estate conveyed, on paying whatever may be due of the 200 dollars, with interest: *held*, the bill cannot be sustained. Allen, J., dissented, considering the case within the principle of *Chowning v. Cox* and others, 1 Rand. 306, recognized more recently in *Breckenridge v. Auld* and others, 1 Rob. 148. The two other judges who sat in the case (*Stanard and Baldwin*) considered it not within the principle of those cases.

Floyd v. Harrison &c., 161

III. Whether mortgagee may sell under power given by the mortgage.

3. The case of *Chowning v. Cox* and others, 1 Rand. 306, is a departure from the doctrine, now well settled in England and recognized in New York, that a mortgagee may sell the property after forfeiture, under a power given for that purpose in the mortgage deed: per *Baldwin, J.*—The doctrine so settled in England and recognized in New York seems to have been wholly overlooked by counsel and court in the argument and decision of *Chowning v. Cox*. Though this consideration may not warrant the reversal of that decision, it is most cogent to limit its authority to the particular case then in judgment. Per *Stanard, J.*

Floyd v. Harrison &c., 162

IV. Discharge of trust deed.

4. How trust deed conveying personal chattels for payment of debts may be discharged. See *Chattels No. 2*, and

Tavener v. Robinson, 280

V. Enforcement of trust deed in equity.

5. Equitable relief to cestui que trust of bond secured by trust deed. See *Trusts and trustees No. 4*, and

Miller v. Trevilian & others, 1

6. Slaves conveyed by deed of trust to secure what may be due from the grantor as guardian, are afterwards attached by a creditor of the grantor, and under the attachment are sold, subject to the prior lien of the deed of trust. In a suit by the ward, a decree is made for the sum due upon the guardianship account, and the decree directs the trustees to retain the slaves until the amount of the decree is satisfied, and then to surrender them to the purchaser at the sale under the attachment. On an appeal by the purchaser, the objection is taken that the decree ought to have

provided for the sale of the slaves, so that out of the proceeds the amount of the decree might be paid, and the surplus paid to the appellant: *held*, the appellant has no right to have the decree reversed for this cause, but the same should be affirmed, with the addition thereto of a decree for the sale of the slaves; and the appellant should be decreed to pay the costs.

Williamson's ex'or v. Howard, 39

VI. Lien of elegit on land conveyed in trust.

7. Lien of elegit on land conveyed in trust to secure debts; and rights of elegit creditor against purchaser under the trust deed. See *Elegit*, and

Findlay v. Toncray, 374

VII. Contribution, after death of grantor, between realty and personalty conveyed for payment of debts.

8. In 1810 a deed of trust was made, whereby it was witnessed, that for the purpose of securing to the grantor's creditors their debts, and to make provision for the support, education and future settlement of his children, he conveyed his whole estate in trust for the payment of

881 his *debts, and for that purpose the trustees were empowered to sell from time to time such parts of the premises as to them might seem fit, or authorized to dispose of the same, or any part thereof, in such manner as might by them be deemed most beneficial and advantageous to all the parties interested; and out of the rents and profits, they were to support the grantor and his wife, and their family, during the joint lives of the grantor and his wife, and the survivor of them during the life of the survivor; and then the estate was in trust for such children of the grantor as he might leave at his death. After making this deed, the grantor died the same year (1810), leaving a widow, and three children by her. In 1811, the acting trustee sold a portion of the real property, and the proceeds were applied towards the discharge of the debts. In 1814 one of the children died, whereby her interest in remainder in the whole estate passed to her mother and the two other children. In 1815 another child died, whereby his like interest (embracing that acquired through the child that had first died) passed to his mother and the surviving child. And in 1816 the widow died, whereby the interest in the remainder which she had so acquired, passed, as to the realty, to her surviving child, and as to the personalty, to her second husband, who survived her and became her administrator. At the period of the widow's death, part of the real and part of the personal estate conveyed was undisposed of by the trustee; and thereafter he disposed of part of each to satisfy debts: *held*, 1. the conversion in 1811, of part of the realty into personalty, being within the authority and discretion of the trustee, and made at a time when there was no conflict, but an identity of interest, amongst those entitled to the estate, cannot, by reason of

circumstances thereafter arising, furnish any equity for a reimbursement of the realty out of the personalty, or for contribution in favour of the former against the latter. 2. That though, upon the widow's death, the succession to the real fell into a different channel from the personal property, yet as the authority and discretion of the trustee in regard to sales of the property, whether real or personal, continued as before, no equity could arise between the realty and personalty for reimbursement of one to the other, neither being primarily, but the whole estate indiscriminately, subjected to payment of the debts by the provisions of the trust deed; which, and not the principles governing the administration of decedents' estates, must give the rule upon the subject. But 3. that an equity of a different nature did, however, arise out of the provisions of the trust deed, so soon as the successions to the realty and the personalty so fell into different channels; and it was simply this, that the owners of the realty and personalty should contribute to the burthen of paying the debts remaining unsatisfied at the widow's death, in proportion to the value of their respective interests: and the exercise by the trustee of the authority and discretion vested in him, should not have the effect of disturbing the due apportionment of that burthen amongst those several interests.

Perrin &c. v. Lomax &c., 133

VIII. Dower in mortgaged land.

9. When widow of grantor in trust deed may recover rents and profits from husband's death. See *Dower No. 4*, and

Macaulay's ex'or v. Dismal swamp land co., 507

MURDER.

What conviction of murder in the second degree is warranted by the evidence.

Parsons v. Commonwealth, 772, 777

MUTUAL ASSURANCE SOCIETY.

I. Who are members.

1. Every owner of a present freehold estate in property which has been insured in the Mutual Assurance society, becomes a member thereof, according to the true spirit of the law and the scheme of the institution.

Shirley v. Mutal Assurance society, 705

II. Lien upon dower interest.

2. Where a husband insures property in the Mutual Assurance society and dies seized, his widow takes her dower interest subject to the lien of the society; but she in- 882 curs no personal *responsibility until dower is assigned her, whereby she becomes a member, and then only for such quotas and premium as accrue while she remains owner of the dower estate, with interest and damages thereon.

S. C., 705

III. Personal responsibility of successive tenants of premises insured.

3. Two tenements, which had been insured in the Mutual Assurance society, descend, upon the owner's death to his heirs, and are assigned to his widow for her dower.

The widow and her second husband sell and convey her life estate. And the society has a claim for quotas accrued after the death of the first husband; some before the assignment of dower; others afterwards and before the sale of the life estate; and the rest since that sale. It has also a claim for an additional premium accrued during the purchaser's ownership: *held*, 1. The heirs of the first husband are personally responsible for what accrued after his death and before the assignment of dower. 2. The widow and her second husband are personally liable for what accrued after the assignment of dower and before their sale. 3. The purchaser is personally responsible for what has accrued since, and for no more. 4. The party liable for any principal money is liable for interest and damages thereon.

S. C., 705, 6

IV. For what the lien exists, and how it will be enforced.

4. The Mutual Assurance society has a lien upon property insured therein for the principal and interest due the society, but not for damages. This lien is effectual not only against the original member, but against all persons deriving ownership from him, and the property may be sold to satisfy the same. Though one party has the estate for life and another the reversion, the lien will be enforced against the tenement insured by selling the whole fee simple title thereof, and the whole of the tenement, unless from the nature of the property it be practicable and expedient to lay off a portion thereof for sale. Before directing such sale, however, the respective personal liabilities of the several parties chargeable will be ascertained. And if the tenant for life advance the amount chargeable to the reversioner, as well as what is chargeable to himself, there will be no sale of the reversion, but a lien established thereon for reimbursement of the amount so advanced, with interest, to be enforced upon the falling in of the life estate.

S. C., 706

5. If a sale take place, what should be the terms as to cash and credit, and how the deferred instalments should be divided.

S. C., 706

6. Under what circumstances a lien upon two tenements insured may be satisfied by selling only one of them, and applying the proceeds in exoneration of the other.

S. C., 706

NEW TRIAL.

What conviction will not be set aside as contrary to evidence.

1. Where a verdict of conviction in a criminal case is clearly against the evidence, or clearly without evidence to justify it, it is the duty of the court to set the verdict aside on the application of the prisoner, and to award him a new trial. But where, upon evidence merely circumstantial, the jury has found the prisoner guilty, and the court which tried the case has refused to grant a new trial, the verdict will not be disturbed by the general court, even though, in the

opinion of that court, the evidence do not amount to very strong and clear proof.

Parsons v. Commonwealth, 772

2. Case in which, under the circumstances just mentioned, a conviction of murder in the second degree was sustained by the general court.

S. C., 772

NONJOINER.

Effect of failure to join a demandant in writ of right. See Writ of right No. 2, and Walkers v. Boaz &c., 485

NONSUIT.

When proper to set aside.

A nonsuit in a writ of right having been suffered under a misapprehension on the part of the demandants and their counsel as to the legal effect of an instruction 883 given at the trial, *held*, the court, in the exercise of a sound discretion, should, on the motion of the demandants, have set aside the nonsuit; and this not having been done, the judgment overruling such motion was reversed.

Walkers v. Boaz &c., 485

NOTICE.

What proprietorship of party receiving notice of application for leave to erect mill and dam is sufficient. See Mills No. 1, and Pitzer v. Williams, 241

NUISANCE.

1. Concerning action on the case by ferry owner for disturbance of his franchise, see Ferry No. 3, 4, and

Patrick v. Ruffners, 209

2. When mill owner cannot be enjoined from rebuilding dam. See Mills No. 2, and Talley v. Tyree, 500

NUNCUPATIVE WILL.

I. Last sickness of decedent, and commitment of testimony to writing.

1. What sickness will be considered the last sickness of the deceased, and what will be considered a commitment to writing of the testimony or the substance thereof, within the meaning of the statute concerning nuncupative wills, in 1 R. C. 1819, p. 377, § 7, 8.

Page &c. v. Page, 424

II. How will may be impeached after probat.

2. The statute in 1 R. C. 1819, p. 378, § 13, which allows a person interested to appear within seven years after probat of a will, and by bill in chancery to contest the validity of the will, applies only to written and not to nuncupative wills.

S. C., 424

3. Where a nuncupative will has been proved before a court of competent jurisdiction, after fourteen days from the death of the testator, and after the widow has been summoned to contest the same, as directed by the act in 1 R. C. 1819, p. 379, § 18, the sentence of the court admitting the same to probat is binding upon her, and cannot be impeached except by appeal therefrom, or by a bill in equity founded upon her having been prevented by fraud or accident from making her defence in the court of probat.

S. C., 424

III. Invalidity of will as to realty.

4. A nuncupative will is of no effect in law in relation to the testator's real estate, or the profits to accrue therefrom. But where, in the lifetime of the testator, a division was made between him and his two brothers of their father's real estate, which was acted upon by him in his lifetime by taking possession of the part allotted to him, and was also confirmed and ratified by him at the time of making his nuncupative will, the validity of such division was recognized in a court of equity. S. C., 425

IV. Construction and effect of will.

5. A testator, by a nuncupative will, gave to his wife certain slaves and articles of personalty, "exclusive of the portions of his estate she would be entitled to as his widow under the law." His wife being pregnant, he said he wished his estate to be kept together and managed by his brothers for the benefit of his wife and child during her widowhood, and in the event of her marriage he wished them to manage the child's part of the estate. If the child should live, and then die under age without lawful issue, he wished his brothers to have the whole of his estate in equal portions, except the slaves and articles specifically given to his wife. The child died in ten days after his birth, living the testator's brothers, who were the next of kin of the testator and of the child: *held*, that by the true construction of the will, the testator intended that his wife should have in absolute ownership the slaves and other personal property specifically bequeathed to her, together with her legal rights in his estate as his widow, and nothing more: that the child inherited the real estate, subject to the widow's right of dower therein, and was entitled under the will (after payment of debts) to the slaves not specifically bequeathed, subject to the widow's life estate in one-third thereof, and to distribution with the widow, in conformity to law, of the other personal estate not specifically bequeathed: and that, upon the death of the child, his interest 884 in the *real estate descended to his paternal uncles, and his interest in the slaves and other personal property passed to them under the executory bequest in their favour contained in the will. S. C., 425

OYER AND TERMINER.

Of what offence court of oyer and terminer has no jurisdiction, and how prisoner under sentence of such court may be discharged. See County and corporation courts No. 3, 4, and

Cropper v. Commonwealth, 842

PARTIES.

1. Effect of nonjoinder of a demandant in writ of right. See Writ of right No. 2, and Walkers v. Boaz &c., 485

2. Within what time the plea of several tenancy should be pleaded in a writ of right. S. C., 485

3. When objection that sheriff is no party to suit in chancery for satisfaction out of insolvent's estate will not avail in appellate court. See Codefendants No. 2, and

Chappell v. Robertson, 590

4. Concerning parties to suit by distributee's donee of a slave, to enjoin sale under execution for distributee's debt to estate, and to set off distributable share against the judgment, see Legatees &c. No. 8, and

Hickerson's adm'r v. Helm, 628

PARTNERSHIP.

Merger of partnership contract.

Mercantile business being carried on in a single name, the merchant in whose name the business is conducted buys goods, and executes a specialty for the price thereof. The party who sells the goods and takes the specialty is ignorant at the time that the merchant has a dormant partner. Discovering this fact after the death of the merchant who gave the specialty, he then brings an action of assumpsit for the price of the goods against the dormant partner: *held*, the creditor has no legal remedy on the simple contract, the same being extinguished by the specialty: *dissentiente* Baldwin, J.

Ward v. Motter, 536

PATENT.

I. What patent for land settled is invalid.

1. Construction of the act in 1 R. C. of 1819, ch. 86, § 40, p. 330, which declares that "no entry or location on any lands within this commonwealth, which have been settled thirty years prior to the date of such entry or location, and upon which quit-rents or taxes can be proved to have been paid at any time within the said thirty years, shall be deemed valid;" and relinquishes any title that the commonwealth may be supposed to have thereto.

Tichanal v. Roe, 288

2. In 1796, a person settled upon, cleared and improved a tract or land. In 1806, he conveyed a part of it by metes and bounds. And in 1834, the land embraced in this conveyance was granted by the commonwealth in conformity with a survey made in 1833. It appearing that the tenant claiming under the deed of 1806 had entered upon, settled and improved the land conveyed by this deed, and had, during the period he held it, paid the taxes thereon, and that a portion of this land was actually enclosed in 1796, when the tract of which it then formed a part was settled, *held*, it is competent for the tenant to connect his possession with the possession of those under whom he claims (the same never having been interrupted); and it thus appearing that the location on which the commonwealth's grant was founded was on lands which had been settled thirty years prior to the date of the location, and upon which taxes had been paid within that time, *held*, farther, that the location was invalid, and that no title passed by the commonwealth's grant. S. C., 288

II. Seisin of patentee.

3. Concerning constructive seisin of land under grant from the commonwealth, see Writ of right No. 3, and

Dawson v. Watkins, 259

PAYMENT.

I. Application to principal of debt.

1. The principle laid down by Cabell, J.,

in *Pindall's ex'x &c. v. The Bank of Marietta* 10 Leigh 484, that "a debtor owing a debt consisting of principal and interest, 885 and making a partial *payment, has a right to direct its application to so much of the principal in exclusion of the interest, and the creditor, if he receives it, is bound to apply it accordingly," approved and acted on.

Miller v. Trevilian and others, 1

2. See, on the same subject, *Trusts and trustees No. 4*, and S. C., 1, 2

II. Evidence to repel presumption of payment.

3. What endorsement on bond is evidence to repel presumption of payment. See *Bond No. 2, 3*, and

Dabney's ex'ors v. Dabney's adm'r, 622

III. Payment by ex'or to legatee.

4. When legatee, voluntarily paid by executor, cannot be compelled by him to refund. See *Legatees &c. No. 11, 12*, and

Davis &c. v. Newman, 664

PEDIS POSITIO.

What is not proof of seisin in deed by pedis positio. See *Writ of right No. 4*, and *Dawson v. Watkins*, 259

PENITENTIARY CONVICT.

Proceedings where received under second or third sentence.

1. A report being made to the circuit court of Henrico by the superintendent of the penitentiary, pursuant to the statute 1 Rev. Code, ch. 171, § 16, that a convict received into the penitentiary is the same person mentioned in the record of a former conviction, and that he has not been sentenced to the punishment prescribed by law for his second offence, the court continues the case at several successive terms, in the absence and without the consent of the convict; after which he is brought into court for the first time, and his identity being duly ascertained, he is sentenced to the proper punishment of his second offence: *held*, such continuance of the case furnishes no ground of objection to the judgment.

Brooks v. Commonwealth, 845

2. Upon an enquiry, in pursuance of the statute 1 Rev. Code, ch. 171, § 16, whether a convict received into the penitentiary be the same person mentioned in the record of a former conviction, the prisoner has no right to challenge peremptorily any person called as a juror. S. C., 845

PERJURY.

I. Indictment.

1. An indictment for perjury in giving false testimony before a grand jury, charges that the defendant, being duly sworn, "did depose and give evidence to the grand jury in substance and to the effect following," (stating the testimony) "which said evidence was wilfully false and corrupt, for in truth" &c. (falsifying the facts deposed to) "and so the defendant did, in manner and form aforesaid, commit wilful and corrupt perjury." On general demurrer to the indictment, *held*,

here is no sufficient averment that the defendant wilfully or corruptly swore falsely, and the indictment is defective as well at common law as under the statute.

Thomas v. Commonwealth, 795

II. Evidence.

2. What witness for prosecution is disinterested. See *Witness No. 2*, and

Commonwealth v. Hart, 819

PERSONALTY.

See *Chattels*.

PETIT LARCENY.

How free negroes and mulattoes are to be tried for petit larceny. See *Free negroes &c. No. 2*, and

Cropper v. Commonwealth, 842

PLEADING.

1. What declaration in case by ferry owner for disturbance of his franchise is sufficient on general demurrer. See *Ferry No. 3*, and

Patrick v. Ruffners, 209

2. What bill does not warrant injunction to restrain mill owner from rebuilding dam. See *Mills No. 2*, and

Talley v. Tyree, 500

3. What indictment for perjury is insufficient. See *Perjury No. 1*, and

Thomas v. Commonwealth, 795

4. When matter of abatement must be pleaded. See *Abatement No. 3*, and

May &c. v. State bank of N. Carolina, 56

5. Nonjoinder of a demandant in writ of right must be pleaded in abatement. See *Writ of right No. 2*, and

Walkers v. Boaz &c., 485

*6. Within what time the plea of several tenancy should be pleaded in a writ of right. S. C., 485

7. When plea to foreign attachment, by party claiming as debtor's assignee, alleging that the debtor was a resident, is demurrable. See *Foreign attachment*, and

Smith v. Hunt &c., 206

POSSESSION.

1. What possession by vendor of chattel is fraudulent as to his creditors. See *Fraud No. 3*, and

Tavener v. Robinson, 280

2. When patent for land settled thirty years is invalid. See *Patent No. 1, 2*, and

Tichanal v. Roe, 288

3. What is competent evidence to disprove constructive seisin of demandant in writ of right. See *Writ of right No. 3*, and

Dawson v. Watkins, 256

4. What facts are insufficient to prove a seisin in deed by pedis positio. See *Writ of right No. 4*, and S. C., 259

POWER OF ATTORNEY.

A power of attorney is in these words: "We authorize J. M. to confess judgment for us and in our name, on a delivery bond in favour of S. & S. executed by us on the 18th November 1840;" and is signed and sealed by

the obligors in the delivery bond referred to. Judgment on the delivery bond is confessed for the obligors by J. M. the attorney, with stay of execution till the next term: *held*, such confession with stay of execution was authorized by the power.

Calwells v. Sheilds & Somerville, 305

PRACTICE IN ACTIONS AT LAW.

1. Nonjoinder of a demandant in writ of right must be pleaded in abatement. See Writ of right No. 2, and

Walkers v. Boaz &c., 485

2. Within what time the plea of several tenancy should be pleaded in a writ of right. S. C., 485

3. When nonsuit in writ of right will be set aside. See Nonsuit, and S. C., 485

PRACTICE IN CRIMINAL CAUSES.

See Criminal jurisdiction and proceedings.

PRACTICE IN SUITS IN EQUITY.

1. Concerning parties to suit by distributee's donee of a slave, to injoin sale under execution for distributee's debt to the estate, and to set off distributable share against the judgment, see *Legatees &c. No. 8*, and

Hickerson's adm'r v. Helm, 628

2. What objection for want of parties will not avail in appellate court. See *Codefendants No. 2*, and

Chappell v. Robertson, 590

3. Case in which a defendant was brought in by a messenger to answer interrogatories.

Johns v. Davis's ex'or &c., 729

4. When plea to foreign attachment, by party claiming as debtor's assignee, alleging that the debtor was a resident, is demurrable. See *Foreign attachment*, and

Smith v. Hunt &c., 206

5. At what time after replication to answer a cause may be set for hearing. See *Hearing of cause No. 1*, and

Poling v. Johnson, 255

6. Consequence if cause be prematurely set for hearing and prematurely heard. See *Hearing of cause No. 2*, and S. C., 255

7. Relief to reversioner of slave removed pending injunction. See *Slaves No. 2*, and

Johns v. Davis's ex'or &c., 729

8. Specific execution decreed in part, without prejudice to further remedy at law. See *Award No. 2*, and

Boyd's heirs v. Magruder's heirs, 761

9. Upon what terms sale under vendor's lien will be decreed against heirs of vendee. See *Specific execution No. 3*, and

Wade's heirs v. Greenwood & wife, 475

10. When vendor obtaining specific execution will be decreed to pay costs. See *Specific execution No. 1*, and S. C., 474

11. When dismission of bill by legatees to recover legacies will be without costs. See *Legatees &c. No. 6*, and

Burnley's representatives v. Duke & others, 102

12. Decree on guardianship account only, in suit by ward distributee against guardian administrator. See *Guardian and ward No. 3*, and

Williamson's ex'or v. Howard, 39

13. When decree may be rendered in favour

of one defendant against another. See *Codefendants No. 2*, and

Chappell v. Robertson, 590

887 *14. Decree over for obligor in assigned gaming bond against obligee assignor. See *Gaming No. 3*, and

Pettit v. Jennings &c., 676

15. An appeal lies to the court of appeals from an order of a circuit court overruling a motion to dissolve an injunction which was improvidently granted. Accord. *Lomax v. Picot*, 2 Rand. 247.

Talley v. Tyree, 500

16. What objection to decree does not lie for the party appealing. See *Codefendants No. 2*, and

Chappell v. Robertson, 590

17. As to what parties erroneous decree will be reversed. See *Appellate jurisdiction No. 6*, and

Arrington v. Cheatham & wife, 492

18. Affirmance of decree, deficiency of one item being regarded as an equivalent for excess in another. See *Appellate jurisdiction No. 8*, and

Williamson's ex'or v. Howard, 40

19. Affirmance of decree enforcing lien of trust deed, with addition thereto of direction for sale of the property. See *Mortgages &c. No. 6*, and S. C., 39

PRESUMPTION.

What endorsement on bond is evidence to repel presumption of payment. See *Bond No. 2, 3*, and

Dabney's ex'ors v. Dabney's adm'r, 622

PRETERMITTED CHILD.

What child pretermitted by father's will is entitled to no provision. See *Will No. 5*, and *Savage &c. v. Mears & wife*, 570

PRINCIPAL AND AGENT.

I. Power of attorney.

1. Construction of power of attorney to confess judgment. See *Power of attorney*, and

Calwell's v. Sheilds & Somerville, 305

II. What purchase by agent from principal will be set aside.

2. The doctrine of the english chancery, that a person standing in the confidential relation of agent cannot, while that relation continues and before that confidence is withdrawn, make a purchase from the principal (that will bind the latter) of a subject within the scope of the agency, recognized and acted upon.

Buckles v. Lafferty's legatees, 292

3. A testator (amongst other things) directed lands to be sold, and legacies to be paid out of the proceeds. The administratrix with the will annexed, on whom the power of making the sale was conferred, appointed an agent, who did the business of the administration, and received the commissions allowed the administratrix. She was old, and had great confidence in him, and he acted in a great degree without her supervision, and practically conducted the admin-

istration without control. After several previous attempts by the agent to sell one of the parcels of land, it was put up at auction (as the sale bill announced) for the last time, and knocked down to a person requested by the agent to bid (for the purpose of promoting the sale) at 21 dollars 52 cents per acre, a higher bid than had been made on any previous occasion. Some persons present were willing to have given as much as 25 dollars per acre; and one of them, who was surprised when the land was knocked off and not to his bid, on the same day (immediately after the sale) stated to the agent his willingness to have gone higher if necessary. A few weeks afterwards, the agent purchased the land from the administratrix by private contract at 22 dollars per acre, and took a conveyance of it from her. This was in 1829. In 1835, a bill was filed by the legatees to rescind the sale and conveyance. The bill alleged that the proceeds of the sale were insufficient to pay the legacies, and it further alleged that most of the plaintiffs were non-residents who had not been in Virginia since the sale, and that some were infants and *femes covert*: *held*, 1. A purchase by such an agent is in substance no better than a purchase from himself, and though it might bind him, is not binding on the legatees, unless ratified by them deliberately and on full information. 2. No such ratification appearing, the delay in this case to impeach the purchase (due allowance being made for the infancy of some and the nonresidence of others) does not deprive the plaintiffs of their right to the aid of equity. 3. The extent of the interest of the plaintiffs ought by a proper account to be ascertained, to the end that the purchaser may, if he thinks proper so to do, remove that interest by paying to the plaintiffs the parts unsatisfied of their legacies. 4. If the purchaser should not do this, the plaintiffs will be entitled to have the land reexposed to sale at a proper upset price, to be ascertained by debiting the purchaser with the profits of the land or with a fair annual rent therefor since his purchase, and crediting him first with his payments and interest on the same, and secondly with all his substantial and permanent improvements. The balance, with the addition thereto of a reasonable amount for the commission and charges of resale, is the sum at which the land should be set up, on a credit of 6, 12 and 18 months, bearing interest. 5. If the land and improvements should not sell for more than the upset price, the purchase should stand confirmed: if it should sell for more, then the former sale should be vacated, the purchase money on the resale duty collected from the purchaser at the same, and a conveyance made to him, and the proceeds of the resale applied, 1st. to pay the charges of sale; 2dly, to pay the first purchaser the balance due him upon an account stated as before mentioned; and the surplus to the legatees, according to their respective rights.

Buckles v. Lafferty's legatees, 292, 3

PRINCIPAL AND SURETY.

1. How far sureties are estopped by entry

of judgment confessed by their attorney. See Judgment No. 1, and

Calwells v. Sheilds & Somerville, 305

2. What receipt of constable is *prima facie* evidence against him and his sureties of the collection of the claim. See *Constables*, and

Smith &c. v. The governor, 229

3. What grant of administration is valid against sureties in administration bond, and for what assets they are liable. See *Legatees &c. No. 6*, and

Burnley's representatives v. Duke & others, 102

4. What legacy is a charge upon the executor as a legatee, and does not render his sureties responsible. See *Will No. 4*, and

Arrington v. Cheatham & wife, 492

PROBATE AND ADMINISTRATION.

1. Concerning the probate of nuncupative will, and how such will may be thereafter impeached, see *Nuncupative will No. 2, 3*, and

Page &c. v. Page, 424

2. What grants of administration, original and *de bonis non*, are valid. See *Legatees &c. No. 6*, and

Burnley's representatives v. Duke & others, 102

PROCESS.

On indictment for playing at unlawful game. See *Gaming No. 5*, and

Wright v. Commonwealth, 800

PURCHASER.

See references under title *Sale*.

RECEIPT.

1. Effect of constable's receipt for claim as evidence of collection. See *Constables* and

Smith &c. v. The governor, 229

2. Relief in equity against estoppel at law by deed acknowledging payment. See *Estoppel No. 4*, and

Radcliff &c. v. High, 271

RECORD.

1. What is the record of a judgment confessed, and how far evidence aliunde is admissible to shew the power and action of attorney confessing the same. See *Judgment No. 1*, and

Calwells v. Sheilds & Somerville, 305

2. See *Registry*, and

Cocke v. Haxall's ex'x, 470

RECOVERY.

See *Former recovery*, and

Weaver v. Vowles, 438

REDEMPTION.

1. What grantor has no right of redemption. See *Mortgages &c. No. 2*, and

Floyd v. Harrison &c., 161

2. Allowance of time for redemption upon decree against heirs of vendee for sale under vendor's lien. See *Specific execution No. 3*, and

Wade's heirs v. Greenwood & wife, 475

REGISTRY.

What registry of trust deed of personality is invalid.

It was the intention of the legisla-

889 ture in the act of 1792 regulating *conveyances, (1 vol. of Old Revised Code, p. 157, § 2, 4,) to require a deed of trust or mortgage of personal estate to be recorded in the general court, or in the court of the district, county or corporation in which the grantor resided. Therefore where a deed of trust of personalty, dated the 15th of July 1812, stated the grantor to be of Henrico county, and the trustee and cestui que trust to be of the town of Petersburg, and the deed was never recorded in Henrico but only in Petersburg, and there was no evidence to shew that either at the date of the deed, or of its recordation in Petersburg, the grantor resided in that town, *held*, the deed so recorded is void as to the grantor's creditors.

Cocke v. Haxall's ex'x, 470

RELEASE.

Of commonwealth's title to land settled thirty years, on which taxes have been paid within that time. See Patent No. 1, 2, and Tichanal v. Roe, 288

RENT.

Apportionment in equity.

Pending a suit in chancery by creditors for the sale of their debtor's land, the heirs of the debtor lease the land to a tenant for 3 years from the first of April, unless there shall in the mean time be a decree of sale, in which case the tenant is to give possession on the first of April after the decree. A rent is reserved of \$300, to be paid at the end of each year of the tenancy. And according to the true construction of the lease, the tenant has a right to the crops growing on the land at the end of every year for which rent is reserved. In June of the third year, the land is sold under a decree in the creditors' suit, and the tenant applies to the purchasers for permission to proceed with the cultivation of the land; but one of the purchasers, in presence of the other (who had been one of the lessors), refuses, declaring that if the tenant sows the land, he the purchaser will reap the crop; and in consequence of this refusal the tenant proceeds no farther with his preparations for a fall crop, though he remains in possession of the land the third year. A few days before the expiration of that year, the purchasers sue out an attachment against the tenant for \$300 rent to become due the first of April, upon the levy whereof the tenant gives to the sheriff bond and security for the rent. Judgment being obtained on this bond, the same is enjoined as to \$200, upon the bill of the tenant praying an abatement of the rent according to equity: *held* by two judges, 1. that under the circumstances, the purchasers were not warranted in assuming the relation of landlord for the purpose of coercing the payment of the \$300; 2. that there not having been an actual eviction, there was no remedy at law, and it was competent for the tenant to come into equity upon the ground that he was entitled to an abatement; and 3. the evidence justifying the allowance of \$200 as a fair abatement, the injunction should be perpetuated.

Mason &c. v. Moyers, 606

REPEAL.

1. What statute is no implied repeal of former laws on same subject. See Gaming No. 4, and

Pitman v. Commonwealth, 800

2. See also, on the subject of implied repeal, title Banks, and

Commonwealth v. Farmers bank, 737

REPLICATION.

At what time after replication to answer a chancery suit may be set for hearing. See Hearing of cause No. 1, and

Poling v. Johnson, 255

RETURN.

Effect of return on fi. fa. as evidence in action against sheriff. See Fieri facias No. 1, and

Lathrop v. Lumpkin &c., 49

REVERSAL.

As to what parties erroneous decree will be reversed. See Appellate jurisdiction No. 6, and

Arrington v. Cheatham & wife, 492

REVERSION.

1. Relief to reversioner of slave removed pending injunction. See Slaves No. 2, and Johns v. Davis's ex'or &c., 729

890 *2. How lien of Mutual Assurance society will be enforced where one party has estate for life and another the reversion. See Mutual Assurance society No. 4, and Shirley v. Mut. Ass. society, 706

REVOCATION.

What is not an implied revocation of will. See Will No. 5, and

Savage &c. v. Mears & wife, 570

SALE.

1. What grantor has no right of redemption. See Mortgages &c. No. 2, and

Floyd v. Harrison &c., 161

2. Whether a power of sale given to mortgagee by the deed of mortgage is valid. See Mortgages &c. No. 3, and S. C., 162

3. What purchase by agent from principal will be set aside. See Principal and agent No. 2, 3, and

Buckles v. Lafferty's legatees, 292

4. Concerning validity, as against wife, of husband's assignment of her personalty, see Husband and wife No. 3, 4, 5, 6, 7, and

Browning v. Headley, 340, 41

5. What sale of chattel is fraudulent as against creditors of vendor. See Fraud No. 2, and

Tavener v. Robinson, 280

6. Action by vendee of chattel against sheriff purchasing at his own sale under execution against vendor. See Fieri facias No. 3, and S. C., 280

7. Effect of sale under second of two fi. fas. in officer's hands. See Fieri facias No. 2, and

M'Key &c. v. Garth, 33

8. What vendee of land, after conveyance by vendor delivered as escrow, is a freeholder qualified to serve as a grand juror. See Freehold, and

Commonwealth v. Burcher, 826

9. When specific execution will be decreed against heirs of vendee. See Specific execution No. 1, and

Wade's heirs *v.* Greenwood & wife, 474

10. What decree will be rendered against such heirs. See Specific execution No. 2, and S. C., 475

11. Time allowed in such case for redemption, and sale to be made upon credit. See Specific execution No. 3, and S. C., 475

12. Lien of elegit on land conveyed in trust to secure debts; and rights of elegit creditor against purchaser under the trust deed. See Elegit, and

Findlay *v.* Toncray, 374

13. When sale under vendor's lien precludes right to dower. See Dower No. 1, and

Wilson &c. *v.* Davisson, 384

14. Affirmance of decree enforcing lien of trust deed, with addition thereto of direction for sale of the property. See Mortgages &c. No. 6, and

Williamson's ex'or *v.* Howard, 39

SEISIN.

1. How constructive seisin of demandant in writ of right may be disproved. See Writ of right No. 3, and

Dawson *v.* Watkins, 259

2. What is not proof of seisin in deed by pedis positio. See Writ of right No. 4, and S. C., 259

3. When husband will be considered as dying seized, so as to entitle widow to rents and profits from his death. See Dower No. 4, and

Macaulay's ex'or *v.* Dismal swamp land co., 507

SETOFF.

1. What claims cannot be set off by purchaser under trust deed against elegit creditor of grantor. See Elegit No. 1, and

Findlay *v.* Toncray, 374

2. When rent may be apportioned in equity. See Rent, and

Mason &c. *v.* Moyers, 606, 7

3. Setoff by distributee of his share against debt for purchases at executor's sale. See Legatees &c. No. 7, and

Hickerson's adm'r *v.* Helm, 628

4. Injunction by distributee's donee of a slave to sale under execution for distributee's debt to the estate, and setoff of distributable share against the judgment. See Legatees &c. No. 8, and S. C., 628

5. Setoff of maintenance supplied by executor guardian de facto against interest on ward's legacy. See Guardian and ward No. 2, and

Arrington *v.* Cheatham & wife, 492

SETTING FOR HEARING.

See Hearing of cause, and

Poling *v.* Johnson, 255

SEVERAL TENANCY.

Within what time the plea of several tenancy should be pleaded in a writ of right.

Walkers *v.* Boaz &c., 485

891

*SHERIFFS.

1. Effect of return on fi. fa. as evi-

dence in action against the sheriff. See Fieri facias No. 1, and

Lathrop *v.* Lumpkin &c., 49

2. Action by vendee of chattel against sheriff purchasing at his own sale under execution against vendor. See Fieri facias No. 3, and

Tavener *v.* Robinson, 280

3. Effect of sale under second of two fi. fas. in hands of officer. See Fieri facias No. 2, and

M'Key &c. *v.* Garth, 33

4. When objection that sheriff is no party to suit in chancery for satisfaction out of insolvent's estate will not avail in appellate court. See Codefendants No. 2, and

Chappell *v.* Robertson, 590

SIMPLE CONTRACT.

Merger of simple contract of partnership in specialty of one partner. See Partnership, and

Ward *v.* Motter, 536

SLAVES.

I. Emancipation.

1. What issue of freedwoman is not entitled to freedom. The decision in Maria and others *v.* Surbaugh, 2 Rand. 228, still adhered to.

Ellis *v.* Jenny &c., 597

II. Relief to reversioner of slave removed pending injunction.

2. Upon a bill in equity by a reversioner of slaves against the husband of tenant for life, alleging a purpose to remove one of the slaves out of the commonwealth, an injunction is awarded, and bond given by the husband with surety, conditioned to abide by and perform the final decree of the court. Upon an amended bill against the surety as well as the husband, it appears that the surety, while bound as such, and of course with full knowledge of the plaintiff's claim, caused the slave to be removed and sold out of the commonwealth, through the instrumentality of an agent: *held*, 1. That for such removal and sale in contempt and subversion of the court's authority, it is competent for the court to give redress and vindicate its jurisdiction by decreeing in favour of the plaintiff against both the obligors in the bond. 2. That the measure of relief is not for the value of the slave, but for the value of the plaintiff's reversionary estate in her, which should be ascertained by reference to a commissioner. 3. That the agent of the surety, by his agency in the removal and sale of the slave, would have subjected himself to the like decree, if he had known at the time of the claim of the plaintiff, and had confederated with the surety to defeat the same.

Johns *v.* Davis's ex'or &c., 729

III. Widow's interest as distributee.

3. Measure of widow's right where slaves of husband liable to her dower have been sold by his executor. See Widow No. 3, and

Hickerson's adm'r *v.* Helm, 629

IV. Injunction to sale under execution.

4. Injunction by distributee's donee of a

slave to sale under execution for distributee's debt to the estate. See *Legatees &c.* No. 8, and

Hickerson's adm'r v. Helm, 628

SPECIALTY.

1. Merger of partnership simple contract in specialty of one partner. See *Partnership*, and

Ward v. Motter, 536

2. What endorsement on bond is evidence to repel presumption of payment. See *Bond* No. 2, 3, and

Dabney' ex'ors v. Dabney's adm'r, 622

SPECIFIC EXECUTION.

I. What contract will be enforced against vendee.

1. In 1814 land was sold, possession thereof delivered, part of the purchase money paid, and a contract, made to pay a further part when a lawful right should be conveyed. In 1820 a bill was filed by the vendor and his wife (who claimed to have inherited the land from her father) against the vendees and their assignee, asking specific execution of the contract. The bill also made defendant a nonresident, who, it was alleged, had formerly owned the land, and conveyed it to the father by a deed which was accidentally destroyed before it was placed on record. The assignee in his answer said, he had heard a report that the

father mortgaged the land to secure 892 *a debt which was yet unpaid. He professed his readiness to pay the balance due from him to the vendees, upon receiving a title to the land, and a release of the mortgage if there was one. The non-resident defendant, though proceeded against by publication, put in no answer. It was proved by a witness, that in 1794 the non-resident defendant conveyed the land to the father of the female complainant; that the deed was acknowledged before three witnesses, and delivered to one of them to have it recorded; and that it was accidentally burnt while in his possession. In 1830 a decree was made for specific execution. During all this time the vendees and their assignee, and the heirs of the latter, continued to hold possession of the land; none of them asked a rescission of the contract; and it did not appear that there was any such mortgage as was mentioned in the answer. Upon an appeal by the heirs of the assignee: *held*, 1. That as the conveyance to the father, though never recorded, and afterwards destroyed, was effectual against the grantor to vest the legal title in the father, and the great lapse of time since that conveyance, in connexion with the uninterrupted possession of the father and those claiming under him, furnished a sufficient presumption against any claim on the part of the grantor's creditors, the decree for specific execution was, under the circumstances, proper. 2. That as there was no record of the said conveyance, a commissioner should be directed to execute another deed from the grantor to the appellants. 3. That as the ancestor of the appellants was not bound to take

the title until the existence and validity of the said conveyance had been judicially ascertained, and as the burthen of establishing these facts devolved on the vendors, they should be decreed to pay the costs.

Wade's heirs v. Greenwood & wife, 474

II. What decree will be made against heirs of vendee.

2. Where a suit is brought against a vendee for specific execution, and pending the suit he dies, and the same is revived against his heirs, they are not liable to a personal decree: the decree should merely be, that unless they pay the purchase money and interest within a period to be prescribed, the land shall be sold.

Wade's heirs v. Greenwood & wife, 475

3. In a suit by a vendor against the vendee's heirs, to subject lands to sale by virtue of the vendor's lien for his purchase money, it is, in general, an improper exercise of discretion to decree an immediate sale without allowing any time for redemption, or to decree the sale to be made for cash. If circumstances exist which render it expedient to sell forthwith and for cash, such circumstances should be disclosed by the record. If there be a decree to sell forthwith and for ready money, in a case in which nothing appears to call for or justify a departure from the general rule, the decree will for this cause be reversed. S. C., 475

III. Specific execution of award.

4. What submission is binding and entitles to specific execution of the award. See *Award* No 1, and

Boyd's heirs v. Magruder's heirs, 761

IV. Specific execution in part.

5. Decree for specific execution in part, without prejudice to further remedy at law. See *Award* No. 2, and

Boyd's heirs v. Magruder's heirs, 761

STATUTES OF VIRGINIA, OF A GENERAL NATURE, CITED AND CONSTRUED.

I. Jurisdiction and practice of courts.

1. Acts of 1838, ch. 64, p. 61, authorizing chancery causes which have been pending in the county courts for one year to be removed to circuit courts, cited.

Hendricks &c. v. Compton's ex'or, 196

2. Acts of 1822-3, ch. 37, § 1, p. 39, Suppl. to R. C. p. 129, allowing four months from replication to answer for taking depositions in chancery, construed.

Poling v. Johnson, 255

3. Acts of 1827-8, ch. 25, § 1, p. 20, Suppl. to R. C. p. 125, declaring that no decree shall be reversed for informality in the proceedings, where the parties have proceeded to take their depositions, have been fully heard on the merits, and substantial justice has been done, cited.

Poling v. Johnson, 257

Hickerson's adm'r v. Helm, 640, 643, 657

893 *4. Ch. 66, § 57, p. 208 of 1 R. C. concerning appeals from interlocutory decrees, cited.

Talley v. Tyree, 503

5. Acts of 1830-31, ch. 11, § 31, Suppl. to R. C. p. 149, on same subject, construed. S. C., 500
6. Acts of 1830-31, ch. 11, § 32, Suppl. to R. C. p. 149, abolishing, in respect to appeals from interlocutory decrees (with certain exceptions), the former privilege as to the time and order of hearing, cited. S. C., 505
7. Ch. 69, § 46, p. 237 of 1 R. C. requiring the orders of each day in the circuit courts to be read in open court at the next sitting, cited. *Calwells v. Sheilds & Somerville*, 327
8. Same chapter, § 56, p. 239, by which appeals were allowed from judgments or sentences of the county and corporation courts, cited. *Farneyhough's ex'ors v. Dickerson &c.*, 584
9. Acts of 1830-31, ch. 11, § 30, p. 50, Suppl. to R. C. p. 145, providing that a supersedeas may be allowed to a final judgment, proceeding or order of a county or corporation court, construed. S. C., 582
- II. Juries.
10. Ch. 75, § 1, p. 264 of 1 R. C. requiring that grand jurors shall be freeholders, construed. *Commonwealth v. Burcher*, 826 cited. S. C., 830
11. Same chapter, § 12, p. 266, prescribing the qualification of petit jurors in the superior courts and for the trial of pleas of the commonwealth, cited. S. C., 833
- III. Constables.
12. Acts of 1825-6, ch. 19, p. 21, Suppl. to R. C. p. 201, concerning the liability of constables and their sureties for claims collected and received for collection, cited. *M'Key &c. v. Garth*, 37 construed.
- Smith &c. v. The governor*, 229
- IV. Land laws.
13. Ch. 86, § 40, p. 330 of 1 R. C. declaring invalidity of entry or location on land settled thirty years, on which quitrents or taxes have been paid within that time, and relinquishing commonwealth's title to such land, construed. *Tichanal v. Roe*, 288
- V. Conveyances.
14. Ch. 99, § 1, p. 361 of 1 R. C. declaring that no estate of freehold in lands shall be conveyed from one to another except by writing sealed and delivered, cited. *Commonwealth v. Burcher*, 831
15. Acts of 1813-14, ch. 10, § 8, p. 36, concerning registry of deeds of trust and mortgages of personal estate, cited. *Cocke v. Haxall's ex'x*, 472
16. Ch. 99, § 11, p. 364 of 1 R. C. on same subject, cited. S. C., 472
17. Act of 1792, 1 Old R. C. ch. 90, § 2, 4, p. 157, on same subject, construed. S. C., 470
18. Acts of 1705, ch. 21, 3 Hen. stat. at large p. 318,—of 1710, ch. 13, 3 Id. p. 517,—of 1734, ch. 6, 4 Id. p. 397,—of 1748, ch. 1, 5 Id. p. 408, and of 1785, ch. 62, 12 Id. p. 154, on same subject, cited. S. C., 472, 3
19. Ch. 99, § 20, p. 368 of 1 R. C. restricting the effect of alienations to so much of the right and estate in the land as the grantor may lawfully convey, cited. *Robinett v. Preston's heirs*, 278 *Findlay v. Toncray*, 379
20. Same chapter, § 29, p. 370, for transferring the possession of land to the bargainee, releasee or person entitled to the use, cited. *Syrus & others v. Allison*, 202
- VI. Wills.
21. Statute of December 13, 1792, 1 Old R. C. ch. 92, § 3, p. 160, 161, 1 R. C. of 1819, ch. 104, § 3, p. 376, providing for children born after the execution of a will made when the testator was childless, and for posthumous children, cited. *Savage &c. v. Mears & wife*, 572, 3, 575
22. Statute of December 5, 1794, 1 Old R. C. ch. 170, § 1, p. 319, 20, 1 R. C. of 1819, ch. 104, § 4, p. 376, making provision for children born after the execution of the father's will and pretermitted thereby, construed. S. C., 570
23. Ch. 104, § 7, p. 377 of 1 R. C. declaring that no nuncupative will shall be established unless it be made in the time of the last sickness of the deceased, construed. *Page &c. v. Page*, 424
24. Same chapter, § 8, p. 377, invalidating nuncupative wills in certain cases unless the testimony or the substance thereof shall have been committed to writing, construed. S. C., 424
- 894 *25. Same chapter, § 13, p. 378, allowing wills to be contested by bill in chancery after probate, construed. S. C., 424
26. Same chapter, § 18, p. 379; 5 Hen. stat. at large p. 457, § 11, prescribing after what time and upon what notice nuncupative wills may be proved, cited. S. C., 425, 435
- VII. Ex'ors and adm'rs.
27. Ch. 104, § 36, p. 384 of 1 R. C. declaring that no omission to plead or mispleading shall charge an executor or administrator or his sureties beyond the assets, cited. *Davis &c. v. Newman*, 667
28. Same chapter, § 59, p. 389, allowing to executors their disbursements, and compensation for their personal trouble, construed. *Farneyhough's ex'ors v. Dickerson &c.*, 582 cited. S. C., 587
29. Same chapter, § 66, p. 390, concerning the liability of the personal representative of an executor in his own wrong, cited. *Burnley's representatives v. Duke & others*, 124
30. Acts of 1839, ch. 70, p. 44, authorizing administrator de bonis non to receive assets from representative of prior executor or administrator, cited. S. C., 133
- VIII. Dower.
31. Ch. 107, § 4, p. 403 of 1 R. C. giving damages to widows deforced of their dower

in lands whereof their husbands died seized, construed.

Macaulay's ex'or v. Dismal swamp land co., 507

IX. Infants.

32. Ch. 108, § 21, p. 410 of 1 R. C. making proceeds of sale of infant's land descendible as realty, cited.

Perrin &c. v. Lomax &c., 142

X. Slaves.

33. Ch. 111, § 48, 49, p. 431, 2 of 1 R. C. forfeiting to reversioner slaves removed out of commonwealth by tenant for life, or husband of such tenant, cited.

Johns v. Davis's ex'or &c., 732, 3

XI. Rents and replevin.

34. Ch. 113, § 23, 24, p. 451, 2 of 1 R. C. concerning the writ of replevin for goods distrained for rent, cited.

Mason &c. v. Moyers, 618

35. Acts of 1822-3, ch. 29, § 9, Suppl. to R. C. p. 255, abrogating the writ of replevin at common law, cited. S. C., 618

36. Acts of 1826-7, ch. 27, § 2, Suppl. to R. C. p. 256, allowing tenant to contest right of landlord to sue out attachment for rent to become due, cited. S. C., 618

XII. Forcible entry.

37. Ch. 115, § 2, p. 455 of 1 R. C. giving summary remedy to person dispossessed by forcible entry, construed.

Pauley v. Chapman, 235

XIII. Writ of right.

38. Ch. 128, § 34, p. 496 of 1 R. C. concerning plea of several tenancy in abatement of writ of right, cited.

Walkers v. Boaz &c., 490

39. Acts of 1822-3, ch. 24, § 2, p. 27; Suppl. to R. C. ch. 151, p. 210, declaring that a non-suit in a writ of right shall be no bar to a subsequent action, cited. S. C., 489

XIV. Death of parties.

40. Ch. 128, § 38, p. 497, 8 of 1 R. C. for preventing abatement of certain actions by death of plaintiff or defendant before judgment, cited.

May &c. v. State bank of N. Carolina, 69

XV. Indebitatus assumpsit.

41. Ch. 128, § 86, p. 510 of 1 R. C. requiring account of items to be filed with declaration in indebitatus assumpsit, cited.

Weaver v. Vowles, 448

XVI. Witnesses.

42. Ch. 131, § 1, 2, p. 517 of 1 R. C. disqualifying as witnesses persons convicted of perjury or felony, cited.

Commonwealth v. Hart, 821

XVII. Insolvents.

43. Ch. 134, § 34, p. 538 of 1 R. C. vesting lands of insolvent debtor in the sheriff of the county where they lie, construed.

Syrus &c. v. Allison, 200

XVIII. Crimes, prosecutions and punishments.

44. Ch. 148, § 1, p. 571 of 1 R. C. defining and punishing perjury, construed.

Thomas v. Commonwealth, 795

45. Acts of 1822-3, ch. 34, § 1, p. 36, Suppl. to R. C. ch. 226, p. 280, making certain trespasses on property *punishable as misdemeanours, construed.

Campbell &c. v. Commonwealth, 791
cited, Pauley v. Chapman, 240

46. Acts of 1827-8, ch. 36, § 4, Suppl. to R. C. p. 275, 6, declaring that persons who should thereafter be guilty of certain offences against the gaming laws should be subjected to a certain punishment in lieu of the former, cited.

Pitman v. Commonwealth, 807, 8, 815

47. Acts of 1841-2, ch. 69, § 4, p. 44, changing the fee of the commonwealth's attorney and the sum to be paid to the literary fund, in all recoveries thereafter had for violations of the gaming laws, construed. S. C., 800

48. Acts of 1842-3, ch. 84, p. 57, repealing the lastmentioned enactment, cited.

S. C., 817

49. Acts of 1827-8, ch. 37, § 5, p. 30, Suppl. to R. C. ch. 183, p. 242, prescribing how slaves shall be tried and punished for simple larceny to the value of twenty dollars or less, cited.

Cropper v. Commonwealth, 843, 4

50. Acts of 1831-2, ch. 22, § 9, p. 22; Suppl. to R. C. ch. 187, p. 247, prescribing how free negroes and mulattoes shall be tried and punished for the same offence, construed.

S. C., 842

51. Ch. 171, § 16, p. 619, 20 of 1 R. C. prescribing the proceedings to be had in certain cases against convicts received into the penitentiary under a second or third sentence, construed.

Brooks v. Commonwealth, 845

XIX. Claims against commonwealth.

52. Ch. 174, § 2, p. 2 of 2 R. C. and Acts of 1838, ch. 14, § 1, p. 27, allowing claims against the commonwealth to be presented to the auditor, construed.

Commonwealth v. Farmers bank, 737

53. Ch. 174, § 6, p. 2 of 2 R. C. Acts of 1838, ch. 14, § 1, p. 27; Acts of 1840-41, ch. 48, § 1, p. 66, prescribing to what court a petition may be presented for redress against the auditor's decision disallowing a claim against the commonwealth, construed. S. C., 737

XX. Banks.

54. Acts of 1838, ch. 13, § 2, p. 27, allowing credit to the banks in account with the commonwealth for the premium on specie paid to the public creditors, construed.

Commonwealth v. Farmers bank, 737

55. Same chapter, § 1, declaring that the interest on public loans shall thereafter be paid in specie or its equivalent, cited.

S. C., 737, 741, 747

56. Acts of 1839-40, ch. 63, p. 52, requiring the banks to pay the next semiannual instalment of interest to the public creditors in specie or its equivalent, construed.

S. C., 737

57. Acts of 1839-40, ch. 65, § 13, p. 55, requiring the banks to pay the next semiannual instalment of interest to the public creditors in specie or its equivalent without charging any premium therefore, cited.

S. C., 745, 753, 757, 759

XXI. Mills.

58. Ch. 235, p. 255 of 2 R. C. concerning mills, cited.

Muire &c. v. Smith, 458

59. Same chapter, § 1, p. 225, declaring who may apply for leave to erect mill and dam, and to whom notice of the application may be given, construed.

Pitzer v. Williams, 241

60. Same chapter, § 9, p. 228, saving prosecutions and private actions except for injuries actually foreseen and estimated upon the inquest in a mill case, cited. S. C., 249

XXII. Ferries.

61. Ch. 238, § 1, p. 261 of 2 R. C. concerning inquest on application for the establishment of a ferry, construed.

Muire &c. v. Smith, 458

62. Same chapter, § 1, 2, authorizing county court to establish ferry where applicant owns the land on both sides of the watercourse or on one side only, cited.

Patrick v. Ruffner, 218

XXIII. Repealing statutes.

63. Various penal statutes containing express clauses of repeal, cited.

Pitman v. Commonwealth, 814

SUBMISSION.

What submission is binding and entitles to specific execution of the award. See Award No. 1, and

Boyd's heirs v. Magruder's heirs, 761

SUPERSEDEAS.

To what proceeding a supersedeas lies.

An executorial account being settled by commissioners under an order of the 896 court of probate, some of the legatees file exceptions to the account, and the court overrules the same, orders the account to be recorded, and adjudges the exceptors to pay the executor's costs: *held*, this is a final proceeding or order, within the meaning of the act in Sess. Acts of 1830-31 ch. 11, § 30, p. 50, Suppl. to Rev. Code p. 145, to which, on the petition of the exceptors, a supersedeas may be awarded. Accord. Triplett's ex'ors v. Jameson, 2 Munf. 242.

Farneyhough's ex'ors v. Dickerson &c., 582

SURETIES.

See Principal and surety.

TAXES.

Invalidity of patent for land settled thirty years, on which taxes have been paid within that time. See Patent No. 1, 2, and

Tichanal v. Roe, 288

TRESPASS.

What trespass is no misdemeanour.

A party in actual and peaceable possession of land, which he claims as his own, encloses it with a fence. About four years afterwards another person, who claims the same land and has a better title to it, forcibly pulls down and removes the fence: *held*, this is not a trespass for which a prosecution can be sustained under the statute of February 14, 1823, Acts of 1822-3, ch. 24, § 1.

Campbell &c. v. Commonwealth, 791

TRUSTS AND TRUSTEES.

I. Mortgages and deeds of trust.

1. See title Mortgages and trusts.

II. Husband trustee for wife.

2. When the husband is a mere trustee for the wife, acquiring no individual interest in her personality. See Husband and wife No. 1, and

Matthews & co. v. Woodson &c., 601

III. Principal and agent.

3. What purchase by agent from principal will be set aside. See Principal and agent No. 2, 3, and

Buckles v. Lafferty's legatees, 292

IV. Equitable relief to cestui que trust of bond secured by trust deed.

4. A testator having authorized a tract of land to be sold and the money put at interest for the benefit of his children, his executor sold the land and took a bond (secured by a deed of trust) to be paid the 21st of August 1820, with interest from the 25th of December 1817. On the 30th of October 1820, the executor received of the purchaser a sum of money, to be applied to the credit of the principal. The purchaser having sold part of the land and taken from his vendee four bonds, one payable the 16th of April 1821, and the others on the 25th of December in the years 1821, 1822 and 1823, the executor, on the 21st of January 1822, took an assignment of those bonds and of a deed of trust securing the same, and gave a receipt stating that they were to be credited in part of the principal at the dates at which those bonds were due. In June 1823, the purchaser in-joined the executor from selling under his deed of trust, upon the ground of a defect of title to two parcels of the land, one of 16½, the other of 100 acres, part of which last parcel being included in the sale to the subvendee, the alleged defect of title was made the ground also of injunction by him. In 1835, the injunction of the first purchaser was perpetuated as to the price of the 16½ acres, and dissolved as to the residue, so far as it remained unpaid. The executor having in the mean time removed from the commonwealth, a bill was thereupon filed by some of the legatees, against the purchaser, the trustee in his deed of trust, the executor, and another legatee, to ascertain the balance due. The bill averred, that many years since, the bond payable to the executor was transferred to the legatee defendant, to collect for himself and the others interested, and he had removed from the state; that the complainants do not know where the bond is, or whether it is lost or destroyed; and that the trustee declines to advertise or sell, for want of the bond. As to all the defendants except the purchaser, the bill was taken for confessed: *held*, 1. Equity has jurisdiction; on the ground that the legatees, though entitled to the balance due 897 from the *purchaser, are mere beneficiaries, having no legal right which they could assert at law; and also on the ground that, the case being one in which it would have been improper for the trustee to

sell until some proceeding was had to ascertain the amount due, the creditors had a right to come into equity to have the amount ascertained. 2. The purchaser, having in his hands evidence of all the payments alleged by him, has no right to require that the bond shall be produced before an account is stated. 3. The payments which the executor agreed should be credited against the principal must be so applied; the case not being taken out of the influence of the principle laid down in *Pindall's ex'x &c. v. The Bank of Marietta*, 10 Leigh 484, by the circumstance that the party who so agreed was a fiduciary, nor by any of the other circumstances before mentioned.

Miller v. Trevilians & others, 1

USURY.

Weight of answer denying usury, where bill disclaims benefit of discovery. See Answer No. 3, and

Thornton v. Gordon &c., 719

VENDOR AND VENDEE.

See references under title Sale.

WARD.

See Guardian and ward.

WARRANTY.

Concerning the effect of a general warranty in deed conveying land, see *Elegit No. 1*, and

Findlay v. Toncray, 374

WIDOW.

I. Rights against husband's assignee.

1. Concerning rights of wife surviving the coverture against husband's assignee of her personality, see *Husband and wife No. 3*, 4, 5, 6, 7, and

Browning v. Headley, 340, 341

II. Right as dowress.

2. See title Dower, and
Wilson &c. v. Davison, 384
Macaulay's ex'or v. Dismal swamp land co., 507
Shirley v. Mutual Assurance society, 705

III. Rights as distributee.

3. A testator dies possessed of slaves, to a third of which his widow, who renounces his will, is entitled during her life. In a settlement of the executors' account after the death of the executor, and after the widow's death, it appears by the appraisal that the slaves were seven in number. Two were specifically bequeathed by the testator, and the presumption is that they were delivered over to the legatees. Two were sold under execution of a creditor of the testator, before the executor had other assets in hand to pay the execution, and were purchased by the executor at the sheriff's sale. And two others were sold by the executor, though the payment of debts did not require the sale of them if the widow had paid up a sum of 792 dollars 48 cents, due from her for purchases of the testator's goods. When or for what prices these two were sold, did not appear. The record furnished

no information of the disposition of the seventh slave; but the probability is that he was old and of little or no value: *held*, the charge for the widow's interest in the slaves, instead of being measured by their estimated hires, should be an annual sum from the death of her husband until her death, equal to the annual interest of one third of the gross amount of the sales or the value of the slaves: *dissentiente Baldwin, J.*, who was of opinion that the widow was entitled to credit for one third annually of the estimated hires.

Hickerson's adm'r v. Helm, 629

WIGGLESWORTH'S TABLE.

Professor Wigglesworth's table of longevity referred to.

Wilson &c. v. Davison, 384, 403

WILFUL TRESPASS.

See Trespass, and

Campbell &c. v. Commonwealth. 791

898

*WILL.

I. Nuncupative will.

1. Concerning the validity nuncupative will, and how the same may be impeached after probate, see *Nuncupative will No. 1*, 2, 3, 4, and

Page &c. v. Page, 424, 5

II. Revocation.

2. What is not an implied revocation of will.

Savage &c. v. Mears & wife, 570

III. Construction and effect of will.

3. See *Nuncupative will No. 5*, and
Page &c. v. Page, 425

4. A testator, by his will, after directing that in the first place all his just debts shall be paid, devises and bequeaths to his wife, during her life, his plantation, all his stock and furniture, and six slaves by name; and then, after various specific devises and legacies to his children, directs as follows: "I desire that my wife will, as soon as convenient after my decease, purchase and deliver to my granddaughter C. C. a negro girl of about £50. price, which I give to my said granddaughter and her heirs." The wife is also named executrix. She qualifies as such, giving a bond with sureties; and the whole personal estate, other than specific legacies, is exhausted in payment of the debts. The widow having accepted the property given her by the will, and taken possession of the whole of it, *held*, she is liable personally as legatee, not as executrix, for the payment of the legacy to the granddaughter, and the sureties in her executorial bond are nowise responsible for the same.

Arrington v. Cheatham & wife, 492

5. A testator having six children, four the issue of a deceased wife, and two the issue of his present wife, devises to his two sons each a tract of land described by metes and bounds, directs that all his other lands shall be equally divided among his four daughters and their heirs, and then devises and bequeaths as follows: "My will is that my negroes be apportioned equally amongst my

six children, under the following regulation, to say, that the one third thereof which shall be allotted to my wife as her dower shall be the full part of the two children I had by her, and also that the several negroes I have from time to time furnished any of my children be their right, but that they shall be each appraised and accounted for in their part of the division of my slaves. Lastly, I desire that all the residue of my estate not before specifically given be equally divided amongst my aforesaid six children." The will is made the 31st of December 1792, and the testator dies in 1794, prior to the 28th of October; between which periods, to wit, in November 1793, a third child of the testator by his second wife is born: *held*, 1. According to the authority of *Yerby v. Yerby*, 3 Call 334, the birth of such third child was not a revocation of the will. 2. As the will was published, and the testator died, before the passage of the act of 1794 providing for pretermitted children, the case does not fall within the operation of that statute. 3. Upon the true construction of the will, the afterborn child has no claim to share in the division of the dower slaves after the death of the widow.

Savage &c. v. Mears & wife, 570

6. What issue of freedwoman is not entitled to freedom. The decision in *Maria and others v. Surbaugh*, 2 Rand. 228, still adhered to.

Ellis v. Jenny and others, 597

WITNESS.

Competency.

1. In an action brought by keepers of a boarding school against a guardian, for board tuition, and other necessities furnished to the ward, the administrator of a previous guardian is a competent witness for the plaintiffs.

Young v. Warne &c., 420

2. On the trial of an indictment for perjury, the commonwealth offers as a witness a person against whom a civil action is pending, wherein the defendant in the indictment has been summoned as a witness for the opposite party: *held*, the witness so offered for the commonwealth has no such interest in the prosecution as renders him incompetent to testify.

Commonwealth v. Hart, 819

3. On a trial for forgery, the party whose signature is alleged to be forged need not be called as a witness for the prosecution. See *Forgery No. 2*, and

Foulkes v. Commonwealth, 836

899

*WOODLAND.

Right to dower in woodland incapable of cultivation. See *Dower No. 3*, and *Macaulay's ex'or v. Dismal swamp land co.*, 507

WRIT OF RIGHT.

I. Matter of abatement.

1. Within what time the plea of several tenancy should be pleaded in a writ of right.

Walkers v. Boaz &c., 485

2. Upon a writ of right by three demandants, it appears at the trial of the *mise*, that the tenement demanded descended to the demandants and their two infant brothers from their mother, and that those two infants successively died without issue, and were survived by their father as well as by the demandants: *held*, 1. That upon the death of the infant who first died, his share of the tenement descended to his four brothers, without regards to the father; and upon the death of the other infant, the share which he derived by descent from the mother passed in like manner to the three brothers, but the share which he derived by descent from his brother (1-4th of 1-5th) descended to his father. 2. That according to the principles established in *Garrard &c. v. Henry &c.*, 6 Rand. 110, and *Linton and others v. Bartly and others*, 9 Leigh 444, the fact of the father's having so become interested as tenant in common with the demandants (not having been pleaded in abatement) cannot prevent the demandants from recovering so much of the tenement as they shew title to, namely, all except that fourth of a fifth. S. C., 485

II. Seisin of demandant.

3. The decision in *Green v. Watkins*, 7 Wheat. 27, that in a writ of right, where the demandant shews no seisin by a *pedis positio*, but relies wholly on a constructive seisin by virtue of a patent of the land as vacant land, it is competent for the tenants to disprove that constructive seisin by shewing that the state had previously granted the same land to other persons, with whom the tenants claim no privity, approved and acted on.

Dawson v. Watkins, 259

4. The demandant in a writ of right claims the land (of which the tenant is in possession) under a patent bearing date the 17th of June 1786, and the tenant disproves the constructive seisin of the demandant, by shewing a patent for a large tract embracing the same land, which issued as early as the first of December 1773. Whereupon the demandant, to establish a seisin in deed by a *pedis positio*, proves that the patentee under whom he claims came, in 1824 or 1825, to the county in which the land lies, and employed an agent to enter upon and survey the said land and various others tracts in the same county; that the said agent procured a surveyor and chain carriers immediately thereafter, who went upon the land in questions, and surveyed and re-marked the same for the patentee: *held*, these facts are not sufficient to authorize a jury to find a seisin in the demandant. S. C., 259

III. Setting aside nonsuit.

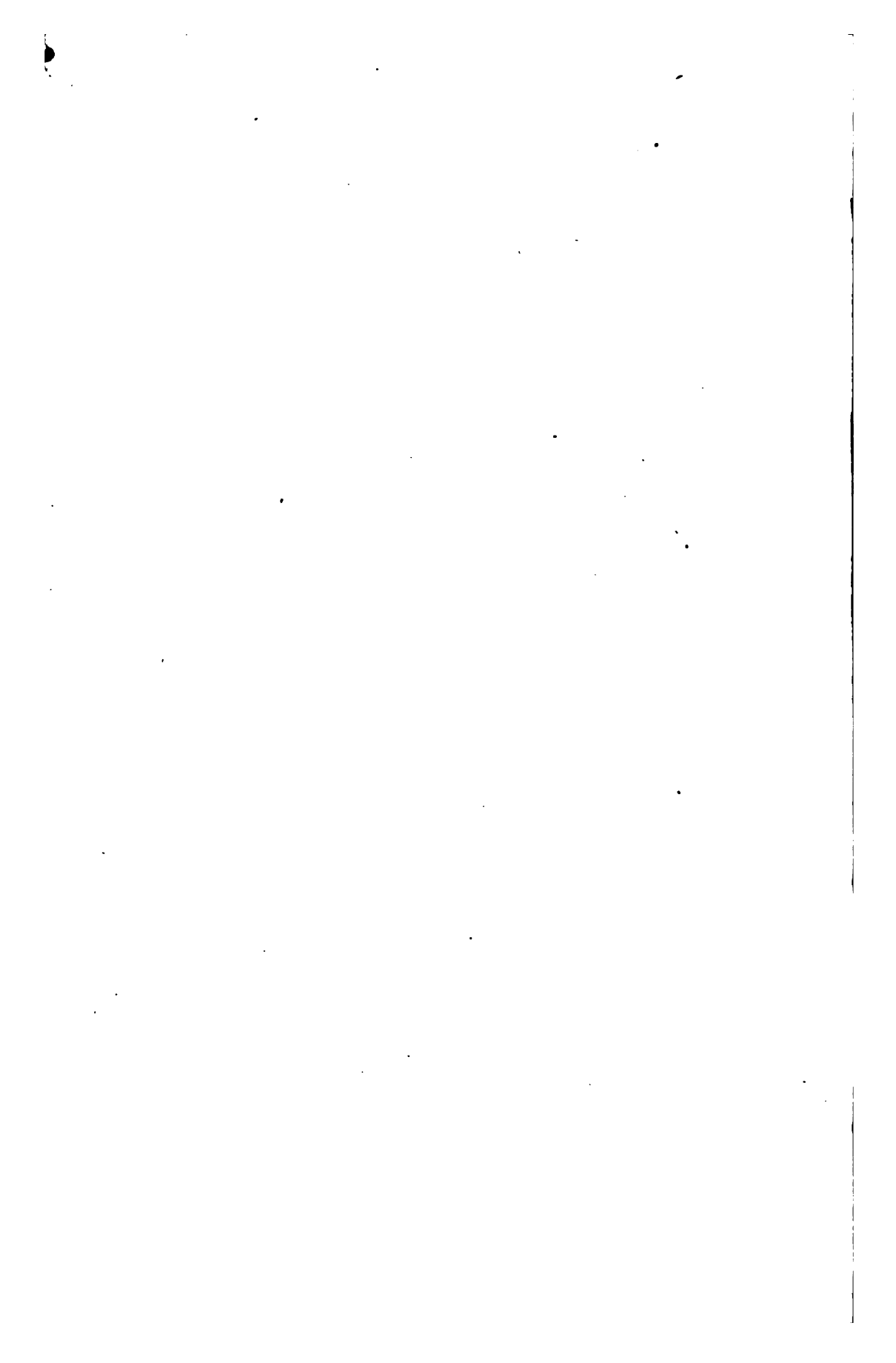
5. In what case nonsuit in writ of rights will be set aside. See *Nonsuit*, and

Walkers v. Boaz &c., 485

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